

ARTICLES

LIABILITY OF MARKETPLACES FOR INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT: THE EXPERIENCE OF THE US AND CHINA

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Abstract

This study addresses the issues involved in holding information intermediaries accountable for infringement of intellectual property rights. The growing significance of online commerce and the necessity to protect intellectual property rights in a digital environment makes this research especially relevant. This study aims to identify the various approaches to holding intermediaries accountable and assess the effectiveness of existing legal regulations in the United States and China. The findings indicate significant differences in the approaches to this issue in the legal systems studied. For instance, in the United States, Section 230 of the Communications Decency Act and the Digital Millennium Copyright Act imposes fewer obligations on intermediaries to monitor user-generated content. This approach provides broad protection to platforms and encourages innovation, but leaves certain gaps in the protection of intellectual property rights. Conversely, China's E-commerce Law places more responsibilities on platforms to prevent violations, offering them less protection. The conclusions drawn may contribute to the improvement of legal regulation concerning the activities of information intermediaries, the enhancement of enforcement mechanisms, and the development of strategies to combat intellectual property rights infringement.

Keywords

e-commerce platforms, intermediaries, intellectual property rights infringements, online environment

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ОТВЕТСТВЕННОСТЬ ИНФОРМАЦИОННОГО ПОСРЕДНИКА ЗА НАРУШЕНИЕ ПРАВ НА РЕЗУЛЬТАТЫ ИНТЕЛЛЕКТУАЛЬНОЙ ДЕЯТЕЛЬНОСТИ: ОПЫТ США И КИТАЯ

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Аннотация

В исследовании рассматриваются проблемы привлечения к ответственности информационных посредников в связи с нарушением интеллектуальных прав. Актуальность исследования обусловлена растущим значением интернет-торговли и необходимостью защиты прав интеллектуальной собственности в цифровой среде. Исследование направлено на выявление различных подходов к ответственности посредников, а также на оценку эффективности существующего правового регулирования в США и Китае. Результаты исследования указывают на существенные различия в подходах к ответственности посредников в изучаемых правопорядках. В США, в частности, раздел 230 Закона о пристойности в коммуникациях (Communication Decency Act) и Закон об авторском праве в цифровую эпоху (Digital Millennium Copyright Act) возлагают меньше обязанностей на посредников по контролю контента, создаваемого пользователями. Этот подход предоставляет широкую защиту платформам и поощряет инновации, однако оставляет определенные пробелы в защите интеллектуальных прав. Напротив, китайский Закон об электронной коммерции возлагает на платформы больше обязанностей за предотвращение нарушений, предоставляя им меньшую защиту. Полученные выводы могут способствовать совершенствованию правового регулирования деятельности информационных посредников, улучшению механизмов правоприменения, а также развитию стратегии борьбы с нарушениями интеллектуальных прав.

Ключевые слова

платформы электронной коммерции, посредники, нарушения прав интеллектуальных прав, онлайн-среда

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Introduction

With the enormous expansion of digital commerce and online marketplaces over the last decade, virtual sales platforms have become a primary avenue for vendors to reach consumers worldwide, while also introducing fresh challenges regarding intellectual property rights (hereinafter — IPR(s)) protection. The issue under scrutiny addresses an essential matter: how accountable these e-commerce platforms should be when users exploit others' copyrights, trademarks or patents.

This analysis examines the differing approaches in China and the US, pinpointing parallels and gaps in oversight. Do existing frameworks effectively deter violations? What effective measures and mechanisms are in place to address IPR violations in both jurisdictions? The answers to these questions are important for all involved — owners seeking fair compensation, platforms seeking clarification of their responsibilities, and shoppers seeking authentic products.

Lessons taken from observing the diverse handling of this issue could aid in drafting statutes that legally support creativity as technologies evolve and exchanges globalize. Comparisons may also help rights-holders and entities running exchanges in comprehending their obligations and limits on offers of property for sale online. The fact that infringement concerns remain acute underlines the timeliness of this research, giving due attention to the value of intellectual works, especially within the digitized realms where transactions occur.

This research is based on general scientific (analysis, comparison, systematic, historical and structural analysis) and special (method of legal interpretation, comparative legal, formal-legal) methods of knowledge acquisition. Analysis of available empirical data in reports and legislation were the main methods used in this study. Judicial practices and scientific literature were analyzed to collect the information required to prepare this academic article.

The study covers a wide range of topics relating to the liability of intermediaries with respect to IPR infringement on e-commerce platforms in the US and China. A comprehensive analysis of laws, regulations, and court decisions on the rights and obligations of online marketplaces is included. Special attention is given to the legal framework, the changing trends concerning marketplace liability, and practical implications for policymakers, lawyers, and stakeholders in the e-commerce industry. The study examines the concept and characteristics of marketplaces as intermediaries, their role in online transactions, and the legal challenges of IPRs. Differences between Chinese and US laws are explored, including specific legal aspects such as Section 230 of the America's Communications Decency Act and the obligations of marketplaces under China's E-Commerce Law.

Intermediary liability has emerged as a crucial area for research, especially in light of the expanding digital economy and the increasing prevalence of e-commerce platforms. The studies of He (2020), Pokrovskaya (2024), You (2020), and Huang & Li (2019) provide a general analysis of the legal frameworks that govern the liability of e-commerce platforms for intellectual property infringement in the United States and China. These works delve into the contrasting approaches each country takes in defining the responsibilities of intermediaries and the enforcement mechanisms in place.

