Proceedings of ICILLP 2025 Symposium: Digital Governance: Inter-Firm Coopetition and Legal Frameworks for Sustainability
DOI: 10.54254/2753-7048/2025.BR25444

The Study on Liability for Intellectual Property Infringement in Cross-Border E-Commerce Platforms from the Perspective of Chinese Law

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Abstract. With the rapid development of cross-border e-commerce in China, intellectual property infringement issues on platforms have emerged as a significant legal challenge confronting society. The current E-Commerce Law of the People's Republic of China (Hereinafter referred to as the "E-Commerce Law") and Tort Liability Law of the People's Republic of China (Hereinafter referred to as the "Tort Liability Law") establish the obligation of "notice and takedown" while also providing e-commerce platforms with a "safe harbor" protection. Nevertheless, ongoing challenges like jurisdictional disputes, shortcomings in e-commerce platform oversight, and the unclear enforcement of the "Red Flag Rule" still hinder the effectiveness of enforcement efforts. This study will analyze multiple Chinese judicial cases from 2019 to 2023 to reveal the three major deficiencies in China's current approach to intellectual property infringement on cross-border e-commerce platforms: i. The criteria for establishing "willful" infringement by platforms lack uniformity. ii. The boundaries of the platform's duty of care are ambiguous. iii. The measures for deterring repeated infringements are insufficiently stringent. Based on this, I propose several recommendations for legal reform, establishing a hierarchical standard for the transition from "knowingly" to "should have known," define the dynamic boundaries of the duty of care, and develop a tripartite disciplinary mechanism for repeated infringements. This study advocates for amending existing legislation to balance the protection of rights holders with the sustainable development of digital trade.

Keywords: Cross-border e-commerce intellectual property infringement, liability for infringement, sustainable development

1. Introduction

Currently, online retail is progressively surpassing brick-and-mortar stores to become the world's most popular purchasing channel, with the explosive growth of cross-border e-commerce reshaping the landscape of global trade. According to data published by the General Administration of Customs of the People's Republic of China, the cross-border e-commerce import and export volume in 2023 exceeded 2.11 trillion RMB, representing a year-on-year increase of 15.6%, accounting for 18.3% of the total foreign trade volume [1]. As cross-border e-commerce continues to expand, issues

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DOI: 10.54254/2753-7048/2025.BR25444

related to intellectual property rights on international platforms have become more widespread. In 2024, customs authorities nationwide detained 25,300 batches and 27.38 million suspected infringing goods through cross-border e-commerce channels, including B2B. This has made enforcement actions in this sector the most frequent in terms of detention batches for intellectual property rights protection across all customs enforcement channels [2].

According to Table 1 below, the number of infringement complaints in the cross-border e-commerce sector reached 142,000 cases as of 2023, representing a 67% surge compared to 2020. These infringement incidents have not only resulted in economic losses amounting to billions of RMB for rights holders but have also directly triggered the following issues: (1) There is a conflict between international regulations and domestic enforcement. The European Union's Digital Services Act (DSA), published in 2020, requires e-commerce platforms to respond within 12 hours of receiving infringement notices. But according to article 43 of E-Commerce Law, it allows a maximum response time of 72 hours. This discrepancy in statutory timeframes could lead to infringing products remaining available in the marketplace for prolonged periods. (2) The delineation of liability boundaries for cross-border e-commerce platforms remains ambiguous. The study titled "Research on the Duty of Care in Intellectual Property Infringements on E-commerce Platforms" suggests that, in cross-border contexts, the duty of care shown by platforms reflects a certain "uncertainty in liability risk." This ambiguity stems from the uncontrollable nature of overseas infringing parties and legal conflicts, resulting in unclear standards for fulfilling these obligations [3]. (3) Difficulties in establishing the admissibility of evidence collected across borders. According to the 2023 White Paper on Foreign-Related Intellectual Property Litigation by the Zhejiang Higher People's Court, it typically takes rights holders of American brands about 120 days to complete evidence notarization and authentication in China. Additionally, 34% of all litigation cases are dismissed because the evidence is invalid or authentication fails.

