

Research on risk precaution of intellectual property infringement in cross-border e-commerce

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Abstract. Cross-border e-commerce is one of the innovative applications of Internet technology in the field of foreign trade. In recent years, China's cross-border e-commerce business has developed rapidly, but it is also faced with the challenge of intellectual property infringement risk. This paper takes the intellectual property rights in China's cross-border e-commerce as the research object, analyzes the current situation and main types of intellectual property infringement risks, and sums up the reasons why China's International online trade enterprises frequently encounter intellectual property risks from the perspective of infringement. For example, the relevant laws and regulations, the supervision mechanism of export products need to be improved and perfected, and there are differences in the determination of intellectual property infringement liability in different countries. Based on this, this paper intends to put forward relevant improvement paths from the aspects of perfecting relevant laws and norms, strengthening the legal supervision of intellectual property rights, clarifying the imputation principle applicable to tort liability and increasing the intensity of compensation for intellectual property infringement damages, in order to promote the vigorous development of China's foreign trade industry.

Keywords: Cross-Border E-commerce, Intellectual Property, Risk Prevention.

1. Introduction

As an organic combination of "Internet plus" and international trade, cross-border e-commerce has occupied a "place" in the global trade market. According to the eMarketer report, in the United States, for example, the number of buyers of cross-border retail e-commerce is expected to reach 71.8 million in 2024, an increase of 10 million compared with 2020, which is enough to highlight the rapid growth trend of international online trade around the world. [1] With the development of domestic Internet technology, the support and guarantee of national policies and the improvement of related infrastructure, a large number of traditional domestic trade enterprises have joined the "wave" of International online trade. In the process of "going out to sea" of these enterprises, they increasingly encounter the complex issue of intellectual property (IP) infringement due to the territorial limitations in IP rights. This challenge has become more conspicuous in the global marketplace. This problem has gradually become one of the main competition modes for overseas enterprises to restrict the development of cross-border e-commerce in China. In April 2023, the General Office of the State Council issued the opinions on promoting the stable scale and excellent structure of foreign trade (hereinafter referred to as "opinions"). The opinion points out that it is necessary to "speed up the introduction of guidelines for the protection of intellectual property rights in overseas digital commerce, and guide cross-border e-commerce enterprises to guard against intellectual property risks." The introduction of relevant national policies means that the state not only encourages and supports the development of enterprises in the field of cross-border e-commerce, but also emphasizes the indispensable role of intellectual property protection in this field.

It's important to highlight that despite numerous investigations into the safeguarding of IP rights within the realm of e-commerce, the scrutiny of IP rights pertaining to overseas digital commerce remains notably scant. Combing through the relevant literature, it can be found that scholars Miao Hebing and Zhang Yili analyzed the reasons why small and medium-sized export cross-border e-commerce enterprises suffered IP rights risk from the perspective of small and medium-sized export cross-border e-commerce enterprises, and put forward the relevant countermeasures from the

perspectives of property rights environment, cross-border e-commerce industry associations and enterprises themselves.[2] Scholars Li Jingyu and Wu Jinrong studied intellectual property risks and responses in cross-border e-commerce, mainly analyzed and expounded the necessity, main categories and performance characteristics of intellectual property legal risks in cross-border e-commerce, and finally put forward countermeasures from many levels.[3] Yu Minyou and Wu Shiran have studied the IP rights protection of cross-border e-commerce under the framework of RCEP. On the basis of combing the bottleneck problems restricting the intellectual property protection of cross-border e-commerce under the framework of RCEP, this paper puts forward the Chinese strategy to promote the innovation and creative rights protection of cross-border e-commerce.[4] Zhang, Y scholar expounded the connotation and importance of enterprise intellectual property strategy, focusing on the strategic path of IP rights promotion of China's cross-border e-commerce enterprises.[5] On the whole, although the existing literature has done groundbreaking research on the risk improvement of IP rights protection in the field of cross-border e-commerce, there is no classified analysis and comparison on some specific key issues. For example, there is no detailed study on the similarities and differences between the imputation principle and the general infringement of cross-border e-commerce IP rights infringement from the perspective of infringement, which is worthy of continuous discussion.

