

# CHAPTER 21

## REGULATION OF E-COMMERCE INTERMEDIARIES: AN INTERNATIONAL PERSPECTIVE

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The most sensational news on Internet economy at the beginning of 2015 was Alibaba's fight with China State Administration of Industry and Commerce (SAIC). On January 23, 2015, SAIC disclosed in a Survey Report that only 37.25% of the products sampled were genuine on TAOBAO, which is Alibaba's C2C platform estimated to hold more than 90% of the Chinese e-retailing market. Alibaba hit back few days later dismissing the allegations as "unfair", accused the SAIC officials in charge of biased and stated that it would file a formal complaint against them. On January 28, 2015, SAIC released a so-called "White Paper" in the name of Administrative Guidance Opinions, identifying Alibaba's misbehaviours in several areas, including enabling counterfeit, substandard, from non-known source or forbidden goods listed on the platform. The White Paper had the immediate effect on the stock market. Alibaba's stock plunged US\$ 11 billion (11%) the other day. The Founder of Alibaba, Jack Ma, urgently met SAIC Director Zhang Mao to remedy the situation and promised taking more actions against counterfeit goods. On January 30, 2015, SAIC announced that the White Paper was merely the "records" of a meeting held in July 2014 and had no legal implication. The White Paper was deleted from the SAIC website later on.

Though the case is fading away, its importance should not be underestimated. Alibaba was founded in 1999 as a B2B e-commerce portal to connect Chinese manufacturers with overseas buyers. It launched Taobao (C2C e-commerce

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marketplace) and Tmall (B2C online commerce platform focused on brand products) in 2003 and 2008 respectively. From 2010, it has been providing Juhuasuan and other services to round off the digital offerings, group shopping and flash sale. In September 2014, Alibaba completed the world largest IPO at New York stock exchange with US\$25 billion. Alibaba has been very successful, particularly in the Internet retailing market. On the so-called "Single Day" on November 11, 2014, the Chinese e-retailing market witnessed a Carnival—the combined Gross Merchandise Volume (GMV) of Alibaba's Taobao and Tmall, two Chinese biggest e-retailing platforms, jump to US\$ 9 billion, almost tripling the number of 2013. The epic booming of e-commerce demonstrates the advantages and potential of Alibaba's business model. Meanwhile, the tension between Alibaba and the regulatory authorities shows the legal risks and dilemma of such a business model.

Alibaba is a typical e-commerce platform service provider enabling millions of sellers and buyers to do business. Regulation of e-commerce platform services may have a serious impact on the Internet economy and thus deserve careful monitoring and elaboration. In addition, when doing business on the global Internet, Alibaba is actually subject to the supervision and sanction not only from its primary market (China) and stock market (US) but potentially from more than 200 countries or regions that may access its services. The Internet services with users in multiple jurisdictions can be subject to a global patchwork of legal and regulatory regimes. Uninformed policies, blunt and heavy-handed regulatory measures, and a lack of consistency across these policies have burdened the platform services and created an environment of uncertainty that impedes innovation online. Enhancement of coherency and consistency of the regulatory approaches would be critically important to health and sustainable development of world digital economy.

## ***I OVERVIEW***

Alibaba offers platform services through displaying the users' marketing and promoted selling, providing pay-for-performance (P4P) marketing services and charging commissions on transactions and storefront fees. Platform services are generally understood as cloud-based public-facing interfaces or "spaces" allowing users to impart and receive information according to the rules defined in a set of contractual agreements.<sup>1</sup> A platform can be developed into enormous economic size. According to Alibaba's 2014 Quarterly Report, there are more than 8 million sellers, 231 million annual active buyers and more than 11.3 billion annual orders on

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1 A platform may have many functionalities but its most important function may evolve over the time. For example, Tencent's "Wechat" was initially created as a mobile social media tool but has developed into a complicated e-commerce platform enabling diverse mobile business models.

the platform; its Gross Merchandise Volume (GMV) reached US\$ 37 billion (2014 4<sup>th</sup> Quarterly Report).

### A *Neutrality*

Alibaba and the other platforms provide the transactional facilities, rules and related services to the transactional parties via its Internet information system. They enable and facilitate the transactions of their users but do not involve as a contractual party, *per se*, in their users' transactions. So, they are often called "third-party platforms".<sup>2</sup> A platform provides a virtual marketplace to allow sellers, including individuals and legal entities, to publish information about goods or services and complete the trading. On a platform, the goods or services are traded between the sellers and the buyers. Where a seller enters into sales contract in its own name with a buyer, it is normally the seller rather than the platform that is responsible for the sales, and warranty and after-sale services. The platform provides information storage space allowing for publication of goods or services, but normally does not take part in the publication and editing of such information. The platform mainly makes a profit by collecting fees from sellers' operation of virtual online stores, and providing keyword-related advertising services.

A platform's neutral status to its users is the most outstanding characteristic. In some countries, a platform service for third parties should be legally separated from any other business to ensure the platform's neutrality, and the provider is subject to the legal consequence for compromising its neutrality.<sup>3</sup> Where a platform's own sales business is not separable or identifiable from its third-party platform services, the provider shall be responsible for compensating consumers suffering from the purchase of any unqualified and/or counterfeit goods sold on the platform, irrespective of whether the goods were actually sold by the provider directly. For example, Dangdang, a leading platform provider in China, was ordered by the court to compensate a consumer ten times the purchase price of the counterfeit goods whose manufacturer had a fake name and address. Although Dangdang argued that it had fulfilled its duty of care over inspection of the quality of the goods, the court held that Dangdang should be liable for failing to comply with the quality review duty required by the Chinese Food Safety Law when enabling the counterfeit slimming

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2 Chinese Ministry of Commerce enacted the "Stipulations on Development of Transactional Rules of Third-Party Platforms for Network Retailing (Trial Implementation)" (December 24, 2014) and "Services Standards of Third-Party E-Commerce Transactional Platforms" (April 12, 2011). SAIC enacted the "Regulations on Network Transactions" (January 26, 2014), which also defined the third-party transactional platform services.

3 SAIC "Regulations on Network Transactions" (January 26, 2014) require that a third-party transactional platform provider differentiate and mark up, in a distinguishable way, its own direct transactional business offered on the platform to avoid consumer confusion.

capsules listed on the platform. In the court's ruling, the consumer who suffered from the counterfeit products was only able to identify the platform but could not find the specific companies behind the supply chain. The court ruled that Dangdang that issued the invoice to the consumer should be responsible as the capsules seller.<sup>4</sup>

The Internet is not a lawless place. As the numerous statutes, evolving case law and precedents make clear, Internet is not only "regulable," many actions on the internet are already subject to conventional regulation, both public and private, by many parties and at many different levels. The platforms and the transactions conducted on the internet, naturally, are not immune from legal regulation.<sup>5</sup> A platform provider plays a bigger role than any seller or buyer on the platform. Its unique technological capacity and neutrality status grant it *de facto* governance power in its own system. There have been many cases where the platform services were reviewed or punished in either judicial or administrative proceedings. All this legal evolution shows that the platforms must assume their relevant legal and social responsibilities to the corresponding stakeholders.

### ***B Internet Intermediaries***

Neutrality of the platform services (including online payment system) or virtual marketplaces makes them enter into the general category of the Internet intermediaries. The Internet intermediaries are the services enabling the communication of information from one party to another. Organisation for Economic and Co-operation and Development (OECD), in a 2010 report, defines the internet intermediaries as the services to bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.<sup>6</sup> Online platforms are essential instruments for individuals to educate themselves, communicate information, store and share data. Increasingly, the operation of these platforms affects individuals' ability to develop themselves and engage in a substantial amount of social interactions.

