

Zhejiang Province Higher People’s Court No. 3 Tribunal

Guidance on the Determination of IP Trials Involving Online Trade Platforms

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Chapter 1 – Basic Principles

1. In the course of trials for intellectual property cases involving e-commerce platforms, we must adhere to the basic value orientation of "strict protection" and at the same time properly handle the relationship between intellectual property owners, e-commerce platform operators, operators within the platform and public interest to realize a balance of interests among all parties.

2. Following the principle of "parity of authority and responsibility" (权责一致), respect should be given to the boundaries of e-commerce platform operators giving them a certain degree of autonomy; the behavioral boundaries of e-commerce platform operators should be ascertained, reasonably defining their legal responsibilities with the aim of promoting the healthy development of Internet-related industries.

3. There should be adherence to the concept of collaboration in network governance, strengthening of the organic connection between judicial protection and administrative law enforcement, mediation and arbitration, encouragement of all parties to jointly participate in promoting governance and share in the e-commerce market management system.

Chapter 2 - General Rules

4. The following factors should be considered where the People's Court determines whether the e-commerce platform operator’s behavior in a case is providing platform services or developing its own business:

- (a) information on the product page indicating the seller’s identity, or labeling on the product page such as “self-run” (自营) or “run by others” (他营);
- (b) the seller’s information marked on the actual product;
- (c) the seller’s information marked on transactional documents, such as invoices.

In the event these three types of information above regarding the seller are inconsistent, it should normally be determined that each relevant entity has jointly engaged in sales activities, except when the seller indicated on invoices are legally authorized by tax authorities to issue invoices on behalf of the [actual seller].

5. In cases of infringement of intellectual property rights, where the plaintiff purchased an infringing product through an e-commerce platform, the place of delivery of the product purchased is neither the place where the contract is performed, nor the place where the infringement has

taken place; therefore, the place of delivery of the product purchased shall not be considered for the purpose of determining jurisdiction.

6. The act of selling infringing products through an e-commerce platform is not an “Act of Information Network Infringement” (信息网络侵权行为) as stipulated under Article 25 of “The Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China” (《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》), and therefore jurisdiction should not be determined based upon the place of residence of the infringed [party].

Chapter 3 – Notices and Take-Downs

7. E-commerce platform operators should establish unimpeded channels for intellectual property complaints and reasonably publish them on their websites.

8. "Notices" issued by the intellectual property owners should include the following:

- (1) The identity and contact information of the intellectual property owner (and its entrusted agent);
- (2) Information or URLs that can accurately identify the alleged infringing products, services or contents;
- (3) Prima facie evidence of infringement, including evidence of ownership and evidence of the existence of the infringement.

9. "Counter-notices" submitted by operators within the platform [sellers] should include the following:

- (1) Subject information, such as the name and contact information of the counter-notifier;
- (2) URLs of the products, services or contents where termination of necessary measures is requested;
- (3) Prima-facie evidence of non-infringement.

10. Both notices and counter notices should be sent in writing, and the notifier and the counter-notifier shall be responsible for the authenticity thereof.

11. E-commerce platform operators may within the legal framework, and based upon their own verification requirements, the types of intellectual property rights involved and the actual situation of industrial development among other factors, request clarification and refinements to the actual requirements for notices and counter-notices and publish them in a timely manner.

For notices involving patents, e-commerce platform operators may require intellectual property owners to provide an infringement comparison; for those involving design and utility patents, e-commerce platform operators may also request that intellectual property owners provide a patent evaluation report or written decision following a request for a declaration of invalidity of a patent right.

12. Requirements for notices and counter notices issued by e-commerce platform operators shall not set unreasonable conditions or obstacles for parties to enforce their rights according to

law, such as imposing additional conditions unrelated to the content of the notices and counter notices or imposing excessive demands for prima facie evidence.

13. E-commerce platform operators should check the contents of notices and counter-notices to determine whether key formal documents are in place and reject notices that obviously do not constitute intellectual property infringements and counter-notices that obviously cannot prove the legality of the conduct of the party receiving notice.