The works of Ying (2014), Zhang & Zhang (2011), Teague (2012), Leaffer (2001), Weckstrom (2012), and Oswald (2008) identify current trends in the development of marketplace liability for IP infringement, such as the increasing role of platform companies in regulating content and developing new methods to combat illegal activity.

Several studies by An (2009), Huang & Li (2019), Tian (2016), and Wang (2024) discuss how the legal approaches of the US and China can be harmonized to better combat IPR infringement on online platforms and ensure fairness for rightsholders.

In general, a marketplace is an online venue where various vendors can post their goods and services for purchase, and patrons can browse selections and make acquisitions (An, 2009, p. 186). The primary role of markets is to act as intermediaries between buyers and sellers.

In a digital marketplace, dealers set up profiles and list their products or services. Customers can peruse numerous offers, compare prices, and choose the product that meets their demands. A marketplace is an ideal platform for this, as it provides safe and simple payment and delivery options, as well as a user-friendly way of locating, evaluating, and obtaining products and services. At the same time, the marketplace gives dealers access to a huge pool of potential consumers with minimal promotion and advertising costs by utilizing established platform infrastructure. There exist both specialized marketplaces that focus on a particular industry or niche, and general marketplaces that connect buyers and sellers of multiple products and services. Examples of general marketplaces include Uber, Airbnb, AliExpress, Amazon, and eBay (Pokrovskaya, 2023a, p. 89). By acting as intermediaries, marketplaces play a significant role in the contemporary economy by facilitating trade and flourishing e-commerce. They also face several legal and regulatory difficulties, including data protection, payment security, and ensuring the assurance of product or service quality.

Legal Regime of Liability of Marketplaces in the USA

Legislative Framework

Initially, it would be prudent to focus on a significant piece of US legislation that determines the liability of e-commerce intermediaries, specifically marketplaces. This legislation plays a critical role in shaping the legal responsibilities and protections afforded to online platforms that facilitate commercial transactions. By examining this legislation, we can gain a clearer understanding of the regulatory framework governing e-commerce marketplaces and their obligations.

The Communications Decency Act¹ is a landmark piece of legislation in the United States, which is particularly recognized for its Section 230. Section 230 of the CDA provides immunity for online services from liability for content created by their users. Its full text contains two critical provisions:

The first focuses on “Interactive Computer Service Provider Protection.” According to Section 230(c)(1), platforms like e-commerce marketplaces are not considered publishers of user-generated content, such as reviews, listings, comments, or other materials. They are therefore protected from lawsuits concerning that content.

The second is the “Good Samaritan Provision,” by which Section 230(c)(2) further extends this protection by allowing platforms to voluntarily remove or moderate content in good faith without losing this immunity. Specifically, it states that they cannot be held liable for actions taken to restrict access to or availability of material that the provider or user considers to be obscene, lewd, filthy,

¹ Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501-561, 110 Stat. 133 (1996) (codified as amended in scattered sections of 47 U.S.C.).

excessively violent, harassing, or otherwise objectionable, whether such material is constitutionally protected or not.

The implications of Section 230 for online marketplaces like Amazon, eBay, and Etsy are profound. While Section 230 protects these platforms from liability for user content, it also encourages them to effectively moderate and police their sites. Marketplaces are legally protected when they remove inappropriate or harmful content, which might include counterfeit goods, fraudulent listings, or defamatory reviews. This liability shield has allowed e-commerce sites to innovate and grow without fear of being overwhelmed by lawsuits. If online marketplaces were held liable for everything posted by their users, the costs associated with monitoring and legal defense could stifle innovation and accessibility.

Despite its crucial role in protecting online platforms, Section 230 has faced significant scrutiny and criticism. Some believe Section 230 gives online platforms too much leeway, allowing them to escape responsibility for harmful content, which can lead to misinformation, hate speech, and other forms of abuse proliferating online. Others argue that the broad immunity combined with the content moderation powers gives platforms too much control over public discourse, empowering them to unilaterally decide what content is acceptable. There have been numerous calls to reform Section 230 to better balance the protections it provides with the accountability it demands. Proposals include requiring platforms to adhere to certain content moderation standards or to limit types of content that are covered by immunity.

The Digital Millennium Copyright Act (DMCA) plays a crucial role in giving structure to intermediary liability of digital platforms. The DMCA's provisions recognize the need for responsive yet responsible handling of illegal user-generated content.² It aims to foster innovation through safe harbors for cooperation, while still incentivizing the judicious policing of prohibited acts.³ Over time, judicial interpretation of these statutes has further developed understanding of the responsibilities and limits of marketplaces. The DMCA establishes notice and takedown procedures that compel online marketplaces to promptly respond to copyright infringement notices and remove violating content.⁴ However, not all reactions are swift or sufficient, leading to alternative enforcement.⁵

If a notification is disregarded or the response unreasonable, additional legislation provides backup. The Federal Trade Commission Act,⁶ along with related consumer and trade protection laws, may be enforced should a marketplace fail to adequately address infringements. While marketplaces have the ability to avoid responsibility for copyright infringement under Section 512(c) of the DMCA, meeting “safe harbor” standards necessitates adherence to specific requirements (MacCarthy, 2010, p. 1088). To benefit from safe harbor exemptions, a marketplace must publicize its policy on infringement, outline procedures to address notices of copyright infringement, and swiftly remove infringing content once notified. Additionally, by carrying out notice and takedown procedures, as well as by deleting infringing material reported by copyright owners, marketplaces can escape liability for copyright violations committed through user activity on the platform. So long as all the requirements are thoroughly met, marketplaces are shielded from legal accountability for instances of copyright infringement initiated by users. On the other hand, marketplaces may be held liable for IPR infringement if they do not use notice and takedown procedures or refuse to take correctional measures after receiving infringement warnings (Ying, 2019, p. 549).

