

5 | 2018

19<sup>th</sup> Year  
15 October 2018  
P. 133–164



# Computer Law Review International

A Journal of Information Law and Technology

**Editorial Board:** Prof. Dr. Thomas Dreier, M.C.J. · Dr. Jens-L. Gaster ·  
RA Thomas Heymann · Prof. Dr. Michael Lehmann, Dipl.-Kfm. · Prof. Raymond T. Nimmert ·  
Attorney at Law Holly K. Towle, J.D. · Attorney at Law Thomas Vinje

[cr-international.com](http://cr-international.com)

**Articles >** *Jan Pohle* – Data Privacy Legislation in the EU Member States –  
Part Two of the Practical Overview ..... 133

*Michaela Witzel* – How to Overcome Three Typical Dilemmas with  
Open Source License Obligations ..... 148

*Rodolfo Alariste* – Ad Blockers: No Constitutional Question in the US..... 154

**Case Law >** USA: Status As Subscriber of IP-Address No Evidence for Copyright  
Infringement (Court of Appeals for the 9th Circuit, decision of 27  
August 2018 – No. 17-35041 by McKeown, Judge – Cobbler Nevada,  
LLC. v. Thomas Gonzales) ..... 160

**Updates >** *Matt Harris / Supuni Perera* – GDPR And Brexit: What's Next  
for the UK? ..... 161

*Daniel Albrecht* – China's New E-Commerce Law ..... 163

## Supuni Perera

Paralegal at Womble Bond Dickinson, Southampton

Supuni.perera@wbd-uk.com



## China's New E-Commerce Law

China is driving a boom in global e-Commerce retail sales, consequently, the issuing of the first fundamental law addressing e-Commerce in China on August 31, 2018, effective on January 1, 2019, is a clear evidence of the widespread awareness of the importance of this phenomenon. The new E-Commerce Law is a response to China's growing use of e-Commerce in daily life, particularly via mobile platforms.

The aim of the comprehensive body of legislation is to improve regulation of the flourishing market and to reinforce punishments towards counterfeit and substandard items, in order to change the perception that China's e-Commerce platforms are lax on enforcing IP laws and allowing fake merchandise to flood the marketplaces<sup>1</sup>.

### 1. Definition of E-Commerce

The e-Commerce, as defined and regulated by the E-Commerce Law, refers to domestic "business activities that sell merchandise or provide services on information networks such as the internet". "Financial products and services, as well as services that use information networks to provide such contents as news information, audio-visual programs, publications, and cultural products"<sup>2</sup> are expressly excluded from the purview of the E-Commerce Law.

### 2. Addressee of the E-Commerce Law

E-Commerce operators, to whom the E-Commerce Law is addressed, are classified into the following three categories<sup>3</sup>:

- ▶ E-Commerce platform operators, which refers to providers of a virtual place of business to the parties of an e-Commerce transaction, to enable them to carry out independent transaction activities (e.g. "Taobao" operator);
- ▶ Operators on the platform, which refers to e-Commerce operators that sell goods or provide services to customers through platforms;
- ▶ Other e-Commerce operators, which refers to e-Commerce operators that sell their own goods or provide their own services to costumers through self-established web sites or other channels (e.g. merchants on WeChat; non-traditional shopping channel will be covered by legislation).

E-Commerce operators can be natural persons, legal persons or unincorporated organizations.

### 3. General Obligations for Operators

The E-Commerce Law stipulates that e-Commerce operators shall fulfil the following general legal obligations:

- ▶ Registration of business entities, Article 10 E-Commerce Law;
- ▶ Obtaining any required administrative license, Article 12 E-Commerce Law;
- ▶ Publishing details of licenses and other important information, Article 15 E-Commerce Law;
- ▶ Following the rules for protection of personal information, Article 24 E-Commerce Law;
- ▶ Disclosing information about goods or services, Article 17 E-Commerce Law;
- ▶ Taking responsibility for any risks in the transportation of goods, Article 20 E-Commerce Law.

### 4. Specific Rules for Platform Operators

In addition to these provisions, e-Commerce platform operators are required to abide by a series of specific rules<sup>4</sup>, which are not insignificant:

- ▶ Assess and manage operators on their platform, Article 28 E-Commerce Law;
- ▶ Submit the required information to government departments (industry and commerce, tax<sup>5</sup>, etc.);
- ▶ Develop service contracts and transaction rules for their platform and keep these prominently displayed<sup>6</sup>. It is necessary to record and store goods, services and transactions information at least for a period of three years, Article 31 E-Commerce Law;
- ▶ Establish a comprehensive credit evaluation system, Article 39 E-Commerce Law;
- ▶ Prefer an environmentally friendly attitude in carrying out e-Commerce activities, Article 13 E-Commerce Law;
- ▶ Abide by drafting and execution's rules of e-Contract, Articles 48 to 57 E-Commerce Law;
- ▶ Establish rules to protect intellectual property rights, Articles 41-45 E-Commerce Law. E-Commerce platforms and online retailers on platforms may lead to a fine of 500,000 Yuan (around 62,000 Euro) or up to 2 million Yuan (around 248,000 Euro) in serious cases<sup>7</sup>, for failing to promptly react

1 Cifnews, e-business means China, Lila Seidman, *China's proposed e-Commerce Law targets fakes*, 25/06/2018, available at: <https://en.cifnews.com/chinas-proposed-e-commerce-law-targets-fakes/>.