In view of the plight of IP rights disputes faced by domestic enterprises, especially small and medium-sized enterprises, in cross-border e-commerce trade, this paper tries to start with the current situation of intellectual property disputes in cross-border e-commerce by means of case study and comparative analysis. Abstract and analyze the reasons behind, discuss and put forward the corresponding improvement path, so as to furnish businesses with insightful guidance on mitigating IP rights risks within the sphere of transnational online retailing. Also, it aims to make a modest contribution to promoting the steady improvement of China's foreign trade level and achieving high-quality economic development.

2. An overview of intellectual property related issues in cross-border e-commerce

2.1. Definition of related concepts

E-commerce is an imported word, which is expressed as "Electronic Business" or "Electronic Commerce" in English. In the narrow sense, the concept of e-commerce mainly refers to all kinds of activities that use the Internet to engage in trade and transactions. Correspondingly, in a broad sense, e-commerce refers to all the business activities such as procurement, talks, payment, signing contracts, data authentication and so on, not just relying on the Internet as the medium.[6] It is generally believed that the relevant legislation of e-commerce in China adopts the broad concept, and this paper also adopts the broad concept of e-commerce. As an online platform to promote e-commerce transactions, e-commerce platform provides businesses and consumers with the infrastructure of transaction, communication and information transmission. At present, e-commerce platform mainly includes online shopping website, electronic payment system, digital currency transaction platform and so on. In view of its rich variety, the e-commerce platform not only facilitates cross-border trade, but also promotes economic exchanges and cooperation between different countries and regions.

Cross-border e-commerce, the full name of cross-border electronic commerce, refers to all kinds of cross-border trade activities and models carried out by all parties using modern information technology, with digital transactions as the main way. Its essence is to make the form of traditional international trade networked and electronic.[7] In a nutshell, cross-border e-commerce is like opening a "window" to the world, allowing goods to flow freely in international markets. According to the classification of commodity flow, cross-border e-commerce can be divided into export cross-border e-commerce and imported cross-border e-commerce; according to the transaction mode, cross-border e-commerce mainly includes B2B (cross-border e-commerce between enterprises), B2C (cross-border e-commerce between enterprises and consumers), and C2C (cross-border e-commerce

between consumers). The mainstream models are B2B and B2C. This paper demonstrates the issues related to intellectual property rights based on the cross-border e-commerce model of B2B and B2C.

2.2. The necessity of strengthening the protection of intellectual property

Firstly, enterprises have a high risk of getting into intellectual property disputes. On the one hand, as small and medium-sized enterprises are unfamiliar with the legal rules of extraterritorial intellectual property rights, once they fall into extraterritorial intellectual property disputes, their high extraterritorial litigation costs and huge energy consumption make it more difficult to resolve violation of intellectual property rights disputes in international e-marketplace activities. In addition, the third-party platform of overseas digital commerce severely cracks down on infringement, the infringing enterprises will face fines, temporary closure and even be blacklisted by the platform, which will cause irreparable losses to enterprises.[8] On the other hand, intellectual property is not only the core asset of the enterprise, but also an important means to enhance the added value and differential competition of the enterprise. By strengthening the protection of intellectual property rights, enterprises can not only prevent others from imitating their own products, but also prevent competitors from seizing their original resource market, so as to improve the quality and reputation of products, enhance consumers' cognition and trust, and expand overseas market share and profit space.