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4 See *Wang v. Beijing Dangdang Information Technology Co., Ltd.*, Beijing Chaoyang District People's Court, March 2013.

5 Although most countries only regulate the conduct of the platforms, some countries have set out the market access threshold to the platforms. Only those operators that pass through the financial, technical and manageable capacity assessment can acquire the administrative license to become the platform providers.

6 "The Economic and Social Role of Internet Intermediaries" OECD (DSTI/ICCP (2009) 9/FINAL.), at <[www.oecd.org/internet/ieconomy/44949023.pdf](http://www.oecd.org/internet/ieconomy/44949023.pdf)>. The report also credits internet intermediaries with "providing the Internet's basic infrastructure and platforms by enabling communications and transactions between third parties as well as applications and services".

Just as online platforms and services can be used for legitimate purposes such as trade, they can also be used for illegitimate purposes such as theft or fraud, harassment, copyright infringement, defamatory speech, etc. The line determining a legitimate and illegitimate use is significantly influenced by political, religious, and cultural context, resulting in multiple understandings of legitimate and illegitimate purposes throughout the world. Despite the diversity among the regulatory regimes and approaches, the Internet intermediaries, particularly e-commerce platforms, are generally regulated from the dual prospective of safeguarding legitimate use and combating illegitimate use. The regulation primarily focuses on defining the intermediary liability and refining the platform governance.

## ***II INTERMEDIARY LIABILITY***

Intermediary liability refers to the liability of an intermediary for the third-party content or communications. In some intermediary liability approaches, such legal provisions define circumstances under which intermediaries can be exempt from liability by setting forth criteria that intermediaries must follow in order to escape civil or even sometimes criminal penalty for users' actions. The interplay between intermediary liability and the digital economy has gained significant attention across jurisdictions. Given the complexity of the digital ecosystem, it is tempting for governments to target intermediaries for regulatory purpose. Intermediary liability is an important lever designed and defined by the government to regulate the Internet intermediaries (including e-commerce platforms) and stimulate them to serve certain social functions.

### ***A Various Models of Intermediary Liability***

Intermediary liability can be roughly grouped into three models, ie strict liability, broad immunity and conditional liability. Exact requirements and nuances of these models vary from jurisdiction to jurisdiction, and are defined by governments and further clarified by courts. Some intermediaries explicitly comply with legal mandates relating to intermediary liability by undertaking measures such as self-regulation via enforcement of their terms of service.

Under a strict liability model, the intermediary is liable for third-party content irrespective of whether it is aware that the content is illegal or not. The only way to avoid liability under such circumstances is to monitor, filter, and remove content proactively if it is likely to be infringing. Even so, monitoring and removing content does not absolve the intermediary of liability if any infringing content is overlooked. Since blanket strict liability heavily burdens the intermediaries and cannot incentivise the intermediary to cooperate with the law enforcement, it is only existing in few jurisdictions and implemented in a few specific areas of law. For example, Chinese State Council Regulations on Internet Information Services

(2000) require the Internet intermediaries not to disseminate any illegal information; if they fail to sufficiently monitor user activity, take down content or report violations, they may face fines, criminal liability, and revocation of business or media licences.<sup>7</sup> However, the Chinese Supreme People's Court has clarified that the intermediaries providing pure network technical services such as storage, search or linking are not obliged to examine the copyright or related rights in the content. An intermediary should not be deemed negligent where it did not proactively examine whether users infringed copyright.<sup>8</sup> So, intermediaries are actually exempted from the general obligation of content monitoring in the area of copyright law, which shows that there is no blanket strict liability applied in China.

Broad immunity for intermediaries is another extreme. In this model, intermediaries are exempt from the liability for a range of third-party content. But the application of this model is limited, dependent on the legal subjects and the liability types. Otherwise, intermediaries that benefit or even conspire with the direct offenders would get away without responsibility, which is against the public interest and rule of law. With respect to the specific areas of broad immunity, there are many discussions at the international level sought to establish common principles and best practices. For example, in December 2011, the OECD Council included "limiting intermediary liability" as one of the recommended principles for internet policy-making to "promote and protect the global free flow of information online". Another initiative is the Manila Principles on Intermediary Liability proposed by a group of scholars and civil society organizations in February 2015, in which immunity for intermediaries ("Intermediaries should be shielded by law from liability for third-party content") is one of the fundamental principles.<sup>9</sup>

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- 7 Chinese Criminal Law is now being amended for the 9th time. In the draft for the 9<sup>th</sup> Amendment, network service providers are required to assume the network security management duty, including preventing the dissemination of illegal information on a large scale; a network service provider that fails to assume the duty upon the order of the competent authority shall be subject to penalties.
  - 8 It has been clarified firstly in the "Supreme People's Court Opinion on Several Issues to Promote Socialist Cultural Prosperity and Economic Harmonious Development Through Exercise of Intellectual Property Judicial Function" (16 December 2011) and then in the "Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements Against Right of Communication via Information Network" (17 December 2012).
  - 9 The Manila Principles, ie "Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation—A Global Civil Society Initiative", aim to protect freedom of expression and create an enabling environment for innovation, while balancing the needs of governments and other stakeholders. The initiative encourages the development of more principled, interoperable, and harmonized liability regimes that can promote innovation while respecting users' rights.

## ***B Liability Criteria and Defences***

Conditional liability is the main-stream model of intermediary liability. Under this model, the intermediary is potentially exempted from liability for third-party content if certain conditions are met. If the conditions are not met, an intermediary may be subject to intermediary liability. Unlike the strict liability model, conditional liability does not compel intermediaries to proactively monitor and filter content in order to avoid liability. The conditions for exemption of liability in different jurisdictions may be in different forms. Generally, the conditions depend either on the intermediary's involvement or interests in the third-party content or on the intermediary's actual or constructive knowledge of the infringing nature of the relevant content.<sup>10</sup> Therefore, if an intermediary either directly benefits from the infringing third-party content or knowingly enables the infringing content to be communicated or disseminated, it shall be liable for intermediary liability. For example, in a case against the Apple's App Store, a company named Cupertino sold the unauthorised digital copies of the encyclopaedia through Apple Inc.'s App Store. The copyright owner, China Encyclopaedia Publishing House, sued Apple for copyright infringement. Apple argued that it should not be responsible for the application software that was developed and offered by the third party through the App store. The court, however, ruled that Apple was responsible as it both approved and profited from the App's sales.<sup>11</sup> Apple was ordered to pay Chinese Yuan 520,000 (US\$82,600) to compensate the Publishing House.<sup>12</sup> In April 2013, Apple consecutively lost three similar copyright infringement cases for the third-party Apps sold through the App Store.<sup>13</sup> These cases show that the APP store operated by

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10 Xue Hong *International Intellectual Property Law @ Crossroad* (Beijing, China Law Press 2012) at 150-162.

11 According to "Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements Against Right of Communication via Information Network", an Internet service provider, if directly acquiring economic interests from the user's provision of copyright works, shall assume a higher duty of care regarding its user's copyright infringing acts.

12 *China Encyclopaedia Publishing House v. Apple Inc.*, Beijing Second Intermediate People's Court, September 27, 2012.

13 In these cases, Beijing Motie Digital Alliance Information Technology Ltd, Mai Jia and Yu Zhuo respectively claimed that Apple allowed pirated versions of their works to be sold through the App Store. Apple was ordered to pay three copyright holders more than Chinese Yuan 700,000 (US\$12,000), although the complainant had demanded compensation for US\$3.65 million. In December 2012, eight Chinese authors won another copyright infringement lawsuit against Apple. These authors are some of China's most popular and grace bestseller lists throughout the country. Their books were offered in Apple's App Store without authorization from the writers. The court ordered Apple to pay a total of Chinese Yuan 412,000 (US \$66,000) for compensation.