When the People's Court determines whether a case falls under the category of "obvious" as abovementioned, it should consider the average judgment capacity of e-commerce platform operators, not judging from the perspective of an intellectual property law professional.

In the event an e-commerce platform operator chooses to raise the examination standards for notices and counter notices, it shall bear legal responsibility resulting from its wrongful examination.

14. The types of "necessary measures" to be applied by e-commerce platform operators after receipt of a qualified notice includes but is not limited to: deletion, blockage, disconnection, termination of transactions and services, freezing of the notified party's accounts or requesting the notified party to pay a bond.

15. The People's Court should determine whether e-commerce platform operators have taken reasonable necessary measures based on the "principle of proportionality", taking into actual consideration including but not limited to the following:

- (1) the likelihood that an infringement is taking place;
- (2) the seriousness of the infringement;
- (3) the impact [of enforcement] on the interests of the counter-notifier [seller];
- (4) the technological capability of the e-commerce platform.

Where the notified party has intentionally infringed the intellectual property rights of others on multiple occasions, the e-commerce platform operators shall take measures to terminate transactions and services.

16. When determining whether the necessary measures taken by the e-commerce platform operators are "timely", consideration shall be given to factors such as the level of difficulty in determining the infringement, the specific types of necessary measures, among other factors, with the aim of making a comprehensive evaluation.

17. In the event an e-commerce platform operator determines that a notice does not meet (its) requirements, it shall provide feedback to the notifier regarding the verification results together with reasons such that the notifier can amend the notice.

Where a further notice is sent by a notifier which has previously been processed and bears no difference from the prior notice, the e-commerce platform operator may not process it.

Chapter 4 – Regarding Determination of E-commerce Platforms Liability

18. For an e-commerce platform operator to be held responsible for acts of intellectual property infringement by vendors within their platform, [the operator] must know or should have known about [the infringement].

19. In the event an e-commerce platform operator knew or should have known of the infringement activities on its platform but failed to take necessary measures in a timely manner, even if the rights owner has not sent a notice, the e-commerce platform operators should also be held jointly and severally liable for direct infringement.

In the event an e-commerce platform operator knew or should have known of infringing activities on its platform but took necessary measures in a timely manner after receipt of notice from the rights owner, it shall only be held jointly and severally liable for losses of the rights owners before it took such necessary measures.

In the event an e-commerce platform operator knew or should have known of infringing activities on its platform and did not take necessary measures after receipt of notice from the intellectual property owner, it shall be held jointly and severally liable for all of the losses of the rights owners.

In the event an e-commerce platform operator did not know or should not have known of infringing activities on its platform but did not take necessary measures in a timely manner after receipt of notice from the rights owner, it should be held jointly and severally liable to additional loss attributable to the platform operator.

20. The People's Court shall determine whether an e-commerce platform operator is at fault based on a combination of the type of intellectual property rights involved and other specific circumstances of the case; consideration in this regard shall not be given to whether the e-commerce operator knew or should have known of the existence of certain infringement activities based solely on its prior monitoring of the legality of transaction information in accordance with relevant management regulations or mere awareness of the possibility of intellectual property infringements on its platform.

21. "Know" refers to the subjective state of the e-commerce platform operator actually knowing of infringing activities.

After receipt of a qualified notice from the rights owner, the e-commerce platform operators should be regarded as knowing the existence of infringing activities. The People's Court should not conclude that the e-commerce platform operators subjectively did not know solely based on rightsholders' failure to send notices or inadequate notices; [rather] the receipt of notices from administrative departments, receipt of consumer complaints, and so forth, can also qualify as evidence that they knew the presence of infringing activities.

22. "Should have known" refers to the subjective state that the e-commerce platform operators should notice or should have noticed but did not notice the presence of infringing activities.

In the event it is determined that the e-commerce platform operator should have known, the People's Court should primarily consider its reasonable duty of care in protecting the intellectual property rights of others; if the e-commerce platform operator did not perform or was negligent in

meeting its reasonable duty of care within its ability and range of foreseeability, it should be determined that this constituted “should have known”.