Secondly, the state now is comprehensively strengthening the protection of intellectual property rights. The first reason is that it's an effective means to ensure the trade security of a country. At present, the intellectual property dispute of overseas digital commerce is not only the conflict of the relevant legislation of various countries, but also the problem of trade confrontation between countries. Taking China and the United States as an example, Chinese enterprises encounter more and more American "337 investigations" in exporting cross-border e-commerce, which makes the settlement of intellectual property infringement disputes elusive.[9] Second, it is an important embodiment of adhering to China's economic development strategy. Cross-border e-commerce is a new form of China's foreign trade, which not only promotes the rapid growth of China's economy and the continuous optimization of its structure, but also provides an important opportunity for China's transformation from a major trading country to a trading power. Intellectual property protection is the basis and guarantee for the healthy development of cross-border e-commerce, also an important means to maintain national economic security and development strategy. The third is it's the necessary measures to improve the innovation level of a country. Intellectual property protection is an important support of innovation-driven development strategy, which plays an important role in enhancing national scientific and technological innovation capability and comprehensive national strength, enhancing national international competitiveness and influence, and building an innovative country and a world scientific and technological power.

3. Analysis on the present situation and causes of intellectual property infringement in cross-border e-commerce

3.1. Current situation of intellectual property infringement in cross-border e-commerce

The regionality of intellectual property is the logical starting point of the legal application and jurisdiction of foreign-related intellectual property. [10] Therefore, cross-border e-commerce transactions span not only different regions, but also different jurisdictions, which makes intellectual property infringement more likely to occur. During cross-border e-commerce operations, the primary intellectual property challenges encountered by market participants are typically represented by three key issues: copyright violations, trademark infractions, and patent breaches.

Copyright is the protection of original works and forms of expression in the fields of literature, art and science, and the related copyright infringement cannot be ignored. Take the Shanghai intellectual property Court of China as an example, among the Internet intellectual property cases handled by it in

2022, there were 348 online copyright infringement cases, accounting for 7.72%. In this particular business activities, the typical infringement of copyright mainly focuses on the infringement of the right of reproduction of unauthorized and unauthorized works and the right of information network dissemination. The former usually means that the third party uses the output of the copyright owner as part of the commodity without receiving the authorization or transfer from the copyright owner. Especially with cartoon characters, cartoon and game characters, celebrities and other related goods, such as "Ultraman", "Peppa Pig", "Boonie Bears" and other well-known animation images, copyright infringement has been banned repeatedly, which is a serious infringement disaster area. The latter mostly occurs in the promotion and advertising of goods, through pirated text, music, videos and other related publicity or commercial use. For example, in October 2023, a loading assistant software developed by a Tianjin Science and Technology Co., Ltd. moved commodity information data from one shopping platform to another, seriously infringing on the copyright of data source merchants.

Trademark infringement has always been the most significant problem in intellectual property disputes. Taking the Shanghai intellectual property Court of China as an example, among the first-instance intellectual property civil cases accepted by the Shanghai intellectual property Court in 2022, there were 9408 trademark disputes, ranking second. In cross-border e-commerce, for the seven kinds of infringement stipulated in the Trademark Law, there is a large proportion of confusion caused by the use of the same or similar trademarks on the same or similar goods without the permission of the trademark registrant. And in terms of the characteristics of infringement, firstly, the infringing products involve a wide range of categories, from traditional 3C, toys, clothing to lighting, lamps and lanterns, etc., covering almost all product categories; secondly, there are various means of infringement, including the direct use of other people's registered trademarks or similar trademarks, the use of other people's unregistered but well-known trademarks and so on. For example, a series of registered trademark infringement cases of Haier, GREE and other well-known electrical companies, as well as the sensational "Jordan" trademark infringement case in China, all reflect the process of steady development and competition upgrading of cross-border e-commerce. Trademark infringement is integrated, diversified and novel, which brings a lot of resistance to trademark protection.

In the field of cross-border e-commerce, the illegal act of implementing protected patents of others for the purpose of production and operation without permission constitutes patent infringement. mainly focused on the violation of sales commitments, the import of patented products or the counterfeit patented products, the use of patented methods and so on.[11] As patent technology has gradually become the foundation of a large number of cross-border e-commerce enterprises and a sharp weapon to gain competitive advantage, the number of patent infringement disputes is increasing. [12] Taking the Shanghai intellectual property Court of China as an example, of all the cases accepted in 2022, patent cases ranked first in total, accounting for 69.85%, an increase of 7.94% over the same period last year. Different from trademark protection and copyright protection, the confirmation of patent rights shows a strong professional and regional nature, especially in view of the strict territoriality of the US patent law.[13] For example, in recent years, the well-known multinational patent infringement disputes with Samsung Electronics of South Korea and China Smoore International Co., Ltd., make the settlement of patent disputes more complicated.