Apple Inc., as an e-commerce platform, was liable for involving in and benefiting from the infringing third-party content.

Safe harbour is one of the important mechanisms of conditional liability. Generally speaking, safe harbour refers to the circumstances where an intermediary may be exempted from certain liability (such as damages) provided that it removes certain content upon receiving notice from the right holder ("notice and takedown"), or notifies the content provider of the notice received from the right holder ("notice and notice"), or discontinues the services for repetitive infringers upon notices ("graduate response").<sup>14</sup> Safe harbour does not shield an intermediary generally from the liability for gross negligence. It means that an intermediary should be liable if it keeps turning a blind eye to the apparent infringing content or communications from its users.

Conditional liability clearly exists in the Chinese law. Under the Chinese Tort Liability Law, Article 36, if an Internet user commits tortious acts through Internet services, the victim shall be entitled to inform the service provider to take necessary measures, *inter alia*, including deletion, blocking and disabling the hyperlinks; if the service provider fails to take necessary measures in a timely manner upon notice, it shall be jointly and severally liable to the victim for the damage caused by inaction. Article 36 also provides that if a service provider is aware that an Internet user is infringing the civil rights and interests of others through its services and fails to take necessary measures, it shall be jointly and severally liable to the victim for such infringement.<sup>15</sup>

Actually, there are very divergent approaches in different jurisdictions to assess e-commerce platform's functions and involvement in the third-party content as well as their fault and negligence therein. The divergence, from considerable leniency to harsh punishment, shows the uncertainties and ambiguity of conditional intermediary liability. However, compared with strict liability and broad immunity, conditional intermediary liability is still the most feasible and adaptable model for e-commerce platforms.

Although clear-cut and uniform criteria to define the liability "conditions" are under developed, there are several elements identified to gauge the appropriate borderlines. The Chinese Supreme People's Court has, in the judicial guidelines, highlighted several elements for the courts to evaluate whether an intermediary

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14 United States Digital Millennium Copyright Act (DMCA) and EU E-Commerce Directive both contain the safe harbour provisions in the form of notice and takedown, under which different categories of intermediaries can seek exemption from liability.

15 Chinese Consumer Protection Law, revised in 2013, contains the similar legal design in Article 44.

knows the infringement of the third-party content, including (i) whether it had, manually or through automated means, recommended, ranked, selected, edited, organised, moderated or processed the users' content in other way; (ii) whether it had the capacity to manage the users' content and whether the character and method of its service were likely to trigger users' infringement; (iii) whether it was capable to take technological measure to prevent the users' infringement and whether actually did so reasonably; (iv) whether it had taken reasonable measures against repeated infringers and infringing content.<sup>16</sup> If an intermediary has adopted reasonable and effective technological measures but is still not able to locate the infringement, it is not deemed knowingly to be providing service to the infringer.<sup>17</sup>

These elements may help the people to reach consensus on liability conditions in cases involving the e-commerce platforms. In the case originating in the UK between L'Oreal and eBay, the court explained that the hosting provider's safe harbour extended only to neutral or passive, automated third-party data processing. The European Court of Justice (ECJ), in the ruling dated July 12, 2011, clarified the notice-and-takedown safe harbour provision of the EU E-Commerce Directive favoured brand owners. The ECJ ruled that an online market such as eBay was not neutral or passive but instead played an "active role" in the electronic marketplace. The High Court of Justice of England and Wales, based on the ECJ's Opinion, rendered a verdict upholding that even though the trademark owner's notice was not detailed and accurate, eBay should be aware of the infringement as a diligent platform provider upon receipt of such a notice.<sup>18</sup> In a Chinese case, *Chen v. Dangdang*, decided in March 2013, Dangdang was ruled by the court to pay a consumer five times the purchase price paid for twenty "iPhone 4" mobile phones found either to be second-hand or counterfeit. Dangdang contended that it was

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16 *Chinese Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements against Personal Rights and Interests via Information Network*, August 21, 2014. There are similar provision in the "Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements against Right of Communication via Information Network", December 17, 2012.

17 *Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements against Right of Communication via Information Network*, December 17, 2012.

18 In this regard, courts in Europe take a different stance from their counterparts of US although they themselves are yet to develop a uniform position. In parallel with the *Tiffany* case in the United States, eBay has been locked in litigation with brand companies in Europe with varying results. The French courts expanded liability, ruling that eBay violated French trademark laws for passively permitting counterfeit sales (See *S.A. Louis Vuitton Malletier v. eBay, Inc.*, Tribunal de Commerce de Paris, Première Chambre B., Case No. 200677799, June 30, 2008). In contrast, Belgian courts declined to hold eBay liable for sales of counterfeit cosmetics (*Lancôme v. eBay*, Brussels Commercial Court, Aug. 12, 2008, Docket No. A/07/06032).

merely an e-commerce platform provider and the mobile phones were sold by a seller named Tianxitong, which issued the invoice to the consumer. The court, however, held that the consumer bought the mobile phones based on the trust in the platform provider's commitment that only genuine and authorised products were sold on the platform. The court noted that Dangdang made an open promise that it would compensate the consumers five times the purchase price of any counterfeiting product bought through the platform, and ruled that Dangdang should be responsible to the consumer according to the promise.<sup>19</sup> The case reveals that a platform provider is legally bound by the guarantee obligations it committed to the consumers/buyers, even if it is not the contractual party in a given transaction. These cases show the e-commerce platform that plays an "active role" (such as recommending, ranking selecting users' listings, providing guarantee) in the electronic marketplace is presumed knowingly to be providing the services to the infringer, irrespective of whether it receives detailed and accurate notice from the right holder.

In a case against Taobao, the Shanghai Pudong New District People's Court ruled in May 2011 that Taobao was jointly liable for trademark infringement for failing to effectively respond to the "TEENIE WEENIE" trademark owner's repeated takedown requests and should compensate the trademark owner Chinese Yuan 10,000 (US\$1,800).<sup>20</sup> The court held that Taobao, once it found out that the sellers continued the infringement via the platform, ought to "take further measures", such as penalizing the sellers according to its terms of services. By doing so, Taobao, although unable to eliminate the infringing activities completely, should be able to reduce the infringing activities proportionally. In the case, Taobao, however, did not do anything although it was able to and in a position to take action against the specific sellers. Upon receiving seven complaints from the plaintiff regarding the seller's unauthorised use of the mark "TEENIE WEENIE", Taobao should have been aware of the seller's sales of counterfeit goods on the platform but still allowed the seller to publish the information of the infringing goods without any restrictions. Taobao, therefore, committed contributory infringement with subjective fault, and thus should be jointly liable. Upon Taobao's appeal, the Shanghai First Intermediate People's Court upheld the first instance ruling and found that Taobao had knowledge of the trademark infringement committed by others through its Internet services, but Taobao only passively deleted infringing links upon notice of the trademark owner

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19 See *Chen v. Beijing Dangdang Information Technology Co., Ltd.*, Beijing Chaoyang District People's Court, March 14, 2013.

20 *E-Land (Shanghai) Fashion Trade Co. Ltd. v. Zhejiang Taobao Network Co., Ltd. and Du Guofa*, Shanghai Pudong New District People's Court, January 19, 2011; *upheld*, Shanghai First Intermediate People's Court, May 8, 2011.

and failed to take other necessary measures to prevent the infringing acts from occurrence later on. Since Taobao erred subjectively and helped others commit infringement objectively, it should be jointly liable for the trademark infringement and assume the joint liability of damages. This case shows that liability assessment should take into account whether an e-commerce platform takes effective and reasonable measures in its capacity of the platform management to prevent and stop the users' infringement.