23. The reasonable duty of care relating to the protection of intellectual property rights by e-commerce platform operators does not include a general obligation of proactive monitoring; but if the following conditions are met, the People's Court may rule that the e-commerce platform operator has not fulfilled its reasonable duty of care:

- (1) Failure to fulfill statutory obligations related to intellectual property protection, such as establishing intellectual property protection rules, verifying entry registration information of registered operators, among other things;
- (2) Failure to request submission of a trademark registration certificate or related authorizations when a seller applies to enter the platform as a branded “flagship store”, “specialty store” operator, among others;
- (3) Failure to adopt effective technical measures for infringement monitoring that had been widely available by the time an infringement occurred, such as failure to directly filter out links with wordings such as “counterfeits”, “high-quality imitations”, among others, and failure to prevent the re-listing of infringing pages after a complaint has been successfully established, among others.

24. An e-commerce platform operator is subject to a higher duty of oversight when it recommends goods or services spontaneously by creating best-selling lists, promoting hot pick products, etc.

An e-commerce platform operator is generally not subject to a higher duty of oversight if it offers real time sales rankings, personalized notices and so forth which adopt reasonable automation technologies; but e-commerce platform operators should be held responsible for the burden of proving the fact and reasonableness of it adopting such automated technical means.

Chapter 5 - Wrongful Notices and Bad Faith Notices

25. “Wrongful Notices” refers to an act where a notifier sent out a notice in a mistake that causes losses to the notified party. Where judicial or administrative authorities rule that the actions of the notified party did not constitute infringement, this shall qualify as a wrongful notice by the notifier.

26. In the event a notified party requires the notifier to bear civil liability for a wrongful notice, it may bring a general civil tort action.

27. “Bad faith notices” refers to an act where the notifier sent a notice regardless of the fact it knew it has no right to file a notice or the notice lacks sufficient evidentiary support, thereby resulting in losses to the notified party.

28. In order to determine the existence of “bad faith” by the notifier, primary consideration should be given to whether the following conditions exist:

- (1) Whether the notifier forged or altered evidence of ownership of rights;

- (2) Whether it knew the status of rights was unsettled or flawed;
- (3) Failure to retract the notice in a timely manner after learning it is wrongful;
- (4) Providing fabricated verification results;
- (5) Reasons in support of a notice conflict with those supporting a prior notice of the same kind.

29. In the event a notified party requires the notifier to bear civil liability, it not only can bring an action based on unfair competition, it can also bring a general civil tort action, thereby making the notified party eligible to request the notifier to double its obligation to pay compensation under Article 42(3) of the E-Commerce Law (电子商务法).

30. The amount of compensatory damages resulting from wrongful notices or bad faith notices should be calculated based on the actual losses of the notified party; in the event the actual losses cannot be determined, it may be calculated based on the benefits from infringement obtained by the notifier; in the event both of the abovementioned two methods cannot be determined, the People's Court should make a decision based on the specific circumstances of the case.

The amount of compensatory damages should include reasonable expenses paid by the notified party to stop acts of infringement.

31. The actual losses suffered by the notified party due to wrongful notices or bad faith notices includes loss of profits, loss of goodwill and recovery of costs, among others.

32. Loss of profits mainly refers to the decrease in profit from sales by the notifier due to measures such as deletion, blocking, and disconnection of related links, among others.

Loss of profits can be calculated based on the average monthly turnover before removal of the link, the average profit margin of the industry, calculated in combination with the duration of the measures taken.

The higher the previous sales volume of the deleted links, the more weight should be put on the changes in the store's overall turnover which resulted from the deletion of the links; this specifically can be based upon various factors, including changes in total sales amount of the store of the notified party within the period of time before and after the notice, the average profit margin of the industry, the duration of the measures taken against the related listings, among others.

33. Loss of goodwill refers to the losses resulting from damage to the credit score of the for the notified party resulting from punishments by the e-commerce platform operator against the notified party's related listings or store as a result of a notice.

34. Recovery of costs refers to the additional expenses, such as promotional fees and technical service fees, among others, incurred by the notified party to eliminate the adverse effects resulting from a notice.

