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The PRC E-Commerce Law on IP protection

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On August 31, 2018, the Standing Committee of the National People's Congress of the People's Republic of China promulgated the *E-Commerce Law of the People's Republic of China* ("Law") which will come into effect on January 1, 2019.

As Chinese e-commerce platforms such as Alibaba, Taobao, JD.com, and others are now among the world's largest e-commerce platforms handling billions of dollars of transactions each year, this Law has been widely called for by different stakeholders to regulate the rapidly growing e-commerce market in China. The Law is formulated with an intent to protect the legitimate rights and interests of various entities in the e-commerce ecosystem, regulate the market order, and promote the continuous and healthy development of e-commerce. Some key provisions relating to intellectual property protection are as follows:

1. The Law codifies that an e-commerce platform operator who is aware or should be aware that a business operator using the platform has infringed the intellectual property rights of others should take necessary measures such as deleting, shielding or disabling access to the hyperlink to the infringing activities, terminating transaction or services (the "Necessary Measures"), failing which the platform operator will be held jointly and severally liable with the infringer. Currently, Article 36 of the *PRC Tort Law* only provides that an internet service provider should take necessary measures if they are aware of the infringing activities. The question of whether the internet service provider is obliged to take action if it "should be" aware of such infringing activities has mostly been left unanswered by the *PRC Tort Law*.
2. The Law provides a standardized take-down procedure pursuant to which the intellectual property right owner should notify the platform operator of the infringing

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activities and provide *prima facie* evidence of infringement. The platform operator should then take the Necessary Measures and promptly forward such notice and evidence to the business operator. The business operator may submit a counter-notice of non-infringement, which should include *prima facie* evidence in support of the counter-notice, to the platform operator. Upon receipt of such counter-notice and evidence, the platform operator should promptly forward them to the intellectual property rights owner, who may lodge a complaint with the competent authorities or file a lawsuit with a People's Court within 15 days from the receipt of such counter-notice and evidence. If no such complaint or lawsuit is filed, the platform operator should terminate the Necessary Measures and allow the business operator to resume selling on its platform. Platform operators who fail to adopt this requisite take-down procedure against a business operator who has committed intellectual property infringement could face a fine ranging from RMB 50,000 to RMB 2 million (approximately US$7,300 to US$290,000).

3. To avoid misuse of the take-down procedure, the Law provides that the complainant will be civilly liable for any notice it filed against a business operator who suffers damages from the loss of business during the take-down period. The Law goes even further to provide punitive damages, and the complainant will be liable to pay double compensation if the notice is filed maliciously.
4. Under the Law, a platform operator has a duty to remind business operators to obtain business licenses from administrative authorities and to require the business operators to display their business license information online. Such requirement will help intellectual property rights owners in uncovering the identity of the infringers.

While a take-down procedure is now codified in the Law, there are still a number of issues that need to be clarified. For instance, it is unclear whether e-commerce platform operators would include social media platforms. It is also unclear whether intellectual property rights owners would need to submit *prima facie* evidence of infringement every time they file a take-down notice. Currently, some platform operators provide a streamlined enforcement mechanism for some well-known brand owners, and automatically process take-down notices from them without requiring submission of any evidence. The Law could arguably increase the costs for well-known brand owners to protect their intellectual property rights if they are required to submit evidence every time a take-down notice is filed.

Implementing regulations to the Law are expected to be published before the Law comes into effect. Hopefully, the implementing regulations will shed some light on these issues. Overall, stakeholders should welcome the promulgation of the Law, which should better streamline e-commerce activities in China.