² 17 U.S.C. § 512(a), 17 U.S.C. § 512(b).

³ 17 U.S.C. § 512(c) – (d).

⁴ 17 U.S.C. § 512(c)(1)(C).

⁵ 17 U.S.C. § 512(g).

⁶ The Federal Trade Commission Act, 15 U.S.C. § 45.

Moreover, it is crucial to note that there is a great deal of case law in the United States devoted to marketplace liability for intellectual property rights infringement⁷. For instance, a markets' knowledge or lack thereof concerning an offending action is considered to determine the precise amount of the platforms' culpability. Therefore, in order to establish a markets' responsibility, it is necessary to analyze not only federal and state statutes, but also study the court decisions that set standards and criteria of the liability of platforms.⁸ One of the most essential factors affecting liability for marketplaces is whether they are aware of copyright violations or other illegal activities on their platforms.⁹ Another important factor is the extent to which a marketplace has a role in providing or regulating content. If a marketplace closely filters and monitors its offerings, actively searching for copyright infringement or other illegal listings, it can make it easier for them to reduce infringement liability.¹⁰ However, if a marketplace only provides a technological platform or a means for sellers and buyers to communicate, without being directly involved, this could also reduce their liability according to the "provider immunity" or "neutral intermediary" theory (Oswald, 2008, p. 250).

Case Studies — Debate over Marketplace Liability

In US courtrooms, debates have revolved around a wide spectrum of issues concerning marketplace culpability, including the ownership of creative works, trademarks, liability for user misbehavior, evaluation of products, and the fine print of dealings between marketplaces, vendors, and consumers.

Application of Immunity — "Safe Harbor" Principle under Section 230

For instance, in a big court case from 1995 called *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹¹ the US Supreme Court found that an interactive service provider like the old Prodigy website could not be blamed for things users posted (exemption from the liability, the application of the "safe harbor" provision). This verdict made Section 230 of the CDA very important, as it meant that websites usually shouldn't be sued for what users say or do. The same was established in *Zeran v. America Online Inc. (1997)*,¹² *Hassell v. Bird (2018)*, and *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*¹³

The next case¹⁴ involved a lawsuit by a plaintiff, Ms. Doe, who alleged that MySpace was responsible for her being sexual assaulted because it had failed to put proper safety measures in place to protect minors. The Fifth Circuit Court of Appeals upheld the immunity granted to MySpace under Section 230, determining that the platform could not be held liable for third-party content or the offline consequences of interactions that began on its site. This ruling reinforced the broad protections

⁷ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010)., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007)., *Viacom International Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012)., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)., *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936 (9th Cir. 2011).

⁸ *Sony Corp. of America v. Universal City Studios, Inc. ("Sony Betamax Case")*, 464 U.S. 417 (1984)., *Grokster Ltd.*, 545 U.S. 913 (2005).

⁹ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007)., *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹⁰ *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

¹¹ *Stratton Oakmont, Inc. v. Prodigy Servs.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

¹² *Zeran v. America Online Inc.*, 129 F.3d 327, 1997.

¹³ *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 62 Va. App. 678 (Va. Ct. App. 2014).

¹⁴ *Doe v. MySpace Inc.*, 528 F.3d 413, 2008.

for online service providers against liability for user conduct. The same rule was applied in *Jones v. Dirty World Entertainment Recordings LLC* (2014).¹⁵

IPR Infringements

In a 2010 ruling, *Tiffany (NJ) Inc. v. eBay Inc.*¹⁶, the court considered whether an online auction site could be blamed for users selling counterfeit merchandise on its website. The court's decision established that, while online marketplaces are not directly responsible for the sale of counterfeit goods sold through their platforms, they can be held accountable if they were aware of such infringements but failed to take corrective action (failure of e-commerce marketplaces to exercise "duty of care").

Lemmon v. Snap, Inc. (2021)¹⁷ marks a notable evolution in case law, as the Ninth Circuit Court of Appeals allowed a claim to proceed against Snapchat for allegedly creating a product that encouraged dangerous behavior. Plaintiffs sued Snap after their sons died in a car crash while using a Snapchat filter indicating their speed. The court distinguished this case from prior Section 230 precedents by focusing on the product design itself, rather than user-generated content. This case opened the door to potential product liability claims against online platforms.

Regulatory Compliance and Data Sharing

In a related case, *HomeAway.com, Inc. v. City of Santa Monica*,¹⁸ a platform was deemed obligated to collect and remit taxes on property rentals because, by earning commissions, it served as an intermediary rather than a neutral service.

Further key decisions offer guidance, such as in *Airbnb, Inc. v. City of New York*¹⁹, where the court decided the platform must share host information with the city to allow oversight of potentially illegal short-term rentals, acknowledging Airbnb's obligation to furnish data to enable enforcement of local regulations. By carefully examining case law outcomes, marketplaces can better navigate complex issues concerning their obligations and liability, as well as their users' responsibilities, under changing e-commerce conditions.