The safe harbour mechanism, particularly in the form of notice and takedown, is also under review and improvement. The Chinese Supreme People's Court defines the necessary information that should be contained in a valid notice served to an intermediary, including (i) the right holder's name and contact, (ii) relevant information to accurately locate the allegedly infringing contents and enable necessary takedown measures, and (iii) the reason to takedown the content.<sup>21</sup> Once a valid notice is served, the intermediary who failed to take timely action to delete, disable or de-link the relevant content should be liable. Assessment of the action's timeliness should take into account the nature of the intermediary service, validity and accuracy of the notice and seriousness of the infringement.<sup>22</sup> In a US case *Tiffany Inc. v. eBay*<sup>23</sup>, the court declined to hold eBay liable for trademark infringement even though a "significant portion" of the Tiffany jewellery offered for sale on eBay was counterfeit and eBay knew generally that "some portion" of the offered goods was counterfeit. The court focused on Tiffany's allegations of contributory trademark infringement under the intermediary liability regime. A manufacturer or distributor should be liable for contributory infringement where it intentionally induced another to infringe a trademark, or continued to supply its product to one who it knows or has reason to know is engaging in trademark infringement. Tiffany contended that eBay, although not intentionally inducing the trademark infringement, continued to provide its services despite knowing or having reason to know that the sellers were offering some counterfeit goods. The court

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21 *Chinese Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements against Personal Rights and Interests via Information Network*, August 21, 2014. Under the Manila Principles, a content restriction request pertaining to unlawful content must, at a minimum, contain the following: the legal basis for the assertion that the content is unlawful; the Internet identifier and description of the allegedly unlawful content; the consideration provided to limitations, exceptions, and defences available to the user content provider; contact details of the issuing party or their agent, unless this is prohibited by law; evidence sufficient to document legal standing to issue the request; and, a declaration of good faith that the information provided is accurate.

22 *Chinese Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements against Personal Rights and Interests via Information Network*, August 21, 2014.

23 See *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93 (2nd Cir. 2010).

disagreed, finding that where eBay had actual knowledge of counterfeit sales, it promptly removed the offending listings. The court likewise rejected Tiffany's assertion that eBay acted with wilful blindness. The court ruled that the "reason to know" test must be applied to specific offending listings and proof of "some contemporary knowledge of which particular listings are infringing or will infringe." The court reasoned that Tiffany was better positioned to identify the counterfeit listings. The court held that broadening the scope of eBay's liability would unfairly benefit Tiffany by diminishing competition from legitimate second-hand sales of Tiffany's products on eBay. The Chinese Supreme People's Court's guidelines seems concurring with the ruling of *Tiffany Inc. v. eBay* case because it requires that a valid notice contain accurate information to locate the infringing content, which means that the right holder should identify the particular listings which were infringing or would infringe.

Intermediaries should not be required to substantively evaluate the legality of third-party content.<sup>24</sup> In a trademark infringement case decided in 2010, the court held that Taobao had not committed contributory infringement.<sup>25</sup> In the court's reasoning, although the plaintiff had complained five times to Taobao that a seller sold the goods bearing the unauthorised mark "E-Land", Taobao could not verify the authenticity of the plaintiff's evidence to support its claim; even if the authenticity could be verified, Taobao was not unable to determine whether the seller had any right or defence to use the mark; Instead, Taobao, upon receipt of the complaints, temporarily maintained the access to the information of the goods at issue while providing the identity of the seller to the plaintiff; Taobao did not remove access to the goods at issue until the plaintiff filed the lawsuit. The court ruled that Taobao had fulfilled its duty of care reasonably.<sup>26</sup>

On the other hand, the notice-and-takedown mechanism may be susceptible to abuse when it lacks elements of due process, such as the opportunity to appeal a takedown request.<sup>27</sup> Notice-and-takedown may also incentivise intermediaries to

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24 See Manila Principles, 3 (a).

25 Alibaba's Taobao had been sued for trademark infringement in more than 20 Chinese cases. These cases were separately brought by the brands like "Puma" or "E-Land". In most cases, the Chinese courts held that Taobao was a mere cyber-based service provider that sufficiently complied with the "notice and takedown" duty.

26 *E-Land (Shanghai) Fashion Trading Co., Ltd. v. Xu and Zhejiang Taobao Network Co., Ltd.*, Shanghai Huangpu District People's Court, 2010.

27 A 2011 study on India's intermediary liability regime indicated a need for increased safeguards against misuse of the privately administered takedown regime. Specifically, the study identified a need to reduce uncertainty in the criteria for administering takedowns; reduce uncertainty in the procedure for administering takedowns; include various elements of natural justice (prevention of bias and emphasis on the right to a fair hearing) in the procedure for administering takedowns; and

remove content immediately after receiving notice, rather than invest resources to investigate the validity of the request and risk a lawsuit.<sup>28</sup> Actually, it is likely that a valid notice has no merit in law. For example, in March 2011, Nippon Paint Co. Ltd. ("Nippon"), the globally well-known paint producer, discovered Zhanjin Company had set up a shop on Taobao and using Nippon trademarks, advertisements and trade dress concerning Nippon products with no approval or licence from it. With no reply from Taobao after filing a complaint, Nippon sued Zhanjin and Taobao, and yet the complaint was rejected by the first instance court.<sup>29</sup> Dissatisfied with this result, Nippon made an appeal. The Shanghai First Intermediate People's Court made the final ruling that the adoption of Nippon's trademark by Zhanjin, a seller on Taobao, was only to display product information and unlikely to lead to confusion among the public. The court ruled that no commercial interests of the plaintiff would be damaged by such use. Based on these findings, the claim for trademark infringement could not be established, and therefore the original decision was upheld. In this case, Taobao could have taken down the listing of Zhanjin products that contained Nippon's mark upon notice from Nippon, although it was eventually found in court that Zhanjin did make legitimate use of the mark. Therefore, notice-and-takedown safe harbour should be reviewed and improved in practice. Otherwise, legitimate content can end up being censored as a consequence; furthermore, it facilitates self-censorship by placing the intermediary in a quasi-judicial position responsible for evaluating the legality of content.

### ***C Obligation to Assist Law Enforcement***

In the 2015 dispute with China SAIC, Alibaba was accused of failing to sufficiently and effectively cooperate with the authority's law enforcement actions, particularly against the prevalent counterfeit goods listed on the Taobao platform. The incidence demonstrates the importance for e-commerce platforms to fulfil their legal obligation to cooperate with law enforcement authorities, especially in the following two aspects, ie implementing the orders of the courts or the administrative authorities through removing, disabling or de-linking the users' content or account<sup>30</sup>,

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replace the requirement for subjective legal determination by intermediaries with an objective test. These issues have been echoed in jurisdictions such as South Africa, particularly with respect to the lack of due process for users whose content is removed.

28 This has been raised in the case *E-land v. Taobao*, in which the court held that Taobao could not verify the authenticity of the plaintiff's evidence to support its claim; even if the authenticity could be verified, Taobao was not unable to determine whether the seller had any right or defence to use the mark.

29 *Nippon Paint Co. Ltd. v. Zhanjin Company and Taobao*, Shanghai Xuhui District People's Court, October 2011; *upheld*, Shanghai First Intermediate People's Court, May 24, 2012.

