

Strategies to Combat Internet Sales of Counterfeit Goods

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The proliferation of counterfeits for sale on e-commerce sites has created new and more dangerous challenges to brand owners than counterfeits sold through brick and mortar establishments. Most brand owners are currently focusing their efforts on simplifying and streamlining Notice and Takedown (“NTD”) procedures set up by e-commerce platforms to remove illegal listings. The shortcomings of these efforts are that NTDs do not directly reach the counterfeiter who remains free to conduct its illegal activities with impunity and that NTDs do not prevent delisted counterfeiters from reappearing in short order under a new fictitious name and identity.

Brand owners should seek to induce China to rigorously enforce its recently enacted Electronic Commerce Law (“ECL”), which was designed by China’s lawmakers to create a “choke point” that excludes counterfeiters and other unscrupulous merchants from gaining access to online accounts. The ECL requires multiple layers of government review and approval that were designed so that they can be satisfied only by legitimate and economically viable business entities. To date, e-commerce sites in China do not strictly comply with the ECL, and U.S.-based e-commerce sites do not require any compliance whatsoever with the ECL. Rigorous enforcement of the ECL should result in preventing counterfeiters from gaining access to e-commerce sites based in China and the United States and should lead to a decrease in sales of counterfeits on the internet.

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I. INTRODUCTION

Although counterfeiting had already emerged as a major business problem for multinational companies (“MNCs”) in the 1990s, the advent of the new millennium brought a new and more dangerous challenge for MNCs as sales of counterfeit goods began to proliferate rapidly on the internet.¹ According to the U.S. Department of Homeland Security, electronic commerce (“e-commerce”) has exacerbated an already massive counterfeiting problem:

For counterfeiters, production costs are low, millions of potential customers are available online, transactions are convenient, and listing goods on well-known platforms provides an air of legitimacy. When sellers of illicit goods are in another country, they are also exposed to relatively little risk of criminal prosecution or civil liability under current law enforcement and regulatory practices.²

A recent U.S. General Accounting Office study found that of forty-seven items purchased online, twenty were counterfeit while twenty-seven

¹ U.S. DEP’T OF HOMELAND SEC., *COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 7* (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf [hereinafter *COMBATTING TRAFFICKING IN COUNTERFEIT GOODS*].

² *Id.* at 20.

were genuine.³ Another study in 2021 found that four out of five small- and medium-sized businesses worldwide are victims of counterfeiting on the internet.⁴ While these statistics present a daunting concern, the problem must be traced to its source to further understand counterfeiting on the internet and the new challenges that it poses.

Counterfeiting is now the largest criminal enterprise in the world and the epicenter of counterfeiting is in the People's Republic of China ("PRC" or China).⁵ Counterfeiting in China first emerged as a major business problem for MNCs at the beginning of the new millennium, and it continues to persist today despite all of the intensive efforts of MNCs to combat the problem in the past two decades.⁶ A recent study found that China produces 80 percent of the world's counterfeits, and that global counterfeiting is now a \$1.7 trillion dollar industry, which is

³ U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET 15 (2018). The purchases were in categories of frequently counterfeited goods: sneakers, mugs, cosmetics, and phone chargers. A recent report from China found that more than 40 percent of all goods sold online through Chinese e-commerce platforms were "counterfeits or of bad quality." *More than 40 Percent of China's Online Sales 'Counterfeits or Bad Quality,'* TELEGRAPH (Nov. 3, 2015, 1:01 AM), <https://www.telegraph.co.uk/news/worldnews/asia/china/11971401/More-than-40-per-cent-of-Chinas-online-sales-counterfeit-or-bad-quality.html>.

⁴ *Four out of Every Five SMBs Are Victims of Counterfeiting on the Internet*, CISION PRNEWSIRE (Apr. 26, 2021, 3:00 AM), <https://www.prnewswire.com/news-releases/four-out-of-every-five-smbs-are-victims-of-counterfeiting-on-the-internet-301275246.html>.

⁵ Wade Shepard, *Meet the Man Fighting America's Trade War Against Chinese Counterfeits (It's Not Trump)*, FORBES (Mar. 29, 2018, 3:52 AM), <https://www.forbes.com/sites/wadeshepard/2018/03/29/meet-the-man-fighting-americas-trade-war-against-chinese-counterfeits/?sh=594537d01c0d>; Elizabeth Schultze, *Counterfeit Goods from China Are Crushing American Small Businesses – and They're Calling on Trump to Fight Back*, CNBC (Feb. 29, 2020, 9:16 AM), <https://www.cnbc.com/2020/02/28/small-businesses-are-pushing-trump-to-fight-chinese-counterfeits.html> ("The epicenter, ground zero, of manufactured counterfeit goods is China," said Bob Barchiesi, president of the International AntiCounterfeiting Coalition.").

⁶ Counterfeiting as a major business problem for brand owners first gained international notoriety at the beginning of the new millennium. See generally Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1 (2000). China was in the early stages of its economic ascent and far from the economic power that it is today. Many observers, including this Author, believed that China would steadily move up the ranks of the leading economies in the world and that the counterfeiting problem would begin to subside. Only the first part of this prediction proved to be accurate; counterfeiting remains rampant in China. For a discussion of the first studies examining the new challenges posed by sales of counterfeits on the internet, see ORGANISATION FOR ECON. CO-OPERATION & DEV. [OECD], *THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY, EXECUTIVE SUMMARY 14* (2007), <https://www.oecd.org/sti/38707619.pdf>.

expected to reach \$2.8 trillion in 2022.⁷ Not surprisingly, China is considered the source of most of the counterfeits found on internet sites, such as China-based Alibaba. Currently, Alibaba is the world's largest e-commerce platform with approximately 1.24 billion active users, including 953 million users in China and 285 million consumers abroad.⁸ After U.S.-based Amazon—the world's second largest e-commerce platform—decided in 2015 to woo Chinese manufacturers to sell directly on its sites, counterfeits for sale on Amazon increased rapidly, leading to accusations that Amazon's efforts are “killing small American businesses.”⁹