Table 1. The increase in the volume of complaints related to intellectual property infringement

Year	Number of infringement complaints (ten thousand cases)	Growth rate	Official basis
2019	4.6	———	Supreme People's Court 2019 Annual Report
2020	5.4	+17.4%	White Paper of the National Intellectual Property Administration of the People's Republic of China
2021	7.0	+29.6%	Alibaba Transparency Report
2022	8.5	+21.4%	Implementation Evaluation of the E-Commerce Law

These contradictions highlight that the "Safe Harbor Principle," centered around Articles 41-45 of the Electronic Commerce Law of the People's Republic of China, reveals China's current legislative lag and lack of effective enforcement mechanisms in addressing cross-border e-commerce infringement issues amid globalizations. Failing to promptly reconstruct the existing responsibility allocation framework under the current circumstances will jeopardize China's influence in the RCEP digital trade regulations and hinder the development of the Belt and Road cross-border e-commerce corridor.

This study examines the issue of liability imbalance in intellectual property infringement on cross-border e-commerce platforms within the context of Chinese law. By analyzing judicial practice cases and legislative texts, it identifies three major deficiencies: inconsistent standards for

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establishing willful infringement, obstacles in cross-border evidence collection, and insufficient punitive measures for repeated infringements. The findings aim to provide substantive evidence to support the revision of the E-Commerce Law, thereby facilitating a more effective balance between innovation incentives and intellectual property protection in China's digital economy governance.

2. Legal provisions and issues concerning the attribution of intellectual property infringement liability on Chinese cross-border e-commerce platforms

2.1. Current regulatory landscape

The primary legislation regulating cross-border e-commerce infringement liability in China is the E-commerce Law. The E-commerce Law stipulates in Article 41 that e-commerce platforms must establish rules for the protection of intellectual property rights. Furthermore, the Administrative Penalty Measures of the State Administration for Market Regulation specify that failure to establish such rules constitutes a legal basis for administrative sanctions.

Article 42 emphasizes the "Notice-and-Remove" mechanism, detailing not only the obligations of e-commerce platform operators to take appropriate actions upon receiving notifications from intellectual property rights holders but also elaborating on the specific scenario where erroneous notifications by rights holders cause losses to platform operators, thereby establishing a liability for damages.

Article 43 stipulates the notification obligations of electronic commerce platform operators and the statute of limitations for intellectual property holders to initiate legal proceedings.

Article 45 states that, apart from the situations specified in the "Safe Harbor Principle" (such as the "Notice-and-Takedown" mechanism), if an e-commerce platform "should have known" about infringing activities carried out by its operators but did not take appropriate action, it will share joint liability with the infringer. This provision clearly establishes the review obligation for e-commerce platform operators.

The "Red Flag Rule" also remains a prominent principle in the context of infringement issues on e-commerce platforms. The Hongqi principle states that when an online service provider encounters blatant infringement, failing to promptly take necessary measures is legally presumed to indicate subjective awareness of the infringement. As a result, the provider loses the safe harbor protection under Article 42 of the E-Commerce Law and shares joint liability for the infringement. Although China's Tort Liability Law explicitly states only the "Safe Harbor Principle" and does not specify the "Red Flag Rule," courts in routine judicial practice often evaluate whether certain online service providers are subject to the "Red Flag Rule" based on specific circumstances. These assessments generally involve considering both objective and subjective factors—namely, whether the service provider had a subjective duty of care concerning the infringing conduct and whether there was an objective acceptance or tolerance of the infringement. By integrating these two aspects, we assess whether the network service provider has committed fault by failing to take appropriate measures despite being aware or should have been aware, thereby determining the service provider's liability for infringing upon the information network dissemination rights of internet users.