30 The Manila Principles propose that the orders and requests for the restriction of content be clear and unambiguous; government orders for the restriction of content should provide: a legally

and providing the relevant information (including the users' personal information) to the authorities for investigation or legal proceeding in accordance with law.<sup>31</sup>

In China, all the platforms must comply with the legal requirements specified in the "Administrative Measures of Internet Information Services" (2000), which applies to any service activity of providing information through the internet to online subscribers.<sup>32</sup> Under the "Administrative Measures of Internet Information Services", the Internet information service providers that engage in the provision of such services as news, publishing or electronic bulletin board services, etc. shall keep a record of the information they provide, the times of dissemination and the URLs or domain names; such records shall be kept for 60 days and provided to the relevant State authorities upon their requests in accordance with law. If an Internet information service provider discovers the information transmitted through its website that is clearly illegal, it shall immediately stop the transmission thereof, save the relevant records and make a report thereon to the relevant authority.<sup>33</sup>

According to SAIC "Regulations on Network Transactions" (2014), a platform provider shall examine, record and retain the information of the goods and services listed on the platform; the users' information such as business licenses or personal registration information shall be retained no less than two years from the date of registration with the platform; transactional records shall be retained no less than two years from the date of transaction. A platform provider shall actively assist AIC

authoritative determination that the content is unlawful; the location and description of the unlawful content; and, information sufficient to identify the legal basis of the order.

- 31 In response to the strong privacy concern over this obligation, the Manila Principles propose that Intermediaries have no obligation to maintain the ability to de-anonymise users or identify past user activities, such as by logging information necessary for such purposes. Under these proposals, intermediaries should not be mandatorily required to implement the "real name" registration system and retain the users' information access history. But these proposals are directly contradictory to some countries' laws and may not be adopted.
- 32 The "Administrative Measures of Internet Information Services" was promulgated by the Chinese State Council on September 25, 2000 and became effective on the same day.
- 33 The "Administrative Measures of Internet Information Services", Article 2, 14, 15, and 16. Under the Measures, Internet information service providers may not produce, reproduce, disseminate or broadcast illegal information with the content that: (i) opposes the fundamental principles determined in the Constitution; (ii) compromises State security, divulges State secrets, subverts State power or damages national unity; (iii) harms the dignity or interests of the State; (iv) incites ethnic hatred or racial discrimination or damages inter-ethnic unity; (v) sabotages State religious policy or propagates heretical teachings or feudal superstitions; (vi) disseminates rumours, disturbs social order or disrupts social stability; (vii) propagates obscenity, pornography, gambling, violence, murder or fear or incites the commission of crimes; (viii) insults or slanders a third party or infringes upon the lawful rights and interests of a third party; (ix) or, includes other content prohibited by laws or administrative regulations. In practice, intermediaries are primarily obliged to monitor and censor the content against public order and public law rather than to protect private rights such as intellectual property.

to investigate the online illegal operations through providing the registration and transactional information of the suspected users on the platform; it shall never conceal any information from the authority.

It is not only Chinese government that requires e-commerce platforms to provide assistance, particularly users' information, for law enforcement. Platform providers, in their global operation, are subject to mandatory legal obligations and requirements in many countries. Edward Snowden disclosed that in United States "PRISM" program, National Security Agency and the Federal Bureau of Investigation had been tapping directly into the central servers of nine US Internet companies, extracting audio, video, photographs, e-mails, documents and connection logs that enable analysts to track a person's movements and contacts over time. The participating technology companies, reportedly including Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube and Apple, could not disclose this highly classified program and their participation. These practices potentially threaten privacy and personal data protection and have been strongly criticised in the international community. In July 2015, Uber, a ride-booking service offered on the Internet, was fined USD \$7.3 million by the California Public Utility Commission for not turning over internal information about rides. The Manila Principles have proposed that intermediaries, including e-commerce platform providers, publish transparency reports to disclose what and how information is provided to the authorities for law enforcement; meanwhile, governments publish transparency reports that provide specific information about all content orders and requests issued by governments to intermediaries.<sup>34</sup>

E-commerce platforms, although obliged to cooperate with law enforcement, have no law enforcement power and should not be utilised as quasi-regulatory agencies to reduce the governmental costs of regulation. Otherwise, there would be the risk of over-regulation, with a negative impact on users' fundamental rights, as well as on innovation and the digital economy. For example, e-commerce platforms, if pressured to take proactively intellectual property measures, could go beyond the legal limits and boundaries of the rights and ignore the other public interest goals.

### **III PLATFORM GOVERNANCE**

Imposition of liability on e-commerce platforms should be the last resort of regulation. Compared with punishment for what had happened, the better regulatory approach is to supervise and guide their daily operation to prevent the harmful result

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34 The Manila Principles propose that intermediaries publish transparency reports that provide specific information about all content restrictions taken by the intermediary, including government requests, court orders, private party requests, and terms of service enforcement.

from happening in the first place. E-commerce platforms are evolving into a sophisticated, large-scale, technologically-capable and powerful transactional eco-system on the Internet. They are not only private market operators but offering certain public services in the society.<sup>35</sup> Their global operation and globally applicable transactional rules even enable their governance globally. It is therefore necessary to regulate these platforms to balance their power with the responsibility and accountability and secure the public interest. Platform management and governance are primarily conducted through the terms of services (ToS) in the forms of standard terms or policy documents included in the contracts binding to the users/subscribers. With the growing social influence of e-commerce platforms, ToS may have implications for the legitimate rights and interests of the other stakeholders outside the platforms. Since platforms' ToS involves the social public interests, there have been many innovative regulatory mechanisms developed to supervise, monitor and guide the development and implementation of the platforms' ToS.

### ***A Governance Through ToS***

ToS, also called "terms of use" (ToU) or "transactional rules", are the open conditions binding and enforceable to all the users/subscribers through contracts. ToS covers not only the contractual documents with the respective users but also any other platform policy documents (eg privacy policy, community guidelines, etc.) that is linked or referred to therein. The Chinese Ministry of Commerce defines the ToS as the public rules provided, amended and implemented by a third-party platform operator, applicable to non-specified subjects using the platform services, and involving social public interest.<sup>36</sup> This is so far the most thoughtful definition for ToS given by a legal document.

ToS covers a wide range of topics, such as user rights and responsibilities, proper or expected usage, potential misuse, accountability for online actions, behaviour, and conduct, privacy policy, payment details such as membership or subscription fees, etc, disclaimer or limitation of liability clarifying the provider's legal liability for damages incurred by users, and user notification upon modification of terms, if offered. Generally, e-commerce platforms' ToS may be summarised into the

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35 A platform's governance power, if exercised appropriately, can be tremendously valuable to the market. For example, there had been the App developers on the Facebook that utilised aggressive advertising and email campaigns to mislead users. Facebook had to take action to enforce its new Terms of Use to prohibit the App developers from giving excessive user notification and advertising on profile page features. Some Apps were even suspended from the platform.

