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二零二零年七月二十七日

中国北京市东城区东交民巷 27 号
中华人民共和国最高人民法院

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主题: 《最高人民法院关于审理涉电子商务平台知识产权纠纷案件的指导意见》(征求意见稿)的反馈意见

致最高人民法院:

美国知识产权所有人协会(下称“IPO协会”)感谢中华人民共和国最高人民法院(下称“最高院”)提供了对 2020 年 6 月 10 日发布的《最高人民法院关于审理涉电子商务平台知识产权纠纷案件的指导意见》(公开征求意见稿)(下称“《指导意见》”)提交意见的机会。

IPO 协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有一百七十五家公司会员以及超过一万两千多名个人会员。这些个人会员有些从属于公司会员或律所成员,有些是发明人、作者或律师会员。IPO 协会的会员遍及三十多个国家。

IPO 协会提倡有效和实惠的知识产权,为会员提供广泛的服务,包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

《指导意见》旨在维护与电子商务有关的各方的权益,电子商务是商业活动日益重要的平台。IPO 感谢最高人民法院高度重视平衡知识产权所有者,电子商务平台业务和平台内业务之间的权利和义务的重要性,同时还要确保知识产权得到稳固的保护。

以下是我们对《**指导意见**》的具体反馈意见。

第一条

第 1 条涉及由最高人民法院于 2020 年 6 月 10 日发布以征求“最高人民法院关于涉网络知识产权侵权纠纷有关法律适用问题的批复”（“批复”）草案的指导原则。这些原则的一部分包括：停止通过电子商务平台和在电子商务平台上发现的其他侵权产品（而非服务）提供假冒和盗版产品的行为。谨此提出，这些原则应加以扩展以包括并明确规定禁止在电子商务平台上提供的其他侵权服务。

第三条

第 3 条列出了区分电子商务平台业务和平台内业务时应考虑的几个因素。除了已经列出的那些因素外，在实践中，确定业务类型时还可以参考交易中的物流服务提供商的信息。例如，有些电子商务平台公司经营自己的“自雇”产品物流服务。因此，IPO 建议对以下内容的第二段进行以下修订：

人民法院认定电子商务平台经营者实施的涉案行为属于提供平台服务还是开展自营业务，可以考虑下列因素：商品销售页面上标注的“自营”或“他营”信息；商品实物上标注的销售主体信息；发票等交易单据上标注的销售主体信息及交易中的物流服务提供者等。

第四条

第 4 条规定了电子商务平台企业已知或应该知道平台内企业侵权时可采取的措施。但是，这些措施并未列出终止交易和服务的选项，除非平台内业务多次故意侵权。每当电子商务平台业务知道或应该知道平台内业务侵权时，也应就可以将终止交易和服务的方式提供给电子商务平台业务。因此，谨提出将第 4 款第二句修正如下：

采取的必要措施应当遵循合理审慎的原则，包括但不限于删除、屏蔽、断开链接等下架措施及终止交易和服务。

第七条

IPO 提议对第 7 条第二款进行以下修订，以澄清实用新型或外观设计专利所需的“评估报告”，并明确规定，为支持撤消通知而要求的类型文件应支持侵权的表面证据。

通知涉及专利权的，电子商务平台经营者可以要求知识产权权利人提交技术特征 或设计特征对比的说明、实用新型或外观设计专利权评价报告等材料，根据《中华人民共和国专利法》第 61 条的规定等，以支持侵权案件表面上的证据确凿。

第十一条

根据此条款，电子商务平台经营者在将平台内经营者提交的不侵权声明转交知识产权权利人后，在 25 个工作日内未收到知识产权权利人提交的人民法院或者行政机关受理通知书的，应当及时终止所采取的删除、屏蔽、断开链接等下架措施。我们认识到，规定 25 个工作日的期限是为了使知识产权权利人必须及时采取法律行动，以不公允地损害提供非侵权声明但仍受制于侵权的一方移除措施。但是，由于案件备案与案件受理之间可能会有所滞后，通常是由于形式或其他原因，而不是知识产权权利人所能控制的（例如，由于外国生成的证据合法化造成的延迟），因此我们建议您注意知识产权所有人的备案通知该案例符合时限要求，如下：

电子商务平台经营者在将平台内经营者提交的不侵权声明转交知识产权权利人后，在 25 个工作日内未收到知识产权权利人提交的人民法院或者行政机关受理通知书提交立案请求通知书的，应当及时终止所采取的删除、屏蔽、断开链接等下架措施。

IPO 协会再次感谢贵院给予此次机会提出反馈意见。我们也非常愿意与贵院进一步交流或能有机会为贵院提供更多的信息。

随信附上本信的翻译版本。

此致



Daniel J. Staudt
美国知识产权所有人协会主席

附件：IPO 协会对《最高人民法院关于审理涉电子商务平台知识产权纠纷案件的指导意见》（公开征求意见稿）的反馈意见（英文版）



27 July 2020

Supreme People's Court
27 Jiaomin Alley
Dongcheng District
Beijing, P.R.China

VIA EMAIL: spcip2020@163.com

Re: Guiding Opinions of the Supreme People's Court on the Trial of Intellectual Property Disputes Involving E-Commerce Platforms