In another online marketplace case, *Craigslist, Inc. v. 3Taps, Inc.*,²⁰ the court settled a disagreement between Craigslist and a company that harvested and redistributed their listings. It was deemed that, while republishing factual information is generally permitted, 3Taps violated Craigslist's copyright by taking and redistributing entire ad copies without authorization.

*Backpage.com, LLC v. Dart*²¹ involved a sheriff banning certain ads on the Backpage classified site, which the site argued infringed on their free speech protections. The court sided with Backpage, finding that censoring certain legal categories of classifieds amounted to an unconstitutional restriction on expression and public access to information.

In light of these rulings, it can be concluded that online marketplaces' legal liability as intermediaries is largely determined by the protections afforded by Section 230 of the CDA. This defense allows platforms to avoid liability for the actions of their users, so they can focus on innovation and

¹⁵ *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 2014.

¹⁶ *Tiffany (NJ) Inc. v. eBay Inc.* 600 F.3d 93 (2nd Cir. 2010).

¹⁷ *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 2021.

¹⁸ *Homeaway.Com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019).

¹⁹ *Airbnb, Inc. v. City of N.Y.*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019).

²⁰ *Craigslist Inc. v. 3Taps Inc.*, No. CV 12-03816 CRB (N.D. Cal. Apr. 29, 2013).

²¹ *Backpage.com, LLC v. Dart*, 807 F.3d 229, 44 Media L. Rep. 1104 (7th Cir. 2015).

development. Nevertheless, platforms must be vigilant about the violations that they are aware of and comply with regulatory and tax obligations to avoid potential legal liability.

Legal Liability Regime for Marketplaces in China

Legal and Regulatory Framework

In China, the legal liability regime for marketplaces consists of various laws and regulations that establish a framework governing the responsibilities and obligations of these platforms. The key legal and regulatory framework includes the E-commerce Law of the People's Republic of China²² and the Consumer Rights Protection Law.²³

E-commerce Law of the People's Republic of China

This law, enacted in 2019, sets out the rights and obligations of e-commerce operators, including online marketplaces. According to Article 38 of this act, e-commerce operators are required to verify the qualifications of merchants and the authenticity of their products. If an e-commerce operator fails to fulfill this obligation, they may be held liable for damages caused to consumers.

The E-Commerce Law was the first to oversee various marketplace functions²⁴, mandating requirements concerning consumer rights²⁵, data privacy²⁶, product oversight²⁷, and other concerns. The law obliges e-commerce providers to provide true, accurate and complete information on their products and services.²⁸ E-commerce providers are required to respect the confidentiality of collected data and take all necessary measures to protect that data from unauthorized access, leakage, or destruction.²⁹ The law also sets out requirements for e-commerce suppliers to comply with legal and quality standards.³⁰

The E-Commerce Law states that, "An e-commerce platform business shall request that businesses applying to sell commodities or provide services in its platform submit authentic information including their identity, address, contact information, and administrative licensing, and also verify and record this information, establish a register, and regularly update and verify the information"³¹. According to the E-Commerce Law, "with respect to commodities or services impacting the life or health of consumers, if an e-commerce platform business causes damage to a consumer by failing to fulfill its obligation to review the qualifications of an in-platform business, or its obligation to guarantee the safety of consumers, the e-commerce platform business shall be correspondingly liable in accordance with the law."³² A business should also "establish and develop a credit rating

²² E-Commerce Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019) (China).

²³ Law of the People's Republic of China on the Protection of Consumer Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) (China).

²⁴ E-Commerce Law of the People's Republic of China, art. 27, 28, 30, 31, 38, 41 (China).

²⁵ Id., art. 24, 38, 39, 41.

²⁶ Id., art. 23-25.

²⁷ Id., art. 26-27.

²⁸ Id., art. 27.

²⁹ Id., art. 28 (China).

³⁰ Id., art. 31 (China).

³¹ Id., art. 27 (China).

³² Id., art. 38 (China).

system, publish credit rating rules, and provide channels for consumers to make comments on the commodities sold or services provided on the platform.”³³

At present, intermediaries cannot just take a neutral approach to transactions (“Negative Requirement”) to be exempt from liability, as there are a number of additional duties stipulated by law (“Positive Requirements”). In other words, neutrality, which has historically been the bulwark of the intermediaries’ exemption from liability, is no longer sufficient under the new law, which requires intermediaries to fulfil a number of “obligations”: according to Article 27, the duties of intermediaries include ensuring that sellers provide true information, such as their identity, address, contact details, administrative license, and registration, as well as to create registration files and regularly check and update them. Article 28 describes the duties of intermediaries to disclose information to the market monitoring and management department, but not to other entities with legitimate interests (e.g. brand owners whose rights have been infringed). Article 30 extends their duties to preventing illegal networks and criminal activities, which is why platforms such as Taobao and Pinduoduo have implemented proactive monitoring systems based on sensitive keywords.

Consumer Rights Protection Law

This piece of legislation, which was enacted to protect consumer rights and interests, imposes certain conditions on e-marketplaces relating to the quality and safety of goods sold on their platforms. Specifically, this law holds marketplaces liable for selling reproduced or low-quality goods. In China, the Consumer Rights Protection Law determines the creditors and guarantor with respect to consumer rights and protections in the marketplace’s legal liability regime.