Brand owners find that counterfeiters who are able to transcend the physical limitations of brick and mortar operations by selling on the internet present even greater and more frustrating challenges than traditional counterfeiters.¹⁰ Brand owners who believe that e-commerce platforms are not doing enough to combat counterfeiting on the internet find that liability by the e-commerce platform is strictly circumscribed.¹¹ In 2010, the leading Second Circuit case of *Tiffany (NJ) Inc. v. eBay Inc.* established the current legal framework for liability for trademark infringement by e-commerce platforms.¹² *Tiffany* held that e-commerce platforms are not liable for direct trademark infringement by third party online vendors of counterfeits but may be liable for

⁷ Shepard, *supra* note 5. The U.S. General Accountability Office reports that in 2016, 88 percent of all seized counterfeit goods by the United States originated from China and Hong Kong. See also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3; OECD & EUR. UNION INTELL. PROP. OFF. [EUIPO] (2016), TRADE IN COUNTERFEIT AND PIRATED GOODS: MAPPING THE ECONOMIC IMPACT 81 (2016), <https://www.oecd-ilibrary.org/docserver/9789264252653-en.pdf?expires=1576509401&id=id&accname=id5723&checksum=576BF246D4E50234EAF5E8EDF7F08147> (“[C]ounterfeit and pirated products can originate from virtually all economies . . . , with China appearing as the single largest producing economy . . .”).

⁸ *Company Overview*, ALIBABA GROUP, <https://www.alibabagroup.com/en/about/overview#:~:text=Annual%20active%20consumers%20of%20the,and%20285%20million%20consumers%20overseas> (last visited Mar. 15, 2022).

⁹ Wade Shepard, *How Amazon's Wooing of Chinese Sellers Is Killing Small American Businesses*, FORBES (Feb. 14, 2017, 11:36 AM), <https://www.forbes.com/sites/wadeshepard/2017/02/14/how-amazons-wooing-of-chinese-sellers-is-hurting-american-innovation/?sh=358fc0d61df2>.

¹⁰ COMBATTING TRAFFICKING IN COUNTERFEIT GOODS, *supra* note 1, at 20. Traditional counterfeiters are always at risk of capture and arrest, but online counterfeiters are not. See *infra* Section III.A.

¹¹ For an overview of limitations for secondary liability, see U.S. PAT. & TRADEMARK OFF., SECONDARY TRADEMARK INFRINGEMENT LIABILITY IN THE E-COMMERCE SETTING 2–4 (2021), <https://www.uspto.gov/sites/default/files/documents/Secondary-TM-Infringement-Liability-Response.pdf>.

¹² 600 F.3d 93 (2d Cir. 2010).

contributory trademark infringement if they facilitate sales of counterfeits by online merchants with knowledge or reason to know of the counterfeits.¹³ *Tiffany* further held, however, that an e-commerce platform that removes an infringing listing after notification submitted under a Notice and Takedown (“NTD”) procedure enjoys the protection of a safe harbor free from any liability.¹⁴ Since *Tiffany*, brand owners have channeled their efforts into streamlining and simplifying NTDs.¹⁵

This Article argues, however, that an approach focusing on improving NTDs has serious shortcomings. First, this approach is directed at the e-commerce platform and does not directly reach the counterfeiter who is able to continue its illegal activities with impunity.¹⁶ Second, even when an infringing listing is removed, the counterfeiter is able to resurface in short order under a new false name and identity.¹⁷ As this Article will explain, one of the glaring weaknesses of the current e-commerce regime is that counterfeiters are able to use totally fictitious information to create accounts with e-commerce platforms.¹⁸

A more fruitful approach that brand owners have heretofore apparently overlooked would be the use of tools to combat internet counterfeiting provided by China’s lawmakers. The recently enacted Electronic Commerce Law (“ECL”) and related legislation were designed by PRC lawmakers to exclude counterfeiters and other unscrupulous entities from selling on the internet.¹⁹ The ECL, together with other PRC laws, requires online business operators to undergo multiple layers of official review and approval by PRC government authorities.²⁰ The ECL and related laws were developed so that only lawful and economically viable business entities can meet all of the ECL’s requirements.²¹ This Article details the various stages of review and approvals by relevant PRC authorities and demonstrates how these levels of review are designed to exclude counterfeiters and other miscreants from operating

¹³ *Id.* at 103–07.

¹⁴ *Id.* at 106.

¹⁵ *See infra* Section III.B.

¹⁶ *See infra* Section III.B.

¹⁷ *See infra* Section III.B.

¹⁸ *See infra* Section III.B.

¹⁹ PRC Electronic Commerce Law (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 31, 2018, effective Jan. 1, 2019); Regulation of the People’s Republic of China on the Administration of the Registration of Enterprise Legal Persons (promulgated by State Council, Mar. 2, 2019, effective Mar. 2, 2019).

²⁰ *See infra* Sections IV.A–C.

²¹ *See infra* Sections IV.A–C.

on e-commerce sites.²² This Article will explain how U.S. brand owners can use the ECL to their advantage to deter counterfeiters and to proceed directly against counterfeiters without having to rely solely on NTDS, which can be cumbersome, time consuming, costly, and ineffective.²³

This Article proceeds as follows: Part II discusses the new challenges created by internet sales of counterfeits. Part III examines the current liability regime for counterfeits sold on the internet established by the Second Circuit in *Tiffany*. Part IV analyzes the ECL and related PRC laws and explains how they can be used to deter and detect counterfeiters in China who seek to sell their illegal goods on the internet. Part V concludes with some suggested steps for the future for U.S. brand owners.