3.2. Causes of intellectual property infringement in cross-border e-commerce

The pertinent legal norms are in urgent need of enhancement. On the one hand, some cross-border enterprises do not have strong awareness of intellectual property rights and lack of intellectual property planning capacity, which leads them to fall into infringement litigation. For example, some small and medium-sized enterprises have formed their own intellectual property rights in the long-term development of China but failed to plan in advance in the development of export cross-border e-commerce business, ignoring the protection of their own intellectual property rights. Like the trademark of an enterprise fails to be registered in the target market country in time, and is preemptively registered by other merchants. Once the enterprise product is on the shelf, it will be complained of infringement, resulting in serious property losses. Therefore, it is urgent to issue

guidelines for the protection of intellectual property rights in cross-border e-commerce and relevant standard documents for enterprise property rights planning. On the other hand, as a new trade model, the development speed of cross-border e-commerce far exceeds the speed of updating and perfecting the law, so there are many legal gaps and loopholes. And based on the characteristics of low cost and large profit of intellectual property crime, some infringement enterprises "unscrupulously" seize illegal interests, and show the characteristics of high repetition rate. Therefore, it is necessary to crack down and punish the intellectual property (IP) crimes in overseas digital commerce, and increase the criminal risk by increasing the punishment, so as to further increase the crime cost, so as to achieve the purpose of punishing crimes and protecting the interests of the parties to the maximum extent.

The regulatory mechanism for the oversight of export products necessitates further refinement. In recent years, "many cross-border e-commerce platforms in China, such as Alibaba's Global Express, Sudo Temu, TikTok and other platforms have strengthened their efforts to serve domestic enterprises' cross-border trade".[14] In China's Electronic Commerce Law, it has been stipulated that the platform should be responsible for supervising the intellectual property infringement that may exist on the platform, and provide convenience for the communication between the intellectual property right holder and the infringer. However, nowadays, there are still some problems in China's e-commerce platform, such as non-standard information management and inadequate organizational management, such as lax audit of merchants' entry and release of goods on some platforms, leading to the proliferation of infringing and counterfeit goods; as well as the lack of professional intellectual property management institutions and personnel on some platforms, resulting in a lack of professionalism and pertinence in intellectual property protection. In addition, the China E-commerce intellectual property Development Research report 2020 points out that the number of intellectual property complaints in China's e-commerce field reached 150 million in 2020. These complaints not only show that the supervision mechanism of intellectual property rights on China's e-commerce platform is not mature enough, but also reflect the lack of supervision and guidance of the relevant state departments to online trading operators. Therefore, the state and relevant government departments still have a long way to go to promote the e-commerce platform to fulfill its main responsibility, standardize business behavior and protect intellectual property rights.

The determination of liability for intellectual property infringement varies across different countries. Intellectual property rights are regional, so domestic intellectual property rights may be infringed abroad. Take the infringement of trademark rights as an example, according to Article 64 of the Trademark Law, if the seller can prove that the trademark used in the goods he sells is legally acquired and does not know that the goods infringe upon the exclusive right to use the registered trademark of others, then the seller can be exempted from the corresponding liability. For instance, in the case of appropriate *Materia Medica v. Baixuantang*, because the accused infringer has no subjective malice and will not benefit from the use of product rights trademarks that are no longer sold in the market, so the court finally decided not to pay compensation in line with the reality of the case. On the contrary, the subjective intention or fault of the defendant is not mentioned in the law of the United States, so the matter cannot be a reason for exemption from liability. [15] According to the 2015 decision of the Federal Court of the Northern District of Illinois in the *Bulgariv. ZouXiaohong* case, the United States court held that "not knowing the tort" could not be a valid defense. The ruling highlights the strict position of the United States in dealing with intellectual property infringement cases, and even unintentional violations may be held liable. Therefore, the differences in legislation in various countries can easily cause some enterprises to face the situation of "passive infringement". [16]