36 Chinese Ministry of Commerce "Stipulations on Development of Transactional Rules of Third-Party Platforms for Network Retailing (Trial Implementation)" (December 24, 2014).

following categories: (i) transactional rules, defining subscribers' eligibility and transactional validity and enforceability; (ii) rules on liabilities and risks, defining the platform provider's liability, limit, exemption and indemnity to the other parties; (iii) intellectual property policies and measures, protecting intellectual property rights of all parties involved; (iv) credit assessment mechanism, through which consumers may submit their comments or reviews on the quality of goods or services received; (v) consumer protection and data protection measures; (vi) content regulation measures; (vii) penalty and dispute resolution; (viii) ToS' applicable subjects, coverage and term; (ix) rules and procedure for amendment of the ToS; (x) Other rules such as on jurisdiction, anti-spamming, network security and data retention.<sup>37</sup>

ToS is normally a set of standard terms provided by a platform unilaterally and not subject to negotiation with the users. But a platform's ToS is more complicated, universal and globalised compared with the standard terms of contracts. Users' subscription to a platform is much more implicative than conclusion of a contract. After years of development, ToS of the platforms, particularly the enormous ones, like Alibaba, have formed sophisticated normative system, with various forms, coverage, subjects, targets and frequent updates. Some of the rules are expressly converted into the standard terms of the contracts between the subscribers and the platform.<sup>38</sup> But many rules, *inter alia*, the punitive ones, are generally applied to the subscribers by default, irrespective of whether a subscriber has clicked through to show clear consent.<sup>39</sup> A subscriber actually enters into a space governed by the platform provider. Once the ToS is modified or updated, most subscribers relying on the platform services have little choice but to accept it. For example, both Facebook and Twitter changed their ToS regarding the data use and process through an open application programming interface (API) and tightened the control on program developers, although these developers had been initially attracted to these platforms by the permissive rules.

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37 These categorisation is based on Chinese Ministry of Commerce "Stipulations on Development of Transactional Rules of Third-Party Platforms for Network Retailing (Trial Implementation)" (December 24, 2014), "Services Standards of Third-Party E-Commerce Transactional Platforms" (April 12, 2011) and SAIC "Regulations on Network Transactions" (January 26, 2014) and also takes into account the ToS adopted on six Chinese leading platforms, i.e. Taobao, Tmall, JD.com (Jingdong Online Mall), Tencent Paipai, Dangdang and Amazon (China).

38 For example, there is ToS on collection, storage and process of users' personal data. A legitimate ToS included in the contract is legally binding, but may be changed by the platform.

39 Since the transactional rules are normally keeping updating according to the market situation and management needs, many platforms merely set out the amendment/updating procedures, rather than let all the subscribers confirm their consent to any new rules or policy. A subscriber, if keeping using the platform services, is presumed to assent to the changed or updated rules.

The ToS constitutes the "bylaws" of a platform. Even though a platform is a third party to a transaction between a seller and a buyer, the platform's rules are inevitably applicable and binding to the transactional parties. Where a dispute occurs in the transaction, the platform may be empowered to resolve the dispute and make the adjudication. If a platform is like a kingdom on the Internet superseding the physical territorial limit, its transnational rules would be *de facto* laws of the domain, binding and defining the relationship of the people therein.

In addition to universality, unilateralism and globalization, platforms' ToS has the characteristic of externality, which is distinct from the traditional standard contractual terms. Apart from the users' subscription contracts with the platform, ToS is applied to the contracts between a subscribed buyers and a subscribed seller. With respect to a given contract between a seller/provider and a consumer/buyer, the platform is merely a third party. However, the platform's transactional rules may define a seller or provider's obligations on implied warranty and after-sale services to the consumers/buyers. The platform's ToS is inherently incorporated in these contracts and binds the contractual parties.

More significantly, ToS may be applied to the other parties that are not subscribed to the platform services, such as the intellectual property owners with trademarks or copyright involved in the platform. Most mature platforms have implemented the measures to protect the intellectual property rights owned by both the subscribers and non-subscribers.<sup>40</sup> For example, many platforms' transactional rules enable a copyright or trademark holder to complain against the relevant piracy or counterfeit occurring on the platform, even though the right holder has not subscribed to the platform and no contractual relationship with the platform provider. The transactional rules, therefore, reach out to the non-subscribers and impact their rights and interests. Where virtual property, such as a seller's online stores or a buyer's credit records, is involved, a platform's transactional rules show clearly the nature of the "bylaws". The platform's rules can, to a large extent, decide the ownership, transferability, inherence and even subsistence of the property.<sup>41</sup> For example, under Alipay's previous rules, the deceased subscribers' account cannot be

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40 Many platforms reserve or claim the intellectual property rights in the user generated content (UGC) through their transactional rules.

41 There has been a case in China concerning the separation between a divorcing couple of the ownership of an "online virtual store", which was deemed the joint property of their marriage. The disputed store was registered by the ex-wife and authenticated by Taobao. According to the transactional rules of Taobao, the store is permanently affiliated with the registrant and its ownership, credit and reputation cannot be transferred to anyone else. The store, therefore, cannot be transferred to the ex-husband according to the divorce agreement. See "Is Taobao Store Separable at Divorce", China People's Court Daily, October 14, 2012, at <[www.chinacourt.org/article/detail/2012/10/id/606755.shtml](http://www.chinacourt.org/article/detail/2012/10/id/606755.shtml)>.

inherited by their successors. Taobao, however, changed the transactional rules to enable the transfer of the ownership and registration of virtual stores on the platform in the circumstances of divorce and succession.<sup>42</sup>

### ***B Due Process***

A platform enables its users to access enormous market, users, data and technological tools that are otherwise unavailable to them and thus enjoys privileged position and much stronger bargaining power than users. There should be certain public interest safeguards to regulate the platforms' ToS and counter balance its unilateralism and externality. Due process is an important safeguard mechanism. Although it does not directly intervene the market operation of a platform, due process requires that ToS follow the principles of transparency, accountability and inclusive, multi-stakeholder policymaking.<sup>43</sup> When drafting and enforcing their content restriction policies, intermediaries should respect human rights. Governments have an obligation to ensure that intermediaries' content restriction policies respect human rights. Intermediaries should provide user content providers with mechanisms to review decisions to restrict content in violation of the intermediary's content restriction policies.<sup>44</sup>

Chinese authorities, in a legal document, require that a platform operator, when concluding a contract with the others, considers not only its own commercial interests and development strategy but its social responsibility, respects the principles of fairness, transparency and equal negotiation, enables social multi-stakeholder participation, and responds to the requests of the stakeholder groups.<sup>45</sup> Due process in development, amendment and implementation of ToS can effectively restrict platforms' unilateral power, prevent and correct unreasonable ToS and ensure a platform's assumption of social responsibility.

Although platform providers are in dominant position over the users and define the transaction process and service standards, forcefully imposition of unilateral and biased ToS could incite serious conflict and even trigger social unrest. In 2011, Taobao encountered a large scale sellers' protest against its unilateral change of the subscription terms regarding the deposits and fees charged to the sellers. The bitter

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42 See "Taobao's Restriction Partially Loosen, But Limited to Divorce and Succession", <<http://roll.sohu.com/20130725/n382557841.shtml>>, July 24, 2013.

43 Due process is borrowed from American constitutional principles and generally means that the rules and procedure should be justifiable.

44 See Manila Principles, 5 (f) and (c).

45 SAIC "Guides on Network Transactional Platforms' Performance of Social Responsibility" May 28, 2014.

dispute was directly sparked by a new rule issued by Taobao Mall that would sharply increase the 2012 annual membership fees and cash deposits for all subscribed sellers. Under the new rules, all subscribed sellers in the Mall must pay much higher fees over their budget by the end of 2011. The hikes in the annual membership fees and cash deposits undoubtedly placed some small business owners in a dilemma: facing up to unaffordable fees and deposits or giving up their early investments in the virtual stores that had been built on the platform. As a result, those small business owners in a feeling of being cornered by Taobao rebelled. Thousands of discontented small business owners and netizens formed a so-called "Anti-Taobao Union" and caused certain large sellers of brand-name products to suffer heavy losses by placing orders and cancelling them after leaving disparaging remarks. China's Ministry of Commerce had to intervene to calm the situation down in October 2011. The Ministry commanded that Taobao Mall actively respond to the legitimate needs of small business owners, and the small business owner protest against the fee increases within legal parameters. The "Union" stopped protesting after the Ministry stepped in and Taobao became more cautious when introducing new terms in the transactional rules. In this incident, Taobao Mall attempted to elevate the sellers' access threshold so as to prevent a flood of counterfeit goods and endless consumers' complaints. Although Taobao's action was completely in line with market logic to dismiss substandard shops and raise its brand value and services, the incident draws the public attention to the platform provider's social responsibility to the small and medium-sized businesses that rely on the platform's ecosystem to survive and grow. From then on, social responsibility is no more than a moral duty of not being evil, but involves governmental intervention and legal supervision.