II. NEW CHALLENGES CREATED BY INTERNET SALES OF COUNTERFEITS

A. *Traditional Means of Detecting Counterfeiting*

The use of e-commerce to sell counterfeits creates new and more dangerous challenges to MNCs and other brand owners. Historically, consumers could rely on two major indicators that goods being sold through brick and mortar operations were counterfeit. First, the location of the counterfeit sales establishment was a telling indication.²⁴ In China, as in many countries, counterfeits cannot be found in large state-owned department stores or MNC retail outlets, such as Costco or Walmart.²⁵ Rather, buyers of counterfeits must travel to side streets and back alleys in less desirable locations or to wholesale markets outside of most urban areas to buy counterfeits.²⁶ In the United States, the same dynamic holds true. No reputable retail business, such as major supermarkets, department stores, or the “Big Box” stores sell counterfeits.²⁷ This is because in the United States, as in China, major retailers have an established distribution network of qualified and vetted distributors that deal only in genuine goods.²⁸ In China, as in the United States, it is difficult for a counterfeiter to penetrate an established distribution network to inject counterfeits into the stream

²² See *infra* Sections IV.A–C.

²³ See *infra* Sections IV.A–C.

²⁴ COMBATTING TRAFFICKING IN COUNTERFEIT GOODS, *supra* note 1, at 14.

²⁵ Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 Nw. J. INT’L L. & Bus. 157, 163 (2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

of commerce.²⁹ Rather, the counterfeiter is relegated to secondary distribution channels that sell to mom-and-pop operators or less reputable retailers in less desirable locations.³⁰ Second, the price of the products is also a reliable indicator of whether a product is a counterfeit.³¹ Counterfeits are rarely, if ever, sold at the full retail price of the genuine product.³² Most counterfeits are sold at substantially lower prices than the genuine product³³ and low quality counterfeits are often sold at a fraction of the price of the genuine product.³⁴ Using these two indicators, location and price, a consumer has a reliable method to determine whether a good sold through brick and mortar operations are counterfeit or genuine.

The rise of e-commerce has now allowed counterfeiters to evade the use of these methods to detect counterfeits. Consumers from anywhere in the world can now purchase counterfeits from the comfort of their home or office using a computer, mobile phone, or other electronic device.³⁵ Counterfeiters can post images of the genuine product while selling counterfeits, and charge prices that are identical, or close to, the retail price of the genuine article.³⁶ The traditional methods of detecting counterfeits have been rendered ineffective by the rise of e-commerce.

The rise of e-commerce also creates another major advantage for counterfeiters. Most counterfeiters depend upon subterfuge, artifice, and disguise to evade detection and capture.³⁷ When counterfeiters

²⁹ *Id.*

³⁰ *Id.*

³¹ COMBATting TRAFFICKING IN COUNTERFEIT GOODS, *supra* note 1, at 14.

³² *Id.*

³³ *Id.*

³⁴ *Id.*; see also Elise Trecul, *How Cheap Does a Counterfeit Have to Be to Steal Your Sale*, RED POINTS, <https://www.redpoints.com/blog/cheap-counterfeits-steal-sales/> (noting that to take sales away from the genuine product, the “sweet spot” for counterfeits is 50 percent of the retail price of the genuine product) (last visited Feb. 25, 2022).

³⁵ See Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, *supra* note 25, at 192.

³⁶ COMBATting TRAFFICKING IN COUNTERFEIT GOODS, *supra* note 1, at 22.

³⁷ Daniel C.K. Chow, *Barriers to Criminal Enforcement Against Counterfeiting in China*, VAND. J. ENT. & TECH. L. (forthcoming 2022) (manuscript at 9–10) (manuscript on file with the Seton Hall Law Review). Brand owners find it necessary to hire private investigation companies to track down counterfeiters who operate clandestinely. Brand owners also outsource investigation because it can be dangerous. Private investigators add to the expense of the brand owner. See *id.* at 10. Brand owners bemoan that they suffer losses from the counterfeiter and then also have to incur the considerable expense of tracking down counterfeiters, a double loss.

were limited to the use of brick and mortar operations, brand owners could identify, capture, and arrest counterfeiters through the use of enforcement operations directed at those physical locations.³⁸ In China, brand owners used administrative entities to conduct surprise raids and seizures.³⁹ The brand owner would appear at the local branch of the State Administration of Industry and Commerce (now renamed the State Administration of Market Regulation), usually along with private investigators in tow, and present a copy of its trademark certificate and a statement that a suspected counterfeiter is infringing upon the trademark.⁴⁰ As time is of the essence because of tip-offs, the enforcement authorities need to act immediately. Often the enforcement authorities and the brand owner would leave half an hour after the filing of the complaint in government vans headed to the location of the counterfeiter.⁴¹ The location of the counterfeiter is not revealed until the government vehicles are en route to avoid tip-offs.⁴² The authorities then conduct a surprise raid and seize any illegal products, equipment, and cash on site and detain any persons found at the location.⁴³

The detention of any counterfeiters found on the premises allows the authorities and the brand owner to identify the person(s) involved and to subject these persons to sanctions in the form of administrative fines and, in some cases, criminal prosecution.⁴⁴ Criminal prosecution and punishment,⁴⁵ when available, operate as effective deterrents to future criminal activity as China's criminal punishment system is notorious for its harsh conditions.⁴⁶ Persons can be arrested and locked

³⁸ *Id.* at 9–10.

³⁹ *Id.* at 10–11.

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Chow, *Barriers to Criminal Enforcement Against Counterfeiting in China*, *supra* note 37, at 3, 10.

⁴⁴ *Id.* at 2–3.

⁴⁵ The sale of counterfeit goods is subject to criminal liability if certain economic thresholds are met. See Criminal Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, and amended most recently on Nov. 4, 2017), art. 214. China is required to have criminal penalties for willful counterfeiting. World Trade Organization Agreement of Trade-Related Intellectual Property Rights, art. 61, Apr. 15, 1994.

⁴⁶ See Chow, *Barriers to Criminal Enforcement Against Counterfeiting in China*, *supra* note 37, at 15–18 (discussing how the Public Security Bureau, China's Police, is one of the most feared and most powerful entities in the PRC government).

up in punitive conditions for many months before a case is prosecuted.⁴⁷ The notorious reputation of China's criminal punishment system is alone a deterrent to many offenders.