This law implies the following obligations of the marketplace:

1. Information disclosure. Marketplaces are required to provide customers with true and full information concerning goods and services. This includes information about the goods’ price and features, the terms of sales, and the service policy.³⁴
2. Product quality and safety. Marketplaces are accountable for ensuring the quality and safety of the goods.³⁵
3. Contractual obligations. Under the Consumer Rights Protection Law, the marketplace is required to oversee contracts and payments in alignment with the information presented in advertising materials. This ensures that all agreements and transactions reflect the true nature of the products or services being offered, thereby supporting consumer safety and transparency.³⁶
4. Dispute resolution. A marketplace must also adopt efficient mechanisms for addressing consumer disputes. Marketplaces must act immediately and deal with customer complaints and also make it possible for buyers and sellers to effectively communicate with each other. Failure to meet these guidelines may lead to a lawsuit against the marketplace.³⁷
5. Misleading and false practices. The Consumer Rights Protection Law does forbid marketplaces from engaging in misleading or deceptive practices. It prohibits false advertising, bait-and-switch techniques, and other forms of deceptive actions. China’s Consumer Rights Protection Law requires that marketplaces demonstrate strong and ethical responsibility.³⁸

³³ Id., art. 39 (China).

³⁴ Law of the People’s Republic of China on the Protection of Consumer Rights and Interests, art. 8 (China).

³⁵ Id., art. 11.

³⁶ Id., art. 18.

³⁷ Id., art. 39.

³⁸ Id., art. 28.

To conclude, market responsibility in China is especially impacted by IP rights and consumer protection laws. Companies must adhere to the rules to avoid severe consequences for infringement solely by adhering to these two components. IP rights secure innovative development and stimulate competition, whereas consumer protection laws elevate a business' standing in the market by fostering consumer trust. In combination, they form a solid basis for growing and prosperous business in China.

Anti-Unfair Competition Law

The PRC Anti-Unfair Competition Law³⁹ (hereinafter — AUCL) is one of the key regulations aimed at protecting a fair and transparent market environment in China. The main provisions of the Anti-Unfair Competition Law with respect to e-commerce platforms concern the following aspects:

- The AUCL prohibits any activity that can be categorized as unfair competition.⁴⁰ This includes the use of false or misleading advertising and defamation of competitors to gain a competitive advantage.⁴¹
- The law prohibits falsification or false representation of goods and services.⁴² E-commerce platforms must monitor their sellers to ensure that they are not offering fake or misleading products.

E-commerce platforms are also obliged to take measures to monitor and control the activities of their users who sell or distribute goods and services through their websites.⁴³ Platforms may be considered liable if they fail to take adequate measures to prevent infringement of intellectual property rights by their users.

Violations of the AUCL can result in a variety of sanctions, ranging from fines to criminal liability in particularly serious cases.⁴⁴

Thus, platforms must not only focus on complying with their own rules and policies, but also take proactive measures to prevent and address unfair competition and intellectual property infringement on their platforms.

Case Law

Case law is crucial for preserving the legal liability regime for marketplaces in China. There have been several cases concerning marketplace liability for intellectual property right's infringement in China.

In the case of *Wei Cai v. Zhejiang Taobao Network Co., Ltd.*⁴⁵, the plaintiff, Wei Cai, took legal action against Zhejiang Taobao Network Co., Ltd., a company that operates the two most popular Chinese e-commerce platforms — Taobao and Tmall — in a Chinese court. The plaintiff claimed that Taobao should have noticed the infringing behavior of an operator on Taobao and provided information about this operator on Taobao. The actual situation was that the plaintiff had bought a Gucci bag from an online vendor at Taobao. The plaintiff argued that Taobao failed to adequately consider the

³⁹ Anti-Unfair Competition Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, amend. April 23, 2019) (China).

⁴⁰ *Id.*, art. 2.

⁴¹ *Id.*, art. 8.

⁴² *Id.*, art. 10.

⁴³ *Id.*, art. 12.

⁴⁴ Anti-Unfair Competition Law of the People's Republic of China, 2019, art. 27–30 (China).

⁴⁵ *Wei Cai v. Zhejiang Taobao Network Co., Ltd.* (2019), E 01 Minzhong No.7131.

background information and should not have sold a potentially fake product. The plaintiff initiated legal action against Taobao, alleging that the company had infringed upon their rights. The court initially dismissed the plaintiff's claims, as they could not conclusively prove that the product was indeed counterfeit or that Taobao had violated any laws. Subsequently, the plaintiff appealed the court's decision but was unsuccessful, and the initial judgment was not overturned. The second court upheld the ruling of the first court and dismissed the plaintiff's appeal. The assertions made by the plaintiff were disregarded due to the inability of the plaintiff to demonstrate that Taobao had breached Article 38 of the E-commerce Law. Since the purchase agreement was between the plaintiff and the seller, any complaints regarding the product should have been directed towards the seller. Taobao had provided accurate information about the vendor, absolving the platform of liability. This case highlights that individual sellers bear the primary responsibility in disputes. As long as Taobao accurately conveys information and takes necessary measures to monitor their sellers, it cannot be held liable for their actions.