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2.2. Issues concerning legal regulation

2.2.1. The statutory criteria for "knowledge" result in a fragmented standard for determination

Article 1197 of the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code") stipulates that when a network service provider is aware or should be aware that a network user is infringing upon the civil rights and interests of others through the use of its network services, and fails to take necessary measures, it shall bear joint liability with the user. In other words, the obligation of "should know" for online service providers remains throughout the entire process. However, the scope of "actual knowledge" as specified in Article 42 of the Electronic Commerce Law highlights that once the platform (i.e., the network service provider) receives notification from intellectual property rights holders, it is considered to have "actual knowledge" after such notification. In contrast, the scope of "should know" under the Civil Code is considerably broader than the "actual knowledge" defined in the Electronic Commerce Law. This broad interpretation of "should have known" in Article 1197 of the Civil Code expands the scope of liability for e-commerce platforms, whereas Article 42 of the E-commerce Law narrows the definition of "knowingly," thereby providing platforms with some room for liability avoidance. Such discrepancies can lead to conflicting judicial rulings, increasing the likelihood of inconsistent judgments in similar cases.

2.2.2. The boundaries of platform duty of care in judicial case law remain ambiguous

The equally important issue requiring further examination concerns the boundaries and extent of the duty of care that e-commerce platforms owe. Article 41 of the E-Commerce Law requires platforms to establish suitable intellectual property protection policies, highlighting their proactive regulatory role. However, Article 42 limits their obligation to take necessary actions only "after notification," which introduces ambiguity about how much proactive monitoring platforms are expected to undertake.

For instance, in a luxury brand promotion case on Douyin, the platform established a "You Might Like" section aimed at catering to consumer preferences. However, this section featured a counterfeit Louis Vuitton tote bag, which achieved substantial sales exceeding 2,000 units. The court subsequently determined that algorithmic recommendations constitute active platform intervention, thereby imposing a higher duty of care. The e-commerce platform failed to fulfill its obligation of due diligence, leading to the ruling that the platform bears liability for compensation [4].

In the case handled by the Shanghai Intellectual Property Court involving Pinduoduo's white-label products, merchants produced and sold unbranded counterfeit Dyson hair dryers without authorization, at prices much lower than genuine products. The court ruled that these unbranded items did not meet the criteria for the "red flag" rule, thus relieving the platform from the duty of proactive review and dismissing the brand owner's claims [5].

It is evident from these two cases that, under the circumstances of platform liability determination in algorithmic recommendation and passive display scenarios, the former typically bears greater responsibility than the latter, reflecting the lack of a clear delineation of the scope of "active conduct" within China's E-commerce Law.

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2.2.3. The punitive mechanism for repeated infringement is effectively ineffectual

The current disciplinary measures for infringing merchants generally involve terminating services, imposing fines, and referring cases to public security authorities. However, these approaches often exhibit certain deficiencies; for instance, using "service termination" as a punitive measure may lead merchants to replace identification documents in order to restart their businesses. According to Alibaba's "2022 Intellectual Property Protection Annual Report,"[6] it is observed that 78% of merchants opt to re-establish their stores under new identities following account deactivation. The consequences arising from this are detailed in Peking University's "Research Report on Digital Platform Governance (2023)" [7]: the recidivism rate for infringement reaches 41%. This indirectly indicates that the deterrent effect of the existing repeat infringement punitive mechanisms remains insufficiently effective.

3. Improvement strategies for liability attribution in intellectual property infringements on Chinese cross-border e-commerce platforms

3.1. Establishing a hierarchical standard for the transition from "knowing" to "should know" in evidentiary assessment

A hierarchical system for the determination of subjective states can be established, wherein the core is a tiered standard of "actual knowledge plus deliberate ignorance," which simultaneously satisfies the criteria of actual awareness of the infringement and intentional disregard of the infringing conduct. This replaces the previously ambiguous concept of "should have known."