4. Strategies to mitigate intellectual property infringement risks in international e-commerce.

4.1. Improve laws and regulations related to intellectual property rights in cross-border e-commerce

In the process of "going out" of China's cross-border e-commerce enterprises, enterprises should be "careful" in the protection of intellectual property rights, and gradually form the norms of property rights protection. First of all, enterprises should conduct adequate market research and risk assessment before expanding overseas markets. For example, before the European luxury jewelry brand TISENTO entered Tmall International, it commissioned a team of lawyers to conduct a preliminary intellectual property inventory for it and got back the disputed trademark rights of TISENTO, which should be used for reference by China's cross-border e-commerce enterprises. In addition, in the process of trade, enterprises should always pay attention to the intellectual property risks in product design, production, sales and promotion, and try their best to avoid the use of intellectual property rights that may involve others, such as trademarks, text, video, and so on. Finally, after receiving infringement complaints or litigation, enterprises should respond in time and communicate actively to safeguard their legitimate rights and interests. For China's legislature, we should improve domestic legal norms and clarify the subject, object, scope and mode of intellectual property protection for cross-border e-commerce. In view of the fact that the intellectual property protection of cross-border e-commerce involves many legal fields, such as civil and commercial law, administrative law, criminal law, customs law and so on, there's a pressing need to delineate and refine the particulars and processes related to IP safeguarding in this domain. This step is crucial to prevent legal voids and ambiguities. At the same time, it is necessary to formulate adaptive legal norms according to the characteristics of cross-border e-commerce, such as network, cross-border, diversity and so on. For example, the establishment of reasonable jurisdiction rules, evidence rules and liability rules can ensure the effectiveness and fairness of the intellectual property protection of cross-border e-commerce and provide a solid legal backing for China's cross-border e-commerce enterprises to "go to sea".

4.2. Strengthen the legal supervision of intellectual property rights in cross-border e-commerce

Cross-border e-commerce platform is the place where many intellectual property rights violations take place in cross-border trade. On the one hand, as far as the responsibility of the e-commerce platform is concerned, Article 38 of the Electronic Commerce Law in China stipulates that if the e-commerce platform operators know that the goods or services sold by the operators in the platform do not meet the requirements for personal and property safety or have other infringing acts, but still do not take necessary measures such as warning, stopping trading, closing online stores, etc., they shall be jointly and severally liable in accordance with the law. In this way, the rights and obligations of cross-border e-commerce platforms and sellers will be clearer, and the examination and approval of product quality regulated by the platform will be more stringent. In addition, the e-commerce platform should also bear the corresponding supplementary liability, that is, in the event of intellectual property infringement, it may need to bear the legal liability of supplementary settlement when the main responsible person (such as the infringing seller) is unable to bear the responsibility. On the other hand, the Chinese Customs and relevant regulatory departments should also improve the regulatory system, such as setting up blacklists and red lists, so as to urge enterprises to include intellectual property protection as a priority in reputation management and to prevent the occurrence of intellectual property infringement and strengthen the crackdown on intellectual property infringement of export products. According to the data released by the General Administration of Customs, the Customs detained 210000 batches and 4.023 million suspected infringing goods in cross-border e-commerce channels in 2022. For example, the case of exclusive trademark infringement by charging plugs seized by Qingdao Customs in July 2022, and the infringement case of mobile phones marked with trademark logos of well-known mobile phone brands seized by Hangzhou Customs, without exception, shows the

necessity of supervising intellectual property infringement. The regulatory authorities should further strictly control the examination of products going out to sea, and continue to intensify the crackdown on infringement, so as to safeguard the good international image of "made in China".