Most legal decisions have determined that online marketplaces function as platform providers rather than parties to the transactions or joint vendors involved in the online dealings. In the case of *Aktieselskabet AF v. eBay Network Information Services (Shanghai) Co.*⁴⁶, the defendant facilitated an Internet trading platform service, which was essentially a virtual marketplace where users could open accounts, register, log in, browse listings, and negotiate with website visitors regarding transactions, although the final transactions were completed offline. The court concluded that, as the online marketplace provider, the defendant was not a party to these transactions and, therefore, not liable for them, even though the online vendors paid service fees to the defendant upon completion of transactions.⁴⁷

In another situation, Plaintiff Lei Wang and Defendant Hai Jiang engaged in a legal dispute with the Alibaba-owned e-commerce platform, Taobao.⁴⁸ The case raised questions about the responsibilities of Taobao's intermediary, specifically Zhejiang Taobao Network Co., Ltd., in handling intellectual property infringement complaints. Hai Jiang accused Lei Wang's shop on Taobao of selling counterfeit goods, leading to further examination of Taobao's role in responding to such complaints. As an intermediary, Taobao has "duty of care" to adequately investigate and respond to the complaints raised. However, Taobao should ascertain that the complaints are valid and based on accurate information. The court observed that Hai Jiang lodged complaints against fellow users on the intellectual property protection platform, utilizing deceptive materials to initiate legal action against them. Furthermore, Hai Jiang misrepresented himself as representing Under Armour, although he had no association with the brand. This conduct presented potential liability issues related to unfair competition. The judgment suggested that Hai Jiang used false materials to sue and make malicious complaints against People's Court and thus was found to have engaged in unfair competition, causing economic injuries to Lei Wang. Taobao's platform acted in good faith by responding to the complaints and taking down the links containing the plaintiff's products. However, the platform's liability may arise in the event that the intermediary fails to conduct thorough enquiries to verify the authenticity of the complaints. Courts will consider the knowledge and control of the intermediary and actions that have been taken to prevent infringement on intellectual property efficiently. The

⁴⁶ *Aktieselskabet AF Nov. 21, 2001 v. eBay Network Info. Servs. (Shanghai) Co. for Trademark Infringement*, 2005 371 (Shanghai No. 1 Interim. People's Ct. Aug. 21, 2006).

⁴⁷ *Beijing Cosmic Star Trade Co. v. Chen Hongzheng, eBay EachNet Network Info. Servs. (Shanghai) Co., Shanghai eBay Trade Co. for Trademark Infringement*, 2005 Qing Min San Chu Zi 404 (Shandong Qingdao Interim People's Ct. June 13, 2005).

⁴⁸ *Lei Wang v. Hai Jiang*, (2018, concluded in 2019) Zhe 8601 Minchu No. 868.

judgment in this case underscores the importance of ensuring that intellectual property complaint mechanisms on E-commerce platforms are not misused for wrongful purposes and demonstrates the potential legal consequences for individuals engaging in such behavior.

In another instance⁴⁹, the plaintiff claimed that Alibaba was an accomplice to the crime since the products were exhibited and sold through the platform and the business continued to sell formerly sold, similarly infringing products after the former verdict. To establish Alibaba's liability for patent infringement, it was crucial to demonstrate that the company either had actual knowledge or should have been aware of the sale of the defendant's infringing products on its platform. Although platforms are expected to do "all that is reasonable under the circumstances" to limit IP violations, their burden is mainly dependent on their actual or presumed knowledge, control of listings, and prior rights-infringement complaints. In the present case, the court established that the plaintiff lacked adequate evidence to prove Alibaba's actual or presumed knowledge of the sale of products that were counterfeit or violated patents. As a result, the claims made against Alibaba were dismissed. The case highlights that, for a complainant to hold a platform liable, they must demonstrate that the platform either 'knew or should have known' about the patent-infringing activities happening on their site. If the complainant cannot prove this, it becomes much harder to hold the platform accountable for monitoring and preventing such violations. Extra case reports involve ongoing efforts by rights-holders to hold online markets accountable for infringement of intellectual law cases in China. There is a growing recognition of the importance of upholding intellectual property rights and the potential for online marketplaces to take action against the sale of counterfeit and IP-infringing products.

Peculiarities of Law Enforcement

First and foremost, Chinese law⁵⁰ implies that marketplaces may be held jointly liable for IP infringements, along with individual sellers (Nawab, 2023, p. 226) – the so-called "secondary liability". As a result, marketplaces have increased responsibility to monitor their platforms and find and delete infringing content.

Secondly, the law requires marketplaces to implement a notice-and-takedown system that allows copyright holders to complain to the company (Wang, J., p. 252). Upon receipt of a valid notice, the marketplace must promptly remove the infringing content, or it will be reviewed for not complying with the law. To currently qualify for exemption from liability under the "safe harbor" provision, intermediaries must take proactive measures, rather than just merely act as neutral intermediaries.

Finally, there are administrative bodies in China, including the State Intellectual Property Office and the Market Supervision Administration. The purpose of these agencies is to control the proper execution of intellectual property laws and penalize marketplaces and sellers that fail to comply with them. Counterfeiting is still a significant issue in China, with thousands of counterfeit products sold on various marketplaces. Therefore, marketplaces must create accurate and efficient systems for monitoring products and identifying counterfeit goods.

The ever-changing legal landscape in China surrounding the liability of marketplaces for IP infringements should be carefully observed and monitored. Recent legal changes, such as the amendment of the AUCL and heightened enforcement actions by the authorities, signal that China considers it increasingly important to hold marketplaces responsible for aiding infringers and to strengthen

⁴⁹ Suzhou Natong Biological Nanometer Technology Co., LTD v. Guangzhou Baiyun District Shengjiemei Beauty Instrument Factory and Hangzhou Alibaba Advertising Co., LTD., (2019) Sumingzhong No. 641.