Recovery of costs can be determined by reference to the corresponding fees paid by the notified party previously to promote the links or stores. In the event of uncertainty, the People's Court shall make a discretionary decision based on the fees general paid by the notified party to eliminate the

adverse effects, such as traffic loss and reduced user loyalty resulting from punishments imposed by the platform in the context of internet-traffic-driven economy.

35. In the event where a notified party reminded the notifier in writing to bring a lawsuit, and the notifier did not bring a lawsuit within one month after receipt of the reminder or within two months after issuance of a written reminder, the notified party can bring an action seeking a declaration of non-infringement.

36. The notified party may apply to the People's Court for pre-litigation or interim injunctions and request the Court to order the notifier to withdraw the notice or prohibit the notifier from continuing to issue notices.

In an intellectual property lawsuit brought by the notifier, the notified party can also apply for interim injunctions.

37. The key factors for examination of the abovementioned injunction requests brought by a notified party being bad faith notice are:

- (1) the degree of bad faith of the notifier;
- (2) the level of impacts on the notified party's store caused by the act of bad faith notice of the notifier;
- (3) whether not taking injunctive measures will cause more harm to the notified party than the harm to the notifier if injunctive measures are taken;
- (4) whether taking preservation measures will cause harm to the public interest.

浙江省高级人民法院民三庭

涉电商平台知识产权案件审理指南

一 基本原则

1.在审理涉电商平台知识产权案件时，应在坚持“严格保护”基本价值导向的同时，妥善处理好知识产权权利人、电商平台经营者、平台内经营者和社会公共利益之间的关系，实现各方主体之间的利益平衡。

2.遵循“权责一致”原则，既要尊重电商平台经营者的自治权限，给予其一定的自治空间，又要明确电商平台经营者的行为边界，合理界定其法律责任，促进互联网相关产业的健康发展。

3.秉持网络协同治理理念，加强司法保护与行政执法、调解、仲裁之间的有机衔接，鼓励支持电子商务各方主体共同参与治理，推动形成共建共治共享的电子商务市场治理体系。

二 一般规则

4. 人民法院认定电商平台经营者的涉案行为是提供平台服务还是开展自营业务，应主要考虑以下几个因素：

- (1) 商品页面上标注的销售主体信息或“自营”“他营”等标记；
- (2) 商品实物上标注的销售主体信息；
- (3) 发票等交易单据上的销售主体信息。

上述三项销售主体信息不一致的，一般可以认定各相关主体共同实施了销售行为，但发票记载的销售主体依法经税务机关委托代开发票的除外。

5. 在知识产权侵权案件中，原告通过电商平台购买被诉侵权产品的，网购收货地既非合同履行地，也非侵权行为地，故不应以网购收货地确定地域管辖。

6. 通过电商平台销售侵权产品的行为，不属于《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第二十五条规定的“信息网络侵权行为”，不应以被侵权人住所地确定地域管辖。

三

关于“通知-移除”规则

7.电商平台经营者应当建立畅通的知识产权投诉渠道，并以合理的方式在其网站上进行公示。

8.知识产权权利人发出的“通知”应当包括以下几方面内容：

- (1) 知识产权权利人（及委托代理人）的身份资料和联系方式等；
- (2) 能够准确定位涉嫌侵权产品、服务或内容的信息或网址；
- (3) 构成侵权的初步证据，包括权属证据和侵权成立的证据。

9.平台内经营者提交的“反通知”应当包括以下几方面内容：

- (1) 反通知人的姓名（名称）、联系方式等主体信息；
- (2) 要求终止必要措施的产品、服务或内容的网址；
- (3) 不构成侵权的初步证据。

10.通知和反通知均应以书面形式发送，通知人和反通知人应当分别对通知和反通知的真实性负责。

11.电商平台经营者可以在法律规定的框架内，根据自身审查需要、知识产权的权利类型、产业发展的实际情况等因素，对通知和反通知的具体要求进行明确和细化，并以合理方式予以公示。