2011 Taobao Incident is a wake-up call to the platforms as well as the government. It shows that due process is not only needed to safeguard public interest but to protect the platforms' sustainable development. Chinese Ministry of Commerce, after making the *ex officio* intervention in Taobao dispute, determined to taken action to supervise the due process of platforms' ToS. The Chinese Ministry of Commerce enacted the "Stipulations on Development of Transactional Rules of Third-Party Platforms for Network Retailing (Trial Implementation)" on December 24, 2014. This is the first legal document to clearly define the principles and process for development of platforms' ToS. Under the Stipulations, a platform's making, amending and implementing ToS shall follow the principles of openness, fairness and justice, respect laws, administrative regulations and social morality, and shall not disrupt social economic order and damage social public interest; a platform provider shall prominently publish on website homepage its proposed ToS or amendments to ToS for public comments at least seven days before its adoption and implementation, and shall take necessary measures to sufficiently and timely to

inform the users, enable their making comments and respond to their requests.<sup>46</sup> Any user that does not accept the proposed ToS or amendment should be able to leave the platform according to the existing contract and ToS.<sup>47</sup>

Since a platform's ToS may affect the rights or legitimate interests of the stakeholders outside the platform, these affected parties, even without contracts with the platform, should also be able to participate the ToS development process. The multi-stakeholder participation is particularly important in the area of intellectual property protection, where platform providers have sought the cooperation with intellectual property owners (such as trademark and copyright owners) to develop and implement right-protection measures to prevent or timely terminate the infringing activities on the platforms. The eventual goal is a win-win scenario for intellectual property owners and platforms alike with an enlarged e-commerce channel for the online sale of genuine goods.

The platform providers should be responsible and accountable to the laws. However, the Internet defies geographical boundaries, and the national laws cannot apply globally. The unique structure of the Internet has raised several judicial concerns. One of the most controversial and unclear areas of evolving laws is the determination of what forum has subject matter jurisdiction over activity (economic and other) conducted on the internet, particularly as cross border transactions affect local jurisdictions. Conflicts of jurisdiction and the platform's forum shopping have created the "legal gaps".<sup>48</sup> To address the legal gaps, it is necessary to develop the platforms' self-regulation and internal accountability mechanism adaptable to the globalised nature.

For example, Facebook held the "Global Site Governance Vote" for greater transparency, accountability and responsiveness in corporate governance from 2009. Since then, Facebook provided to its user community the chance to read and comment on the proposed changes to its Statement of Rights and Responsibilities

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46 However, under the Ministry of Commerce Stipulations, if the pending ToS or amendment to the ToS involves the platform's trade secret or is introduced for compliance with the law or governmental requirements, it may not be published.

47 SAIC "Regulations on Network Transactions" (January 26, 2014).

48 Forum shopping refers to the practice adopted by some litigants to have their legal case heard in the court thought most likely to provide a favourable judgment. In a cross-border trade dispute, one party may choose to sue the other at the plaintiff-friendly jurisdictions even though there is little or no connection between the legal issues and the jurisdiction in which they are to be litigated. Alternative dispute resolution (ADR) may offer a solution to the conflict of jurisdiction. If a platform openly submits itself, in its transactional rules, to a certain arbitration and mediation procedure, any dispute involving it will be resolved through that procedure so as to avoid the territorial conflicts over jurisdiction.

(SRR) and Data Use Policy. After the comment period, the users can join the global site governance vote to shape the policies that govern the platform. Facebook stated that the comments and vote helped it better comply with the law and interact with its global community with 1 billion users. In December 2012, Facebook held another "Vote" to decide whether to adopt a wide variety of changes to its user's data usage policy as well as its SRR. One of the biggest and more controversial changes was a policy that allowed Facebook to share the user data across Facebook-owned entities like Instagram, although Facebook committed that any sharing of the data would be in compliance with all applicable laws and always obtain the consent of its users when required. Another potential changes was to strip Facebook users of the power to endorse or reject policy changes through popular voting. Facebook firstly offered the proposals up to the community for feedback and then launched the global Vote after receiving the more than 7,000 comments required to trigger the Vote. For the Vote to be binding, more than 30% of Facebook users must participate in the voting. When Facebook closed the polls on December 10, 2012, its proposed changes were opposed by a majority of the voters, but not enough people cast the ballots to make the results binding. Facebook had more than 1 billion users but less than 30% voted. According to the result published on the Facebook governance site, the referendum was opposed by 87% of 668,125 members who cast ballots. As a result, the California-based firm was free to go forward with its proposed amendments to the ToS.

Facebook's global referendum shows both the strength and vulnerability of experimental global governance and accountability process. Without a balanced and globalised supervision system, these experimental processes can easily become symbolic rather than meaningful.

### ***C Legitimacy***

There have been many cases in which platforms were ordered to assume intermediary liability for not implementing the relevant ToS or not developing the necessary ToS to tackle users' illegal activities. For example, the court ruled in the case *Eland v. Taobao* (2011)<sup>49</sup> that Taobao's liability lay in merely removing the infringing goods' information but not taking the punitive actions against the seller according to its transactional rules, ie freezing the seller's account, degrading the seller or disabling the seller from making new infringing listings. Furthermore, platforms' ToS may be directly reviewed or repudiated for legal defects. Legitimacy

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49 *E-Land (Shanghai) Fashion Trade Co. Ltd. v. Zhejiang Taobao Network Co., Ltd. and Du Guofa*, Shanghai Pudong New District People's Court, January 19, 2011; *upheld*, Shanghai First Intermediate People's Court, May 8, 2011.

review of platforms' ToS is an important approach to regulate the platform governance.

The 2015 Alibaba dispute with SAIC was primarily caused by the problems and defects in Taobao's ToS. In the "Administrative Guidance Opinions" (White Paper), SAIC identified Alibaba's misbehaviours in several areas, almost all of which directly targeted to the problems in the ToS or its implementation, including: unauthorised or untruthful sellers operating on the platform; counterfeit, substandard or forbidden goods listed; chaotic sales management on the platform; defective design of sellers' credit assessment; and, poor internal staff management. The SAIC state in the White Paper, Alibaba has not paid enough attention to illegal operations on its online trading platforms or taken effective measures to tackle them, placing itself in the biggest credibility crisis since its establishment.

China is not alone in regulating platforms' ToS. A platform's transactional rules regarding collection, storage and utilization of the personal data are under strict scrutiny in many countries. The Irish Data Protection Commissioner, which presides over Facebook's European headquarters in Dublin, had briefed the social network provider to modify its data use policy to allow users a greater level of control over the way their information and content on the site can be utilised by the company. In the United Kingdom, the Information Commissioner's Office made efforts to examine and review the appropriateness of the changes made to Facebook's privacy policy. Facebook also reached a settlement with the United States Federal Trade Commission over the claims that it deceived users into sharing more information than what they had realised. Under the settlement, Facebook must obtain users' consent for significant changes to its privacy settings and must commit to 20-year independent privacy audits.