B. How the Internet Facilitates Evasion by Counterfeiters

The use of the internet now allows counterfeiters to easily evade detection and capture. Many counterfeiters use false names, identities, and addresses when opening an online account.⁴⁸ For example, brand owners report that it is possible to use entirely fictitious information in setting up an account with Amazon.⁴⁹ E-commerce platforms vary greatly in the amount and nature of the information required to establish an online account, and counterfeiters do not have any difficulty in circumventing these requirements.⁵⁰ Alibaba is known to be careless in enforcing its identification requirements, allowing counterfeiters to submit false information.⁵¹ The ease with which counterfeiters can use fictitious identities and locations means that counterfeiters can disappear into the vastness of cyberspace at the first sign of trouble only to reappear under a new fictitious identity and location in short order.⁵²

The rise of e-commerce has allowed counterfeiters to overcome three of the most serious barriers to the further penetration of counterfeit goods into the stream of commerce. First, counterfeiters no longer struggle to sell their goods in legitimate distribution channels; the internet is a new and universal legitimate distribution channel that reaches nearly every consumer in the world and is available to genuine and counterfeit goods alike. Second, counterfeiters no longer have to charge lower prices for their goods; they can charge prices that are identical or similar to prices for genuine products. Finally, counterfeiters have no fear of detection and capture on e-commerce sites. The internet has allowed counterfeiters to overcome the traditional problems that created limitations and imposed threats on counterfeiting.

⁴⁷ *Id.* at 17 (explaining how the Public Security Bureau can detain persons for over eight months without ever charging them with a crime).

⁴⁸ *See infra* Section III.B.

⁴⁹ *See* Chow, *Barriers to Criminal Enforcement Against Counterfeiting in China*, *supra* note 37, at 19–20.

⁵⁰ *Id.*

⁵¹ *Id.* at 15.

⁵² *Id.* at 20.

III. LIABILITY OF E-COMMERCE SITES FOR SALES OF COUNTERFEIT GOODS

A. *The Framework Established by the Second Circuit in Tiffany*

In *Tiffany (NJ) Inc. v. eBay Inc.*,⁵³ decided in 2010, the Second Circuit established the liability regime for e-commerce platforms for the sale of counterfeit goods.⁵⁴ Tiffany (NJ) Inc. and Tiffany Company (together “Tiffany”) brought a lawsuit against eBay, the proprietor of an internet-based marketplace that sells goods through an auction system, for direct and contributory trademark infringement and other claims.⁵⁵ Tiffany is in the business of selling a high-end brand of jewelry.⁵⁶ Tiffany found that third party merchants were using eBay’s website to sell counterfeit Tiffany merchandise.⁵⁷

To deal with counterfeits, eBay implemented and administered a notice and take-down system that allowed brand owners to alert eBay of listings that infringed intellectual property rights.⁵⁸ Upon notification, eBay would remove such listings.⁵⁹ eBay expeditiously removed such listings after receiving the notifications, including those from Tiffany, often within twenty-four hours or less.⁶⁰ eBay also administered a “three strikes” policy that resulted in a merchant’s online account being suspended if the merchant infringed intellectual property rights on three occasions.⁶¹ As part of its promotional activities, eBay also actively advertised and promoted premium brand jewelry products offered for sale on its websites, including Tiffany merchandise.⁶²

Tiffany argued that eBay’s conduct of facilitating and advertising the sale of Tiffany branded goods, many of which turned out to be counterfeit, constituted both direct and indirect (otherwise known as

⁵³ See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

⁵⁴ *Id.* at 105–07.

⁵⁵ *Id.* at 96–97, 101, 103.

⁵⁶ *Id.* at 96.

⁵⁷ *Id.* at 97.

⁵⁸ *Id.* at 99. NTDs were first established as a safe harbor in the context of copyright by Section 512 of the Digital Millennium Copyright Act (DMCA). 17 U.S.C. § 512(g). The DMCA does not apply directly to trademarks, but the NTD model created by the DMCA has been widely adopted by e-commerce sites to also apply to trademark counterfeiting. *Tiffany* holds that NTDs also provide a safe harbor for trademark infringements. *Id.* at 106.

⁵⁹ *Tiffany*, 600 F.3d at 99.

⁶⁰ *Id.*

⁶¹ *Id.* at 100.

⁶² *Id.* at 101.

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secondary or contributory) infringement of Tiffany's trademarks.⁶³ Tiffany subsequently filed a lawsuit in federal district court in the Southern District of New York.⁶⁴ The district court ruled in favor of eBay on the trademark infringement issues.⁶⁵

The Second Circuit affirmed the district court.⁶⁶ The Second Circuit first held that eBay was not directly liable for trademark infringement.⁶⁷ To recover for direct trademark infringement, the owner of a trademark registered with the U.S. Patent and Trademark Office must prove that a person or entity used the trademark without the owner's consent in violation of Section 32 of the Lanham Act.⁶⁸ Under the Lanham Act, Tiffany would have to show that eBay, not the third party merchants, used Tiffany's trademarks without its permission. Although eBay did use Tiffany's trademarks without Tiffany's permission, the Second Circuit found that eBay's use was a nominative fair use because eBay used the Tiffany trademarks to describe and identify the goods as those of Tiffany, the brand owner, rather than to mislead and confuse consumers, and thus the use was lawful.⁶⁹

⁶³ *Id.* at 101.

⁶⁴ *Id.* at 96.

⁶⁵ *Tiffany*, 600 F.3d at 101.

⁶⁶ *Id.* at 114.

⁶⁷ *Id.* at 103.

⁶⁸ Section 32 of the Lanham Act states in relevant part:

Any person who shall, without the consent of the registrant- (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1114(1)(a).