4.3. Clarify the principle of imputation applicable to tort liability

In China, the existing identification of the imputation principle of intellectual property infringement is mainly scattered in some provisions of the Trademark Law, copyright Law and Patent Law, and there is no clear and systematic regulation on the imputation principle of intellectual property infringement. Among them, the no-fault principle is generally adopted to stop the tort liability, that is, the infringer should bear the corresponding liability for compensation even if there is no intention or negligence in the infringement of intellectual property rights. This helps to alert the subject of intellectual property infringement, crack down on intellectual property infringement, and maintain a good intellectual property ecological environment. In addition, presumptive liability can also be used in many intellectual property cases. For example, in the 2001 edition of the copyright Law, Article 52 of the Law adopts the principle of presumption of fault in the principle of imputation, which is conducive to the protection of the legitimate rights of the infringed and plays an obvious role in investigating the liability of intellectual property infringement. However, for some cross-border e-commerce enterprises that have established intellectual property compliance system, the court should consider the efforts of enterprises to objectively maintain the intellectual property system when determining infringement, which is conducive to the function of legal norms and guidance. In rendering a verdict, the judiciary ought to differentiate and assess a corporation's infringement based on its adherence to an intellectual property (IP) compliance framework. This evaluation includes examining if the corporation possesses a dedicated IP management unit, well-defined IP policies and guidelines, along with consistent IP education and audits. Based on these findings, the court may then decide whether to have a lenient treatment or incentives to the corporation as a form of encouragement. If the principle of no-fault imputation is blindly applied to stop infringement, it is not conducive to the guidance function of legal norms, has a great negative impact on the development of intellectual property rights of enterprises, and causes damage to the interests of the state and society. [17]

4.4. Increase compensation for infringement of intellectual property

On the one hand, judicial organs can apply the system of punitive damages in accordance with the law. For the bad intellectual property infringement, we should give full play to the dual functions of compensation and punishment by standardizing the applicable conditions, fine cardinality calculation and scientific determination of the multiple of compensation. For example, in the trademark infringement and unfair competition case sued by WILO (China) Co., Ltd., the court applied triple punitive damages, taking into account the popularity, scale of infringement and subjective malice of "WILO", maintaining the 15.1 million yuan awarded in the first instance. This helps to maintain a fair market competition order, promote the compliance operation of enterprises, and ensure a fair competition environment in the market economy. On the other hand, government agencies should reasonably support the legal cost of safeguarding rights. For example, we should increase the compensation for the reasonable expenditure of the right holder, coordinate it with the market price of intellectual property services, safeguard the rights and interests of intellectual property owners, and reduce the losses caused by infringement. For example, in the "C'estbon" trademark infringement and unfair competition case, the court fully supported the reasonable expenditure of more than 130000 yuan spent by the plaintiff, effectively reducing the cost of safeguarding rights. In addition, the improvement and application of the relief mechanism can help the right holders to protect their rights and interests through legal or non-legal means. It is of great benefit to the implementation of a series of measures, such as stopping tort, investigating tort liability, restoring reputation, eliminating influence, compensating losses and so on.

5. Conclusion

Intellectual property is not only the core element of export cross-border e-commerce, but also the embodiment of the important competitiveness of China's cross-border e-commerce. Effectively preventing and dealing with the risk of intellectual property infringement of cross-border e-commerce is a necessary condition to enhance China's cross-border e-commerce brand image and market share, also an important guarantee to promote the healthy and sustainable development of cross-border e-commerce in China. From the point of view of theory and practice, this paper makes a systematic study on the risk of intellectual property infringement of cross-border export e-commerce in China, and puts forward some suggestions for preventing the risk of intellectual property infringement, among which the discussion on the settlement of intellectual property disputes is still slightly insufficient. Finally, it is hoped that the follow-up scholars will put forward more feasible suggestions for the intellectual property risk prevention of products in export e-commerce, so as to provide useful reference for the intellectual property issues of cross-border e-commerce in China.

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