To the Supreme People's Court:

The Intellectual Property Owners Association (IPO) wishes to thank the Supreme People's Court (hereinafter referred to as the "SPC") for the opportunity to respond to the request for comments on the draft "*Guiding Opinions of the Supreme People's Court on the Trial of Intellectual Property Disputes Involving E-Commerce Platforms*" (hereinafter referred to as the "Guiding Opinions") published on 10 June 2020.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes 175 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

The Guiding Opinions aim to safeguard the rights and interests of parties involved in e-commerce which is an increasingly critical platform for commercial activity. IPO appreciates the SPC's close attention to the importance of balancing the rights and obligations between IP owners, e-commerce platform businesses, and in-platform businesses, while ensuring that IP rights are firmly protected.

We provide below our comments on the Guiding Opinions.

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Dolby Laboratories
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Bridgestone Americas
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BP America, Inc.
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Medtronic, Inc.
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Article 1

Article 1 addresses the principles governing the draft “*Supreme People’s Court’s Reply on the Application of Laws in Disputes related to Internet Intellectual Property Infringement*” (“Reply”), which was also issued by the SPC for comments on 10 June 2020. These principles include, in part, stopping the acts of providing counterfeit and pirated products through e-commerce platforms and other infringing products (but not services) found on e-commerce platforms. It is respectfully submitted that these principles be expanded to include and explicitly set forth the prohibition of other infringing **services** offered on e-commerce platforms.

Article 3

Article 3 lists several factors that could be considered when distinguishing between an e-commerce platform business and an in-platform business. In addition to those factors already listed, in practice, the information of the logistics service provider in a transaction could also be referenced when determining the type of business. For example, there are e-commerce platform businesses that operate their own logistics service for “self-employed” products. IPO therefore proposes the following revision to the second paragraph of Article 3:

*When the people’s court determining that the act of the e-commerce platform business involved in the case is providing platform services or carrying out self-operated business, it may consider the following factors: “self-employed” or “other employed” information marked on the product sales page; sales subject information marked on the physical goods; sales subject information marked on invoices; **the logistics service provider in a transaction;** and other transaction documents.*

Article 4

Article 4 addresses the measures available to an e-commerce platform business that knows or should have known that an in-platform business infringes. The measures, however, do not list the option to terminate transactions and services except when the in-platform business has intentionally infringed on multiple occasions. Termination of transactions and services also should be made available to the e-commerce platform business as an additional measure whenever the e-commerce platform business knows or should have known of the in-platform business infringement. It is therefore respectfully submitted that paragraph 4, second sentence, be amended as follows:

*The necessary measures to be taken shall follow the principle of reasonableness and prudence, including but not limited to measures such as deletion, blocking or disconnection of links **and termination of transactions and services.***

Article 7

IPO proposes the following revisions to the second paragraph of Article 7 to clarify the “evaluation report” needed for utility model or design patents, and specify that the type of documents required in furtherance of a takedown notice should be to support a *prima facie* case of infringement.

*If the takedown notice involves patent rights, the provider of the e-commerce platform may request the intellectual property rights holder to submit documents such as description of the technical features or comparison of the technical features, evaluation report on the utility model or design patent **as provided by Article 61 of the Patent Law of the People’s Republic of China**, and so on, **to support a prima facie case of infringement**.*

Article 11

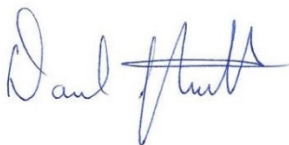
Under this article, the provider of the e-commerce platform shall terminate takedown measures if it does not receive a case acceptance notice from the IP right holder within 25 working days of forwarding the Counter Notice to the right holder. We recognize that the purpose of prescribing a 25-working day time limit is so that the IP right holder must take timely legal action so as to not unfairly prejudice the party who has provided a statement of non-infringement and yet is still being subject to the takedown measures. However, because there may be a lag between case filing and case acceptance, oftentimes for formality or other reasons beyond the IP right holder’s control (e.g. delays due to legalization of foreign-generated evidence), we recommend that notice of the IP right owner’s filing of the case meets the time limit requirement, as shown below:

*If the provider of the e-commerce platform does not receive from the intellectual property rights holder ~~the case acceptance notice issued by~~ **notice of case filing with** the People’s Court or administrative authority within 25 working days after forwarding the Counter Notice advocating non-infringement to the intellectual proper rights holder, the provider of the e-commerce platform shall terminate the measures, such as takedown, blocking or disconnecting links, in a timely manner.*

We thank the Supreme People’s Court for the opportunity to comment, and we welcome further dialogue and opportunity for contribution.

We have enclosed this letter as translated herewith.

Sincerely,



Daniel J. Staudt
President

Attachment