⁶⁹ *See Tiffany*, 600 F.3d at 103. A more complete statement of the doctrine of nominative fair use is that it allows "[a] defendant [to] use a plaintiff's trademark to identify the plaintiff's goods so long as there is no likelihood of confusion about the source of [the] defendant's product or the mark-holder's sponsorship or affiliation." *Merck & Co. v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402, 413 (S.D.N.Y. 2006). The doctrine of nominative fair use is often involved in comparative advertising. For example, suppose that Brand A Cola airs a television commercial with the slogan, "In a blind taste test, most consumers prefer the taste of Brand A Cola to the taste of Brand B Cola." The use by Brand A of the Brand B Cola trademark is done without the permission of the company that owns the Brand B trademark, but the use is permitted as a nominative fair use. The rationale is that the product (i.e., Brand B Cola) is not readily identifiable without the use of the trademark, and Brand A has done nothing to suggest that the Brand B has sponsored or endorsed the advertisement. *Cf. Tiffany*, 600 F.3d at 101.

On the issue of indirect or secondary trademark infringement by an e-commerce platform, the Second Circuit noted that this was an issue of first impression.⁷⁰ The U.S. Supreme Court first applied the common law doctrine of contributory liability for trademark infringement to manufacturers and distributors of products in 1982's *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*⁷¹ In *Tiffany*, the Second Circuit extended the holding of *Inwood* for the first time to an online marketplace.⁷² The Court of Appeals found that e-commerce platforms could be held liable for contributory trademark infringement "for culpably facilitating the infringing conduct of the counterfeiting vendors."⁷³ The Second Circuit elaborated:

[T]here are two ways in which a [service provider] may become contributorily liable for the infringing conduct of another: first, if the service provider "intentionally induces another to infringe a trademark," and second, if the service provider "continues to supply its [service] to one whom it knows or has reason to know is engaging in trademark infringement."⁷⁴

Tiffany argued that eBay was liable under the second test for contributory infringement⁷⁵ and argued that eBay continued to supply its services to merchants of counterfeit *Tiffany* merchandise while knowing, or having reason to know, that the merchants were infringing *Tiffany*'s trademarks.⁷⁶

With respect to listings by merchants that were specifically flagged by *Tiffany* to eBay and later removed, the district court held, and the Second Circuit agreed, that eBay had no liability.⁷⁷ On appeal, *Tiffany* did not contest this ruling.⁷⁸ *Tiffany* argued, however, that eBay's general knowledge of ubiquitous *Tiffany* counterfeits for sale on its website, combined with eBay's continued service to merchants of counterfeits, created secondary liability:

Tiffany argued in the district court that eBay knew, or at least had reason to know, that counterfeit *Tiffany* goods were being sold ubiquitously on its website. As evidence, it pointed to,

⁷⁰ See *Tiffany*, 600 F.3d at 103.

⁷¹ *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 853-54 (1982).

⁷² See *Tiffany*, 600 F.3d at 105-06.

⁷³ *Id.* at 104.

⁷⁴ *Id.* at 106 (quoting *Inwood*, 456 U.S. at 854).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Tiffany*, 600 F.3d at 106.

inter alia, the demand letters it sent to eBay in 2003 and 2004, the results of its Buying Programs that it shared with eBay, the thousands of [notices] it filed with eBay alleging its good faith belief that certain listings were counterfeit, and the various complaints eBay received from buyers claiming that they had purchased one or more counterfeit Tiffany items through eBay's website. Tiffany argued that taken together, this evidence established eBay's knowledge of the widespread sale of counterfeit Tiffany products on its website. Tiffany urged that eBay be held contributorially [sic] liable on the basis that despite that knowledge, it continued to make its services available to infringing sellers.⁷⁹

The Second Circuit rejected this argument.⁸⁰ The Court held that a generalized knowledge or a reason to know of general trademark infringement on eBay's sites was insufficient to establish eBay's contributory negligence.⁸¹ The Court found that liability can only attach to particular knowledge of specific listings that are infringing or will infringe in the future.⁸² Further, eBay was protected from liability when it removed the illegal listings after notification by the brand owner.⁸³

Tiffany established the liability framework under which most brand owners now deal with counterfeit products sold on e-commerce platforms. Following this case, no general claims that counterfeits are found in any quantity, even if they are ubiquitous, on a website will lead to secondary liability. Websites like eBay have no general duty to police or monitor their sites for counterfeits and will not be held liable for failing to do so when *Tiffany* squarely places the burden of monitoring and detecting listings for counterfeit goods on the brand owner.

Only a claim that a particular listing sells counterfeits may result in liability.⁸⁴ If the e-commerce platform has set up a notice and take-down procedure and then removes the listing after the plaintiff has submitted a satisfactory notice, *Tiffany* establishes that the e-commerce site enjoys a safe harbor free from any secondary liability.⁸⁵

⁷⁹ *Id.*

⁸⁰ *Id.* at 107–09.

⁸¹ *Id.* at 107.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Tiffany*, 600 F.3d at 107.

⁸⁵ *Id.* at 106–09.

B. Brand Owners' Efforts After Tiffany

After *Tiffany*, brand owners have focused their efforts on using, improving, and streamlining NTDs.⁸⁶ Brand owners have found that they encounter two different sets of problems when using NTDs as further explained below.

The first set of problems deals with what brand owners suspect are conflicts of interest on the part of e-commerce platforms that has resulted in half-hearted efforts to remove offending listings. E-commerce sites, such as eBay, earn revenue from sales of products, including counterfeit products.⁸⁷ Some brand owners believe that this economic incentive to make sales leads some e-commerce sites to tolerate the sale of counterfeit products and to be lax in policing their sites for them.⁸⁸ Brand owners have made these accusations against popular e-commerce platforms such as Amazon,⁸⁹ but have singled out Alibaba's conduct as particularly egregious,⁹⁰ leading the U.S. government to place Alibaba on the Notorious Markets blacklist in

⁸⁶ Jeff Bercovici, *Small Businesses Say Amazon Has a Huge Counterfeiting Problem. This 'Shark Tank' Company Is Fighting Back*, INC. (Apr. 2019), <https://www.inc.com/magazine/201904/jeff-bercovici/amazon-fake-copycat-knockoff-products-small-business.html>.

⁸⁷ *Tiffany*, 600 F.3d at 97.