⁵⁰ E-Commerce Law of the People's Republic of China, art. 45 (China).

IP protection. However, the extensive growth of e-commerce platforms in the country makes it challenging to adequately control online infringement, given the number of listings and transactions. This makes prompt and efficient removal of infringing content possible only with the help of technology and significant resources. Recently, marketplaces have been turning to advanced technology, such as machine learning and artificial intelligence, to identify and remove counterfeit and infringing products in an automated, scalable way. However, even with this technology on their side, this requires fine-tuning and produces many false positives and negatives.

Furthermore, given the international nature of most major online marketplaces, cooperation between countries is essential in combating cross-border infringements. China actively participates in global initiatives aimed at protecting international property rights, such as the TRIPS Agreement.⁵¹ Additionally, through its own measures, like implementation of the AUCL, China has demonstrated its commitment to strengthening its domestic IP enforcement mechanisms. As a measure of success in battling frequent occurrences of IP infringements on online marketplaces, many brands have implemented brand protection strategies (Tian, 2016, p. 41). Those usually include measures to monitor unauthorized sellers online, take enforcement action against infringers, and collaborate with marketplaces to efficiently fight counterfeits. Educating consumers, sellers, and marketplace operators is critical in creating a culture of respect for IP, in which infringement is rarer. Such efforts may include educational campaigns, training programs, and programs to educate the public about the dire consequences of infringement.

On the whole, determining the liability of marketplaces as intermediaries for infringement of IPRs in China is a complicated problem, which involves multiple levels of legal regulation, enforcement, and duty-sharing between various parties. However, once the peculiarities in this area are accounted for and appropriate measures are taken to tackle IP infringements, China's international status as a highly aware guardian of intellectual property will be strengthened.

Comparative Analysis of the Legal Systems of the USA and China: Commonalities and Differences in Approaches to Marketplace Responsibility

Both the United States and China have instituted a variety of regulations aimed at protecting consumers and curtailing unfair practices in e-commerce. Nonetheless, the countries' laws prescribe dissimilar responsibilities for marketplaces with respect to the actions of sellers.

Within the US legal framework, online marketplaces are chiefly viewed as neutral third parties that facilitate interactions between vendors and buyers (Chow, 2000, p. 19). According to Section 230 of the CDA⁵², platform operators generally face minimal exposure for unlawful or infringing user-generated materials. As such, liability typically falls upon the individual sellers rather than the marketplace itself in cases involving copyright violations or trafficking of counterfeit goods, as reflected in Frosio (2018, p. 19).

More broadly, marketplace duties in the US derive from legislation addressing consumer safeguards and free enterprise. Moreover, US intellectual property protections and prohibitions on fraudulent wares impact the accountabilities expected of marketplaces. However, this immunity is not absolute, and it cannot cover platforms that are actively involved in creating or developing illegal

⁵¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

⁵² Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501-561, 110 Stat. 133 (1996) (codified as amended in scattered sections of 47 U.S.C.).

content. This caveat implies that a platform with actual, rather than presumed, knowledge of potential intellectual property rights claims and the opportunity to take action will not be immune from section 230 of the CDA.

By contrast, Chinese e-commerce and customer rights laws assign marketplaces a more active oversight role for the products listed on their sites (Gao, 2004, p. 63). Certain Chinese platforms must rigorously authenticate merchandise and shield customers from potential harm (“proactive measures”). If issues arise or bogus items are found, the e-commerce marketplaces themselves may suffer legal repercussions rather than pass responsibility to sellers alone⁵³ (Wall, 2006, p. 378).

The Chinese marketplace is strictly monitored to ensure respect for IP rights (Friedmann, 2017, p. 293), product safety and fair competition (Lanfang, 2013, p. 575). Consumer protection laws⁵⁴ demand transparency from online retailers, while anti-monopoly rules curb predatory business conduct.⁵⁵ On the contrary, US online e-markets enjoy relative independence, though they require close monitoring due to ubiquity (Leaffer, 2001, p. 857). Both systems aim to achieve equilibrium between open trade and consumer welfare.

Yet disparities abound when considering issues such as liability for counterfeiting, data privacy, and safety duties, as the extent of marketplace responsibility in these domains diverges markedly between the two nations.

Both countries fight deceptive marketplace behaviors through robust consumer statutes and jurisprudence that not only penalize violations but also establish a clear legal framework within which businesses must operate. By adjudicating specific cases, courts in both China and the US play a critical role in defining the boundaries of acceptable business conduct. This judicial oversight helps foster a market environment where consumers can make informed choices and have confidence in the integrity of market transactions. Through these legal mechanisms, both nations aim to uphold consumer trust and ensure fair competition within their respective markets. Regulations mandate truthful product descriptions, guaranteeing quality and safety, and reimbursing customers for unfair treatment. Finally, intellectual property is safeguarded from pirating through bans on counterfeiting enforced upon online vendors.

Both the United States and China have implemented various consumer protection laws and market regulation policies to ensure product safety, verify quality standards, and educate buyers regarding potential hazards. While the two nations share some high-level goals with respect to protecting consumers and fostering fair competition, their specific approaches differ in meaningful ways.

In the US, online retailers face liability only if they knew or should have reasonably known that goods infringed on intellectual property rights.⁵⁶ However, Chinese law holds marketplaces responsible if they fail to take necessary measures after being notified of such violations.⁵⁷ Additionally, US e-commerce platforms bear responsibility solely for defects in items they produce themselves (Bieron & Ahmed, 2012, p. 558). Conversely, under Chinese statutes, platforms may be found accountable even when uninvolved in producing or altering products (Cheung, 2016, p. 425).