对于涉及专利的通知，电商平台经营者可以要求知识产权权利人提供侵权比对说明；涉及外观设计和实用新型专利的，还可以要求其提供专利权评价报告（或无效宣告请求审查决定书）。

12.电商平台经营者提出的通知和反通知要求不能对当事人依法维权设置不合理的条件或者障碍，例如规定与通知和反通知内容无关的额外条件，或者对初步证据提出过高要求。

13.电商平台经营者应当对通知和反通知是否具备形式要件进行审查，并排除明显不构成知识产权侵权的通知和明显不能证明被通知人行为合法性的反通知。

人民法院在认定是否属于上述“明显”的情形时，应考虑电商平台经营者的一般判断能力，不能从知识产权法律专业人员的角度进行评判。

电商平台经营者选择提高对通知和反通知的审查标准的，应当承担因审查判断错误而导致的法律责任。

14.电商平台经营者在收到合格通知后应当采取的“必要措施”的类型，包括但不限于：删除、屏蔽、断开链接、终止交易和服务、冻结被通知人账户或者要求其提供保证金。

15.人民法院应当根据“比例原则”判断电商平台经营者是否采取了合理的必要措施，具体考量因素包括但不限于：

- (1) 侵权的可能性；
- (2) 侵权的严重程度；
- (3) 对被通知人利益造成的影响；
- (4) 电商平台的技术条件。

被通知人多次故意侵害他人知识产权的，电商平台经营者应当采取终止交易和服务的措施。

16.人民法院认定电商平台经营者采取必要措施是否“及时”，应当根据判断侵权成立与否的难易程度、必要措施的具体类型等因素加以综合判断。

17.电商平台经营者认为通知不符合要求的，应当向通知人反馈审查结果并说明原因，以便其补正。

对于同一权利人发送的已经过处理的通知，与此前通知内容没有区别的，电商平台经营者可以不予处理。

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关于电商平台的过错认定

18.电商平台经营者对平台内经营者侵害知识产权的行为承担过错责任，其主观要件包括知道或应当知道。

19.电商平台经营者知道或应当知道平台内侵权行为而未及时采取必要措施的，即使权利人没有发送通知，电商平台经营者也应与直接侵权人承担连带责任。

电商平台经营者知道或应当知道平台内侵权行为，但在收到权利人通知后及时采取了必要措施的，仅对采取必要措施之前权利人的损害承担连带责任。

电商平台经营者知道或应当知道平台内侵权行为，且在收到知识产权人通知前后均未采取必要措施的，对权利人遭受的全部损害承担连带责任。

电商平台经营者不知道或不应当知道平台内侵权行为，在收到权利人通知后亦未及时采取必要措施，对损害的扩大部分存在过错的，应就该部分承担连带责任。

20. 人民法院应结合知识产权的权利类型和个案其他具体情况认定电商平台经营者是否存在过错，不能仅因电商平台经营者需要按照相关管理规定进行交易信息合法性的事前监控，或者只是知晓其平台内存在知识产权侵权的可能性等，就认定其知道或应当知道特定侵权行为的存在。

21. “知道”是指电商平台经营者实际知晓侵权行为存在的主观状态。

电商平台经营者收到权利人合格通知的，应认定其知道侵权行为的存在。权利人未发送通知或通知不合格的，人民法院不应仅据此就认定电商平台经营者主观上不知道，收到行政部门通知、消费者投诉等事实也可以证明其知道侵权行为的存在。

22. “应当知道”是指电商平台经营者对于侵权行为的存在，应注意或能注意却未注意的主观状态。

在认定电商平台经营者是否应当知道时，人民法院应着重考量其在保护他人知识产权方面的合理注意义务，如果电商平台经营者未履行或怠于履行在其预见能力和预见范围内的合理注意义务的，应当认定其构成应当知道。