2 Art. 2 E-Commerce Law People's Republic of China.

3 CMS Law Tax, *New Law governing E-Commerce is published in China*, 04.09.2018, available at: [http://www.cms-lawnow.com/ealerts/2018/09/new-law-governing-e-commerce-is-published-in-china?cc\\_lang=en](http://www.cms-lawnow.com/ealerts/2018/09/new-law-governing-e-commerce-is-published-in-china?cc_lang=en).

4 JUNHE LLP, "How will e-Commerce platforms be impacted by the e-Commerce Law?", 2018.9.7, available at: <http://www.junhe.com/law-reviews/847>.

5 Article 11 E-Commerce Law.

6 Global Times, *China's New e-Commerce Law shifts responsibility to websites*, 2018.09.02, available at: <http://www.globaltimes.cn/content/1117986.shtml>.

7 China.org.cn, Xinhua, *Draft of e-Commerce Law better regulates operators*, August 27, 2018, available at: [http://www.china.org.cn/china/Off-the\\_Wire/2018-08/27/content\\_60563000.htm](http://www.china.org.cn/china/Off-the_Wire/2018-08/27/content_60563000.htm).

when a violation of IPR by merchants on their platforms is reported, as well as they operate unreasonably restricted transactions on the platforms or abuse their position of dominance to exclude or restrict competition.

- Promote the protection of consumer's rights and privacy. The E-Commerce Law stresses that operators must not create reviews to mislead consumers; show consumers targeted ads without also showing them non-targeted ads and make tied merchandise or services selected by default<sup>8</sup>. Regarding the collection and refund of deposits, e-Commerce operators shall clearly explain the procedure for deposit refunds, shall not impose unreasonable conditions for refunds, and shall promptly provide refunds.

These provisions involve a comprehensive body of legislation that contains legal principles and rules governing the various aspects of e-Commerce: it covers issues such as the protection of consumer rights, the obligations of businesses, e-Contracts, electronic payments, cybersecurity, the protection of personal information, anti-competitive activity, and the protection of intellectual property rights. However, various areas still need clarification. For example, the relevant legal responsibility of online platform operators under the new E-Commerce Law has not been made clear.

## 5. Platforms Operators' Liabilities

According to the E-Commerce Law, e-Commerce platform operators should bear varying liabilities in accordance with specific circumstances.

### a) Joint and Individual Liability

E-Commerce platform operators will be held accountable if they fail to adopt necessary counter-measures when they know or should have known that the goods sold or services provided by operators on the platform do not meet personal or property safety standards, or that there are other actions that infringe the legal rights of the customers.

Moreover, e-Commerce platform operators will be liable if they fail to adopt necessary counter-measures when they know or should have known that operators on the platform have infringed intellectual property rights.

### b) Corresponding Liability

E-Commerce platform operators will be held accountable if they cause damage to consumers because they did not undertake their duty to check the qualifications of platform operators, or their duty to protect consumer safety<sup>9</sup>.

## 6. Effect on Non-Chinese Companies Doing Business in China

The new law supports the current effective regulations on foreign online trade, according which selling items online in China is an activity reserved to Chinese e-commerce platforms (Article 2 of E-Commerce Law), therefore foreign companies are not allowed to open an online shop in China, unless they have a Chinese partner company or a subsidiary in China<sup>10</sup>.

merce Law could represent a barrier to the development of foreign companies' business.

## 7. Does the new E-Commerce Law boost intellectual property protection?

Doubts persist over the applicability of the provisions related to the intended boost of intellectual property protection, because, as defined and regulated by the E-Commerce Law, the new measures would disproportionately affect smaller platforms without the means to tackle counterfeiting as effectively as larger e-Commerce players like JD.com and Alibaba Group.

Moreover, Article 41 E-Commerce Law stipulates that "E-Commerce platform operators shall establish rules for protecting intellectual property rights [...]". The margin of discretion allowed to operators, does not permit to establish wide binding measures to root out the counterfeiting phenomenon.

## 8. Initial Observations

The biggest difference between the European and the Chinese approach to regulating e-Commerce is that China has issued a comprehensive body of legislation addressing the e-Commerce sector in the Country whereas the European Union is focused on legislation to create a more open, integrated and competitive retail market and to foster an European Digital Economy and society with growth potential.

There are several parallels between the China's E-Commerce Law and the European approach. Both regimes are rooted in a shared desire for protection of consumers' rights (Article 38 of E-Commerce Law); fair competition (Article 22 of E-Commerce Law) and protection of intellectual property (Articles 41-45 of E-Commerce Law)<sup>11</sup>.

*Daniel Albrecht, Beijing*

### Attorney at law Daniel Albrecht

Guest Professor for Civil Law (CUPL Beijing, China) and Managing Counsel at Starke, Beijing

Corporate Law, Trademark Law, E-Commerce

law@beijing-starke.com

www.beijing-starke.com



<sup>8</sup> Articles 17 to 19 E-Commerce Law.

<sup>9</sup> Platform Operators Liabilities, Article 38 E-Commerce Law.

<sup>10</sup> China Brand, China IP Blog, *What changes come with the new e-Commerce Law in China?*, 7 June 2018, available at: <https://en.blog.chinabrand.de/2018/06/07/what-changes-come-with-the-new-e-commerce-law-in-china/>.

<sup>11</sup> NPC Observer, *NPCSC Adopts E-Commerce Law*, September 3, 2018, available at: <https://npcobserver.com/2018/09/03/npsc-adopts-e-commerce-law-soil-pollution-prevention-and-control-law-amends-individual-income-tax-law/>.