⁸⁸ See Gillian Wong, *Alibaba Disputes U.S. Group's Claim that It Tolerates Fake Goods on Taobao*, WALL ST. J. (Apr. 14, 2015, 1:23 AM), <https://www.wsj.com/articles/alibaba-rebuts-u-s-groups-claim-it-tolerates-fake-goods-on-taobao-1428981233>.

⁸⁹ William Mauldin & Alex Leary, *U.S. Tags Amazon Sites as 'Notorious Markets'*, WALL ST. J. (Apr. 29, 2020, 5:43 PM), <https://www.wsj.com/articles/u-s-puts-amazon-foreign-websites-on-list-of-platforms-blamed-for-facilitating-piracy-11588172453> (U.S. accuses Amazon of tolerating counterfeits on its online platforms in foreign countries); see also David Pierson, *Extra Inventory. More Sales. Lower Prices. How Counterfeits Benefit Amazon*, L.A. TIMES (Sept. 28, 2018, 3:00 AM), <https://www.latimes.com/business/technology/la-fi-tn-amazon-counterfeits-20180928-story.html> ("Not only has [Amazon] avoided any serious backlash for allowing the sale of fake goods, it's actually thrived from it, say more than two dozen brand owners, e-commerce consultants, attorneys, investigators and public policy experts.").

⁹⁰ Michael Schuman, *A Small Table Maker Takes on Alibaba's Flood of Fakes*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/2017/03/18/business/alibaba-fake-merchandise-e-commerce.html> (discussing the suspicions of many U.S. business that Alibaba tolerates counterfeits on its sites with one business owner stating, "[i]t just keeps going and going and going . . . It's like trying to pick weeds on a 70-acre farm"). One brand owner stated, "Alibaba's strategy has consistently been to provide lip service to supporting brand enforcement efforts, while doing as little as possible to impede the massive flow of counterfeit merchandise on its platforms." Letter from Lee S. Sporn, Senior Vice President, Bus. Affs., Michael Kors (USA), Inc., to Bob Barchiesi, President Int'l Anti-Counterfeiting Coal. (IACC), (Oct. 26, 2016), at 2.

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2011,⁹¹ 2014,⁹² and each year from 2016-2020.⁹³ Brand owners can point to comments made in 2015 by Jack Ma, Alibaba's outspoken founder, as indicating a tolerance for the sale of counterfeits. In a speech at Alibaba's headquarters, Ma discussed the prevalence of counterfeits on the internet:

The problem is the fake products today are of better quality and better price than the real names. They are exactly the [same] factories, exactly the same raw materials but they do not use the names.⁹⁴

Ma gave this speech to his assembled staff while he was still Alibaba's chief executive. One could have only concluded Ma believed counterfeits are superior to genuine goods and that he was endorsing their sale and consumption. Ma's comments ignited a firestorm of outrage among brand owners, leading one to label Alibaba as "our most dangerous and damaging adversary."⁹⁵ In response to angry denunciations by brand owners, Ma subsequently walked back these

⁹¹ The United States has repeatedly placed Alibaba on blacklists. Alibaba was first placed on the Out-of-Cycle Notorious Markets List in 2011. OFFICE OF U.S. TRADE REPRESENTATIVE, 2011 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 3 (Dec. 20, 2011), <https://ustr.gov/sites/default/files/uploads/gsp/speeches/reports/2011/Notorious%20Markets%20List%20FINAL.pdf> (discussing Alibaba's subsidiary site Taobao.com).

⁹² OFF. OF U.S. TRADE REPRESENTATIVE, 2014 OUT-OF-CYCLE NOTORIOUS MARKETS 8 (2015) https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published_0.pdf (discussing Alibaba's subsidiary site Taobao.com).

⁹³ OFF. OF THE U.S. TRADE REPRESENTATIVE, 2016 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 12 (2016), <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf> (Alibaba's subsidiary site Taobao.com; 2020 is the most current year for which statistics are available); OFF. OF THE U.S. TRADE REPRESENTATIVE, 2017 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 20 (2017), <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf> (Taobao.com); OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 26 (2018), https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf (Taobao.com); OFF. OF THE U.S. TRADE REPRESENTATIVE, 2019 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 28 (2019), https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf (Taobao.com); OFF. OF THE U.S. TRADE REPRESENTATIVE, 2020 REVIEW OF NOTORIOUS MARKETS FOR COUNTERFEITING AND PIRACY 31 (2020), [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (Taobao.com).

⁹⁴ Charles Clover, *Alibaba's Jack Ma Says Fakes Are Better than Originals*, FIN. TIMES (June 14, 2016), <https://www.ft.com/content/6700d5cc-3209-11e6-ad39-3fee5ffe5b5b>.

⁹⁵ Eva Dou, *Jack Ma Says Fakes "Better Quality and Better Price than the Real Names,"* WALL ST. J. (June 15, 2016, 3:06 AM), <https://www.wsj.com/articles/BL-CJB-29327>.

remarks, but industry suspicions of Alibaba remain high.⁹⁶ For example, one study in September 2020 found that Alibaba's sites use algorithms that promote counterfeit goods.⁹⁷

The second set of problems relates to the use of NTDs. Brand owners claim these procedures can be cumbersome, labyrinthine, and time consuming.⁹⁸ Completing some of these procedures can take months and can be costly.⁹⁹ For example, one NTD requires brand owners to place an order for the counterfeit goods, buy and receive the goods, test and verify that the goods are counterfeit, and then submit both the counterfeit and genuine goods with notices documenting these actions.¹⁰⁰ Even if the brand owner spends the time and effort to successfully use the NTD, the notice will only result in a removal of the specific offending listing. On most e-commerce sites, the merchant enjoys a "three strikes" policy, i.e., the merchant's online account is closed only after the merchant is caught three different times using an illegal listing.¹⁰¹ As one brand owner lamented, using Alibaba's reporting system "can become expensive, . . . can become frustrating, [and] . . . can take time away from your sales, marketing and other creative endeavors."¹⁰² Brand owners also complain that even after complying with the time-consuming procedure, it can still lead to frustration for the brand owner due to the overwhelming scale of the

⁹⁶ Ma subsequently walked back these remarks, stating, "Every fake product we sell, we are losing five customers' . . . 'We are the victims of that. We never stop fighting.'" *Id.* Ma also boasted that Alibaba was "the world's 'leading fighter of the counterfeits.'" *Id.* Despite Ma's assertions, Taobao.com, the e-commerce site of an Alibaba subsidiary, has been on the U.S. government's blacklist of notorious markets for the past five consecutive years. *See supra* note 93.