The first step: Objectifying "actual knowledge"

By referencing Article 2 of the Supreme People's Court's Reply on Infringement Disputes Involving Internet Intellectual Property Rights, the qualified notice is established as the core criterion for "knowledge." In numerous cross-border platform scenarios, the legal equivalence of multilingual notification versions should be explicitly recognized. For instance, if the infringing party submits a copyright infringement report based on a quotation version, the cross-border e-commerce platform shall not refuse to process the infringement notice on the grounds of language inconsistency. In the lawsuit against the American TRO case initiated by Guangxi Apparel Company, the company obtained an English notification template from the National Overseas Dispute Response Guidance Center and ensured that the AliExpress platform removed infringing products related to them within 24 hours[8].

The second tier: Conditions related to deliberate disregard

Based on the Beijing High People's Court's "Answers to Several Issues Concerning the Trial of Civil Cases Involving Intellectual Property Rights on E-Commerce Platforms" [9] (hereinafter referred to as the "Answers") and the "Red Flag Principle"[10] stipulated by U.S. law, the following circumstances can be presumed as the platform's knowledge:

a. Some overseas sellers who repeatedly register new accounts, including those engaging in infringing activities, may continue their violations by creating new storefronts after their payment accounts are suspended.

b. The significant price disparity, with certain products being sold at less than 70% of the authentic price, constitutes a conspicuous deviation.

c. Anomalies in sales data, such as a sudden surge in seller sales for specific products exceeding ten times the industry average, accompanied by a disproportionately high volume of negative reviews.

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Through this hierarchical, stepwise design, the application of formulas enables judgments based on sound reasoning, allowing for the concretization of some ambiguous "should-know" scenarios.

At the legislative level, it is necessary to standardize the criteria for "knowledge," which can include objective circumstances of "should have known" in cross-border scenarios, such as: product descriptions containing infringing keywords like "high imitation"; seller registration information closely linked to previously banned accounts; and instances where foreign court TRO injunctions have been issued, yet the platform has not implemented effective domestic measures. At the same time, efforts should be made to promote the exemption of liability for incorrect notifications. When rights holders submit notifications in good faith that contain some inaccuracies, and the platform has exercised reasonable due diligence—such as engaging legal professionals to prepare infringement comparison reports—the platform's liability for compensation may be reduced or entirely eliminated [11].

3.2. Establishing the dynamic boundaries of the duty of care

The scope of obligations can be dynamically adjusted based on the level of control exerted over cross-border transactions across platforms offering different service types. For foundational service-oriented platforms, their offerings are limited to disseminating relevant transaction information or facilitating transaction negotiations. The provisions outlined in Article 5 of the Beijing High Court's "Guidance" can be referenced, which state that "platforms generally do not have an active obligation to monitor transaction information," thereby limiting platform responsibilities to formal review processes, such as verifying seller identities and contact information. For platforms with deep engagement, such as logistics and marketing, there is a substantive obligation to conduct thorough reviews, including but not limited to assessing infringement risks, monitoring anomalous data, and auditing foreign storage samples of goods. The following Table 2 delineates the duty of care requirements across various platform types.

Table 2. The duty of care requirements across various platform types

Platform business models	The intensity of the obligation	the obligation requirements	and the conditions for exemption from liability
Pure information intermediary	Low	Verification of the seller's identity through formal review; transmission of the qualification notification	Implement prompt removal of links and other related measures to ensure timely mitigation.
Provision of logistics and warehousing services	Moderate	Sampling inspection of foreign warehouse goods; recording inbound and outbound logistics information	Provide a clear traceability pathway within the supply chain
Participation in marketing revenue sharing	High	Proactively filter keywords such as "high imitation"; review promotional content from merchants.	Proof has been established for the monitoring system, with regular updates implemented to ensure optimal performance.
Control of Payment Settlement	High	Funds of frequently reported frozen accounts; review of anomalous transactions	Establishing a sufficient infringement compensation deposit

At the judicial level, it is essential to promote a hierarchical progression of adjudicative principles, ranging from assessing whether the platform possesses foreseeability regarding

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infringing conduct, to evaluating whether the preventive measures implemented by the platform incur costs significantly lower than the anticipated infringement damages, and ultimately, to examining whether the platform's relevant actions pose an increased risk of harm.