23.电商平台经营者在知识产权方面的合理注意义务不包括一般性的事前监控义务，但符合下述情形的，人民法院可以认定电商平台经营者未尽到合理注意义务：

（1）未履行建立知识产权保护规则、核验登记经营者入驻信息等与知识产权保护存在关联的法定义务；

（2）品牌“旗舰店”“专卖店”等类型的经营者入驻时，未要求其提交商标注册证或相关授权；

（3）未采取侵权行为发生时已普遍存在的监控侵权的有效技术手段，例如未对标注“假货”“高仿”等字样的链接进行过滤、未在已经投诉成立的侵权链接再次上架时进行拦截等。

24.电商平台经营者通过设置热销榜单、推荐明星产品等方式对商品或服务进行人为推荐的，应承担较高的注意义务。

电商平台经营者主要通过合理的自动化技术手段实施实时销量排名、个性化推送等行为的，一般不导致其注意义务的提高，但电商平台经营者应对其采用自动化技术手段的事实及其合理性承担举证证明责任。

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关于错误通知和恶意通知

25.“错误通知”是指通知人发出的通知错误从而对被通知人造成损害的行为。司法机关或行政机关最终认定被通知人不构成侵权的，应当属于通知人通知错误。

26.被通知人以通知错误为由要求通知人承担民事责任的，可以提起一般民事侵权之诉。

27.“恶意通知”是指通知人明知自己无权通知或通知依据不足，仍然发出通知，从而对被通知人造成损害的行为。

28.认定通知人是否存在恶意，应重点考量是否存在以下情形：

- (1) 伪造、变造权属证明；
- (2) 明知权利状态不稳定或有瑕疵；
- (3) 知道通知错误后不及时撤回；
- (4) 提供虚假鉴定意见；
- (5) 前后同类通知理由冲突。

29.被通知人以恶意通知为由要求通知人承担民事责任的，既可以提起不正当竞争之诉，也可以提起一般民事侵权之诉，且均有权基于《电子商务法》第四十二条第三款的规定要求通知人加倍承担赔偿责任。

30.因错误通知或恶意通知导致的损害赔偿数额应当按照被通知人因通知行为受到的实际损失计算；实际损失无法确定的，可以按照通知人因侵权获得的利益计算；上述两项均无法确定，由人民法院根据个案具体情况裁量。

赔偿数额应当包括被通知人为制止侵权行为而支出的合理开支。

31.被通知人因错误通知或恶意通知受到的实际损失包括利润损失、商誉损失以及恢复成本等。

32.利润损失主要指因相关链接被采取删除、屏蔽、断开等措施而造成的通知人销售利润的减少。

计算利润损失可以根据被删链接此前的月平均营业额、行业平均利润率结合被采取措施的时长进行计算。

被删链接此前的销量越高，越应当考虑因该链接被删所导致的整个店铺的营收变化，具体可以根据被通知人的店铺在通知前后一定时间内的销售总额的变化、行业平均利润率、相关链接被采取措施的时长等因素确定。

33.商誉损失是指被通知人的相关链接或店铺因通知行为受到电商平台经营者的处罚，导致其店铺信誉积分受损而产生的损失。

34.恢复成本是指被通知人为消除通知行为带来的不利影响而额外支出的推广费、技术服务费等费用。

恢复成本可以参照此前被通知人为推广链接或店铺所支出的相应费用予以确定。不能确定的，由人民法院结合流量经济背景下被通知人为消除因遭受平台处罚带来的流量流失及用户粘性减弱等不利影响所需支出的通常费用进行裁量。

35.被通知人书面催告通知人提起诉讼，通知人在收到催告之日起一个月内或者自书面催告发出之日起二个月内仍不起诉的，被通知人可以提起确认不侵权之诉。

36.被通知人可以向人民法院申请诉前或诉中行为保全，请求法院责令通知人撤回通知或者禁止通知人继续发出通知。

在通知人提起的知识产权侵权诉讼中，被通知人也可以申请诉中行为保全。

37.对被恶意通知人提出的上述行为保全申请的审查要点是：

- (1) 通知人的恶意程度；
- (2) 通知人的恶意通知行为对被通知人店铺的影响程度；
- (3) 不采取行为保全措施对被通知人造成的损害是否超过采取行为保全措施对通知人造成的损害；
- (4) 采取行为保全措施是否损害社会公共利益。