⁹⁷ Yaling Jiang, *Are Luxury Brands Losing the Battle Against Alibaba's Counterfeiters*, JING DAILY (Sept. 6, 2000), <https://jingdaily.com/are-luxury-brands-losing-the-battle-against-alibabas-counterfeiters/> (The Jing Daily article does not claim that the use of the algorithm to promote counterfeits is intentional and notes that Alibaba is making many efforts to scrub clean its dubious reputation.).

⁹⁸ Bercovici, *supra* note 86.

⁹⁹ Jiang, *supra* note 97.

¹⁰⁰ *See* Bercovici, *supra* note 86.

¹⁰¹ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 100 (2d Cir. 2010) (describing eBay's three strikes policy). A three strikes approach is common among e-commerce sites. For Alibaba's three strikes policy, see ENFORCEMENT ACTIONS FOR INTELLECTUAL PROPERTY RIGHTS INFRINGEMENTS ON ALIBABA.COM, <https://rule.alibaba.com/rule/detail/2043.html> (last visited Feb. 27, 2022). Amazon has rejected a three strikes policy. Angela He et al., *Amazon's Anti-Counterfeit Effort Falls Short* (Sept. 11, 2020, 4:27 PM), <https://www.law360.com/articles/1307710/amazon-s-anti-counterfeit-efforts-fall-short>.

¹⁰² Schuman, *supra* note 90.

problem.¹⁰³ Brand owners have summed up their experiences with the use of Amazon's NTDs as "a horror story"¹⁰⁴ and compared their use as being imprisoned in "Amazon purgatory."¹⁰⁵

The response by brand owners to these obstacles posed by some NTDs has been to lobby e-commerce sites to simplify and streamline NTDs.¹⁰⁶ The basic goal of these efforts is to reduce the burdens for brand owners of both the time and cost investments in complying with NTDs. This approach, however, suffers from serious shortcomings.

First, the approach deals only with the listing on the e-commerce platform and does not address or reach the underlying problem of the merchant of counterfeit goods. The counterfeiter remains beyond the reach of the brand owner and the law and can continue its illegal activities with impunity even if its listing is removed. The counterfeit goods can find other channels to enter the stream of commerce and inflict harm on the brand owner. The brand owner is also relying entirely on the e-commerce site, even though brand owners have consistently expressed suspicions that e-commerce sites tolerate counterfeits because their sales also generate revenue.¹⁰⁷ Second, even if the brand owner succeeds in permanently barring a merchant under a "three strikes" policy, nothing prevents the counterfeiter from reappearing in short order on the same site under a new name, identity, and address.¹⁰⁸ Some brand owners refer to this process as a futile game of "Whac-A-Mole," in which the only result after a significant expenditure of time, money, and effort is that the counterfeiter simply creates a new virtual identity and is back in business quickly with little effort or expense.¹⁰⁹ The U.S. Department of Homeland Security highlighted this problem in a recent study of online counterfeiting:

Commenters also noted several disparities across e-commerce platforms. For example, among third-party marketplaces that control who may list products on their site for sale,

¹⁰³ *Id.* ("Although those [complaints filed with Alibaba] were successful, [the brand owner] quickly realized that the scale of the problem and the paperwork Alibaba required were too much for her to handle as a one-person business.").

¹⁰⁴ Bercovici, *supra* note 86.

¹⁰⁵ *Id.* ("As horror stories go, the experience of trying to survive in Amazon's world is more Kafka than Lovecraft. Any reader of *The Trial* would recognize the labyrinthine bureaucracy, arbitrary rulings, and absurd contradictions, all under the weight of a faceless looming authority.").

¹⁰⁶ *Id.*

¹⁰⁷ See Clover, *supra* note 94.

¹⁰⁸ Pierson, *supra* note 89 (noting that if "Amazon shuts one store for selling knockoffs, the owner often shifts operations to another").

¹⁰⁹ *Id.*

some scrutinize their sellers much more than others. Some allow anyone to sell a product if they provide basic information about themselves, such as credit card and tax identity information. Others require more detailed information, such as an existing online presence, proof that the seller is a business entity and not an individual, and that the seller has established customer support. . . . A key underlying problem here is that on at least some e-commerce platforms, little identifying information is necessary for a counterfeiter to begin selling.¹¹⁰

Not only can the listing be posted using false information, but the counterfeiter can also process payments anonymously:

Counterfeiters have the ability to remain anonymous as virtually every aspect of the sales process can be performed using false or incomplete names. . . . Some online marketplaces are often lax in verifying that sellers are using valid contact details, and are hesitant to share this information with brand owners.¹¹¹

E-commerce platforms may have an incentive to create identification requirements that are not onerous and difficult to satisfy because it would lead to more sellers on their sites, a greater volume of sales, and more revenue for the e-commerce platform. The problem with this approach is that it allows counterfeiters to get easy access to the e-commerce platform.

Clever counterfeiters in China find it easy to circumvent these listing requirements.¹¹² Providing false identifying information is an easy feat.¹¹³ Even the more stringent requirements of some e-commerce platforms, such as requiring more detailed information about whether an entity is a business or an individual or whether the seller has customer support, can be easily fabricated by counterfeiters.¹¹⁴ For example, brand owners who recently attempted to pursue counterfeiters on Amazon found that almost all of the sellers used false names and fictitious addresses in setting up their Amazon seller

¹¹⁰ COMBATTING TRAFFICKING IN COUNTERFEIT GOODS, *supra* note 1, at 22, 25.