3.3. Establishing a tripartite disciplinary mechanism for repeated infringement

To address the issues related to the superficial enforcement of the repeated infringement penalty mechanism mentioned above, a tripartite approach involving technical isolation, financial linkage, and credit scoring can be employed to impose restrictions. Information isolation entails establishing a cross-platform account association blocking system.By leveraging the Amazon Anti-Counterfeiting Exchange (ACE) cross-platform anti-counterfeiting collaboration mechanism, the objective is to establish a "joint defense system" across global e-commerce platforms through the sharing of infringing seller data. This approach aims to disrupt counterfeit supply chains at their source and can be applied to promote the sharing of digital fingerprints of infringing sellers among Chinese platforms.For instance, device IDs, identity information, payment accounts, and so forth. Financial sanctions involve dynamic margin fluctuations and insurance compensation. The margin is linked to infringement risk, allowing account funds to be frozen within a specified period upon the first infringement.In the event of a second infringement, a deduction from the security deposit is required to compensate the infringing party. Should the number of infringements reach three or more instances, the merchant's services will be permanently terminated and their information will be integrated into the credit reporting system.

4. Conclusion

This study concentrates on the central disputes concerning intellectual property infringement liability on cross-border e-commerce platforms within the Chinese legal framework. It primarily examines the establishment of the "notice-and-takedown" mechanism as delineated in the E-commerce Law of the People's Republic of China and the Civil Code, as well as the challenges associated with applying fault-based liability in certain cross-border factual scenarios.An analysis of selected representative cases and relevant data from 2019 to 2023 reveals three structural deficiencies inherent in the current institutional framework.The primary issue pertains to the fragmentation of the standard for "knowledge," resulting in a conflict between the obligation of "should know" under the Civil Code and the application of "actual knowledge after notification" as stipulated in the E-Commerce Law.Secondly, the ambiguity surrounding the scope of platform duty of care, along with judicial divergences in rulings on proactive behaviors such as algorithmic recommendations (e.g., the TikTok luxury goods case) versus passive display of products (e.g., Pinduoduo's white-label products), highlights the current legislative gaps in this domain. The ineffective enforcement of repeat infringement penalties and the resetting of merchant identities to evade bans undermine the deterrent effect of service termination, exposing the insufficiency of current punitive measures.

In response to the aforementioned issues, this study proposes the following feasible improvement strategies: 1. Constructing a tiered subjective standard for determination, incorporating a dual framework of "actual knowledge plus deliberate ignorance," effectively addresses the fragmentation and inconsistency of evidentiary standards in cross-border scenarios. This approach encompasses situations such as "prices below 70% of genuine products" and "reuse of blacklisted foreign accounts," thereby establishing a presumption of "should have known" and enhancing the robustness of legal assessments. 2. Establish the boundaries of the dynamic duty of care by categorizing the

DOI: 10.54254/2753-7048/2025.BR25444

obligation strength based on the platform's level of control over the transaction chain (see Table 2). Clearly specify that proactive interventions such as algorithmic recommendations entail a correspondingly higher level of scrutiny and responsibility. 3. Design a "Trinity" disciplinary mechanism: drawing on Amazon ACE's cross-platform data sharing logic, integrating technical isolation, financial sanctions, and credit disclosure measures to effectively sever the source of repeated infringements.

The current liability framework of cross-border e-commerce platforms is progressively shifting towards a dual-track approach that simultaneously emphasizes domestic regulatory reform and the exportation of international standards. Promoting global engagement in the responsible governance of cross-border e-commerce platforms by integrating a dynamic obligation grading model and a tripartite disciplinary mechanism into the WIPO Guide on Intellectual Property Protection in Cross-Border E-Commerce. This approach facilitates a more inclusive regulatory framework in the construction of the "Belt and Road" cross-border e-commerce corridor, effectively avoiding the excessive platform liability imposed by the EU Digital Services Act (DSA) while transcending the safe harbor logic of the US Digital Millennium Copyright Act (DMCA), thereby ultimately achieving sustainable development through "innovative protection" and "trade facilitation."

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