⁵³ E-commerce Law of the People’s Republic of China, art. 45 (China).

⁵⁴ Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007), Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93 (2d Cir. 2010).

⁵⁵ Consumer Protection Law of the People’s Republic of China, art. 8. (China); Anti-Monopoly Law of the People’s Republic of China (promulgated by promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 8, 2008, rev’d Jan. 8, 2022), art. 32 (China).

⁵⁶ Digital Millennium Copyright Act, 17 U.S.C. § 512 (c) (1) (A).

⁵⁷ E-commerce Law of the People’s Republic of China, art. 45 (China).

Results

Our research article has presented a detailed comparative analysis of intermediary liability for IPR infringement on e-commerce platforms in the United States and China. Through comprehensive examination of the legal frameworks in both jurisdictions, key similarities and differences have been identified with respect to how these countries approach the regulation of intermediary liability in the context of IPR protection. In the United States, we found that intermediary liability is primarily governed by the Digital Millennium Copyright Act (DMCA) and Communications Decency Act, which provide a “safe harbor” framework for online service providers. This framework establishes a system of notice and takedown procedures, which incentivizes platforms to promptly respond to copyright infringement claims from rights holders, while shielding them from liability for the infringing activities of their users under certain conditions. The “notice and takedown” procedure is key to protecting platforms from liability. Platforms are required to respond to reasonable notices of copyright infringement. The analyzed court cases in the US demonstrate the extent of platforms’ involvement, and it can be found that their duties vary depending on their awareness of infringement and role in content regulation.

Conversely, in China, intermediary liability for IPR infringement is regulated through a combination of laws, regulations, and judicial interpretations. In China, the E-Commerce Law is the main legislation governing e-commerce and determining the liability of intermediaries. Article 45, in particular, outlines the responsibility of platforms when they ignore notices of intellectual property infringement. The Chinese legal framework imposes obligations on online service providers to implement measures to prevent and address IPR infringements on their platforms, with potential liability for failure to do so.

Our comparative analysis revealed that, while the United States and China both strive to strike a balance between protecting IPRs and fostering innovation in the digital economy, they adopt different approaches in regulating intermediary liability. Both jurisdictions require platforms to respond promptly to breach notifications, but the approaches to implementation and consequences for non-compliance differ. The United States relies more on a self-regulatory model with safe harbor provisions, while China emphasizes proactive measures and supervision to ensure compliance with IP laws.

Overall, our analysis underscores the complex and multifaceted nature of issues concerning intermediary liability with respect to e-commerce platforms and IPR protection. The results of this study highlight the need to improve regulatory frameworks to enhance enforcement and create strategies to combat intellectual rights infringement. To enhance the management of IPR infringements, platforms should consider fostering closer collaboration with rights holders to effectively identify and address violations. Investing in technology, such as content recognition systems and automated monitoring, can significantly aid in preventing infringement. Additionally, conducting regular training sessions for platform staff on intellectual property and related procedures can help minimize infringement risks. A successful strategy for managing these risks requires a comprehensive approach that takes the unique aspects of each jurisdiction into consideration.

Conclusion

Following a comparative legal assessment of the responsibility of marketplaces for IPR infringement in the United States and China, several notable findings were highlighted. The US and China have markedly different philosophies and procedures addressing commercial culpability for breaches of IPRs. The US utilizes a notification system and DMCA liability process, ensuring infringing material can be deleted by pertinent markets upon request from the copyright owner. The same is happening in China, as it has implemented a notice-and-takedown system similar to America's, requiring online venues to promptly remove infringing content after receiving a valid complaint from the copyright holder, the so called "notice and take-down system". Marketplaces play a significant role in intellectual property, as they offer a platform for trading and distributing such objects.

However, their accountability for infringement of these works remains controversial, with diverging approaches across nations. Effectively, the progression of cooperative systems between marketplaces and rights holders is crucial in combating IPR infringement. Herein, markets must design and apply policies and procedures for adequately reacting to rights holders' issues and removing unlawful material in a timely manner. A key aspect of marketplace liability legislation is achieving a balance between safeguarding the rights of copyright owners and the rights of customers. Mechanisms must be established to ensure that infringing material is deleted, while lawful material remains accessible and consumers' interests are protected. The issue of marketplace liability for infringement of IPRs is global, thus international collaboration is needed to address it. Sharing knowledge and exemplary practices between different countries will help in developing unified rules and recommendations for controlling marketplace accountability for IPR violations.

These findings underscore the necessity for continued scholarly inquiry and policy innovation to counter violations of IPRs and to safeguard the interests of rights holders, marketplaces, and the public.

The United States and China have adopted divergent stances on commercial accountability pertaining to the infringement of intellectual property protections. In the US, a "safe harbor" doctrine shields venues from liability for user conduct, provided they adhere to set standards, such as removing unlawful materials upon a copyright owner's request. In China, marketplace culpability may be more direct and stringent, necessitating intensive monitoring of shared information.

Both nations prioritize preservation of IPRs, although their methods for regulating and reacting to infringements can vary. Typically, the United States relies on lawsuits initiated by copyright holders to prevent infringement, whereas China actively employs administrative supervision and legal proceedings to address infringement.

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