Whether a platform's ToS fairly defines the right, obligations and liabilities of itself and its users is an important area of legitimacy review. If the ToS unreasonably favours the platform and harms the users, it shall be corrected or revoked. For example, the Chinese SAIC discovered in the administrative review that the Taobao platform provided unreasonable standard terms against the consumers or sellers and enabled unfair competition against the other platforms (2015 White Paper). In addition, many platforms substantially limit their own risk and liability. For example, the ToS provides that the platform is not responsible for the users' losses caused by any system failure or other malfunctions of their network information systems. However, these liability limits or exemptions directly conflict with consumer protection law and should be revoked by the judicial or administrative authorities.

There are also platforms that deprive their subscribers' (particularly consumers') of the right to correct the input errors in electronic communications. These unfair and harsh transactional rules are also not allowed at law. According to the "United Nations Convention on the Use of Electronic Communications in International Contracts" (effective as of March 1, 2013), where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person has the right to withdraw the portion of the electronic communication in which the input error was made if: (i) the person notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and, (ii) the person has not used or received any material benefit or value from the goods or services, if any, received from the other party.<sup>50</sup> These stipulations make clear that the consumers' right to correct the input errors in electronic communications should not be deprived by any transactional rules set out the platforms.

With the growth of e-commerce, Chinese government departments are strengthening the regulation on platform governance. SAIC released, in June 2010, the "Interim Measures for the Administration of Online Commodities Trading and Relevant Services"; SAIC, along with the Ministry of Public Security, the Ministry of Commerce and other 6 Ministries and Administrations jointly published the "Notice on the Implementation Plan For the Special Campaign to Crack Down Intellectual Property Infringements and Manufacture and Sales of Counterfeit and Shoddy Goods in the Online Shopping Area" in July 2011.

The SAIC "Regulations on Network Transactions", enacted on January 26, 2014 and effective from March 15, 2014, provide that a platform provider shall only reasonably collect the consumers' personal information to the extent necessary, acquire the consent of the consumers, clearly inform the scope and purpose of the collection, and provide the services, free of charge, to enable the consumers to access and retrieve their personal consumption records. All these administrative requirements should be incorporated in and implemented through the platforms' ToS. If inconsistent with the legal stipulations, the ToS are void and subject to mandatory correction.

The Chinese Ministry of Commerce, in the "Stipulations on Development of Transactional Rules of Third-Party Platforms for Network Retailing (Trial

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<sup>50</sup> See the United Nations Convention on the Use of Electronic Communications in International Contracts (effective as of March 1, 2013), Article 14.

Implementation)", requires that a platform's ToS define the rights and obligations between the stakeholders fairly, remind the stakeholders to take note of the exclusion and restriction on the platform's liability, and explain the ToS upon request of the stakeholders.

The SAIC, in the "Normative Guidelines on Standard Terms of Network Transactional Platform Contracts" (July 30, 2014), provides that a platform shall not exempt or alleviate, through ToS, the following liability, ie (i) liability for consumers' personal injury; (ii) liability for consumers' property damage caused by intentional act or gross negligence; (iii) joint liability with the sellers or providers on the platform; (iv) information security liability for collection of personal information or trade secret; (v) other liability for breach of contracts.<sup>51</sup> Neither shall a platform, through the ToS, increase the liability of the users or exclude or limit their legitimate rights.

The legitimacy review of platforms' ToS is being developed in both judicial and administrative channels and is expected to enhance the platforms' social responsibility and accountability.

#### ***IV CONCLUSION***

The development of e-commerce platforms in the world economy is remarkable in less than two decades. As a neutral intermediary, a platform actually governs all the subscribers and non-subscribers through a matrix of transactional rules. As the nexus of e-commerce, platforms acquire considerable power to regulate, define and affect the transactions and the stakeholders. Meanwhile, platforms and their transactional rules are increasingly subject to legal review, sanctions and monitoring in different jurisdictions and in a variety of legal subjects, such as consumer protection, privacy and personal data, intellectual property, network security and anti-cybercrimes, content regulation, market competition and antitrust.

This paper attempts to analyse the dynamics of platforms and existing legal framework. With the legal norms on intermediary liability evolving and improving and platforms' transactional rules regulated and refined, platforms, in exercising their power, are gradually adapting to the legal and regulatory environment, and their global operation is stimulating the innovation of regulatory norms and approaches to safeguard not only the interests of the stakeholders on the platforms but the interests of the public generally. In light of the important role that platforms are playing in shaping a global information society and the significant impact they have on the

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51 According to these stipulations, in the case of system malfunction or failure, a platform provider should be presumed negligent and liable for the consumers' suffering therefrom, except that the provider is able to prove its innocence.

exercise of the rights of Internet users, an expectation exists that such entities will behave responsibly and balance their own interests with the public good.

## **REFERENCES**

Andrew Murray *Information Technology Law: The Law and Society* (Oxford University Press, Oxford, UK, 2010).

David N. Balaam and Michael Veseth *Introduction to International Political Economy* (3rd ed, Pearson Education International, 2005).

Hong Xue "A Reading of Anti-Counterfeit Trade Agreement" presented at ATRIP Congress 2009, Vilnius 15 September 2009.

Hong Xue "An Anatomical Study of the United States versus China at the World Trade Organisation on Intellectual Property Enforcement" (2009) Issue 6 European Intellectual Property Review.

Hong Xue "Between the Hammer and the Block: China's Intellectual Property Rights in the Network Age" (2005) 2(2) University of Ottawa Law & Technology Journal.

Hong Xue "Copyright Exceptions for Online Distance education" (2008) Number 2 Intellectual Property Quarterly.

Hong Xue "Les Fleurs du Mal - A Critique of the Legal Transplant in Chinese Internet Copyright Protection" (2007) 34(1) Rutgers Computer and Technology Law Journal.

Hong Xue "Reverse Engineering 2nd Draft for 3rd Revision of the Chinese Copyright Law" (2012) 28 (1) International Law Review.

Hong Xue "The Voice of China: A Story of Chinese Character Domain Names" (Fall 2004) 12 (2) Cardozo Journal of International and Comparative Law.

James Boyle *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard University Press, 1997).

Jeremy Malcolm *Multi-Stakeholder Governance and the Internet Governance Forum* (Terminus Press, 2008).

John Hagel III and Arthur G. Armstrong *Net Gain: Expanding Markets through Virtual Communities* (Harvard Business School Press, 1997).

Lawrence Lessig *Code: And the Other Laws Of Cyberspace* (Basic Books, 2000).

Lawrence Lessig *The Future of Ideas: The Fate of the Commons in A Connected World* (Vintage, 2002).

Lilian Edwards and Charlotte Waelde *Law and the Internet* (Hart Publishing (UK), 2009).

Michael P. Ryan *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brooking Institute Press, Washington DC, 1998).

Milton L. Mueller *Network and States: The Global Politics of Internet Governance* (MIT Press, 2010).

Ori Brafman and Rod Beckstrom *The Starfish and the Spider: The Unstoppable Power of Leaderless Organizations* (Portfolio Hardcover, 2006).

Rebecca MacKinnon, Elonnai Hickok, Allon Bar & Hae-in Lim *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Publishing, 2015).

Satish Nambisan and Mohanbir Sawhney *The Global Brain: Your Roadmap for Innovating Faster and Smarter in a Networked World* (Pearson Education, Inc., 2008).

Stuart Biegel *Beyond the Control: Confronting the Limits of Our Legal System in the Age of Cyberspace* (MIT Press, 2001).

Urs Gasser & Wolfgang Schulz *Governance of Online Intermediaries: Observations from a Series of National Case Studies* (The Berkman Center for Internet & Society Research Publication Series, 2015).

Yochai Benkler *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