¹¹¹ INT'L TRADEMARK ASS'N, ADDRESSING THE SALE OF COUNTERFEITS ON THE INTERNET 7 (2017), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/Addressing_the_Sale_of_Counterfeits_on_the_Internet_021518.pdf.

¹¹² Alana Semuels, *Amazon May Have a Counterfeit Problem*, ATLANTIC (Apr. 20, 2018), <https://www.theatlantic.com/technology/archive/2018/04/amazon-may-have-a-counterfeit-problem/558482/>.

¹¹³ *Id.*

¹¹⁴ *See id.*

accounts.¹¹⁵ As one brand representative stated, “[t]he real problem is that it’s possible to set up an Amazon account using totally fictitious information.”¹¹⁶

The ease with which counterfeiters can obtain online accounts with e-commerce platforms using fabricated information is a glaring weakness of today’s e-commerce marketplaces.¹¹⁷ This weakness allows counterfeiters to easily circumvent identification requirements, disappear at the first sign of trouble, and reappear under a new name and identity. This weakness creates a never-ending cat and mouse game in which the counterfeiter has perpetual opportunities to reemerge on the same or different websites protected by the anonymity of the internet and the ability to escape detection by disappearing into the vastness of cyberspace. Even when brand owners endure the misery of using cumbersome NTDs to take down illegal listings, they find these efforts are futile to stem the tide of counterfeiting on e-commerce sites.¹¹⁸

IV. USING CHINA’S ELECTRONIC COMMERCE LAW AND RELATED LEGISLATION

While brand owners have concentrated their efforts on improving NTDs, to date brand owners have not, to this Author’s knowledge, used China’s recently enacted laws and regulations meant to control and limit counterfeiting on the internet. As China is the epicenter of counterfeiting, using China’s relevant laws and regulations should create an effective deterrent to counterfeiting on the internet not only on Alibaba, China’s largest e-commerce site, but also on Amazon and other U.S.-based sites that are being flooded by counterfeits originating in China.¹¹⁹

A. *The PRC Electronic Commerce Law*

In 2019, China implemented the Electronic Commerce Law (“ECL”) to strengthen government regulation of e-commerce.¹²⁰ The basic

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See COMBATTING TRAFFICKING IN COUNTERFEIT GOODS, *supra* note 1, at 22.

¹¹⁸ Bercovici, *supra* note 86.

¹¹⁹ DEP’T OF HOMELAND SEC., COMBATTING TRAFFICKING IN COUNTERFEITING AND PIRATED GOODS (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_ply_counterfeit-pirated-goods-report_01.pdf (“Counterfeit and pirated products come from many economies, with China appearing as the single largest producing market.”).

¹²⁰ PRC Electronic Commerce Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2018, effective Jan. 1, 2019), 2019 (China) [hereinafter ECL]; see *id.*, art. 1 (“In order to safeguard the legitimate rights and interests of all subjects

approach of the ECL is to impose a strict and tightly regulated system of government supervised approval and registration requirements that must be satisfied before any merchant can be allowed to operate on any e-commerce platform.¹²¹ The drafters of the ECL believed that the critical point in time is the point of entry to the e-commerce marketplace.¹²² Therefore, they treat the point of entry as critical by imposing strict entry requirements, which has created an effective “choke point” to exclude vendors of counterfeit goods and other unscrupulous sellers.¹²³ The ECL, and other legal regulations, further discussed below, must also be viewed in the larger context of China’s overall goal of closely monitoring and supervising every aspect of their industrial, commercial, and social spheres.¹²⁴ This overall effort is part of the Chinese Communist Party’s recent efforts to strengthen its dominance and control over all aspects of Chinese society.¹²⁵ Today, China has an advanced and pervasive system of social controls that brand owners can use to their advantage in the fight against counterfeiting on the internet.¹²⁶

involved in electronic commerce, regulate e-commerce practices, maintain the sound market order and foster the development of the e-commerce industry in a sustainable and healthy manner, the E-commerce Law of the People’s Republic of China (hereinafter referred to as this “Law”) is formulated.”); art. 7 (“The State has developed a collaborative administration system that conforms to the characteristics of the e-commerce sector, and pushes for forming a governance framework for the e-commerce market within which related departments, industrial organizations for the e-commerce industry, e-commerce operators and consumers join to govern this market.”).

¹²¹ *Id.* ch. II, arts. 9–25.

¹²² *Id.* arts. 10, 12.

¹²³ *See, e.g., id.* arts. 10, 12, 15.

¹²⁴ Anna Mitchell & Larry Diamond, *China’s Surveillance State Should Scare Everyone*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/international/archive/2018/02/china-surveillance/552203/>.

¹²⁵ Liza Lin, *China Targets News Media in Xi Jinping’s Campaign to Expand Communist Party Control*, WALL ST. J. (Oct. 12, 2021, 11:55 AM), <https://www.wsj.com/articles/china-targets-news-media-in-xi-jinpings-campaign-to-expand-communist-party-control-11634054123>.

¹²⁶ China has been particularly focused on closely monitoring the activities of areas in western China inhabited by Uyghurs, an ethnic minority, and has created what some have called a twenty-first century perfect police state to suppress resistance. Sebastian Strangio, *Geoffrey Cain on Xinjiang’s Perfect Police State*, DIPLOMAT (Aug. 24, 2021), <https://thediplomat.com/2021/08/geoffrey-cain-on-xinjiangs-perfect-police-state/> (stating that “every person in Xinjiang is documented down to their genetic makeup, the sound of their voice, and whether they enter their homes through the front or back door”). As part of the Communist Party’s expanded control, China recently implemented a “social credit system” that creates moral rankings of behaviors of its entire population, companies, and government organizations. Bad habits, such as having too much debt, can result in a lower score in the social ranking system, resulting in sanctions, such as

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The ECL applies to all natural or legal persons who are “e-commerce operators,” i.e., persons or entities that use the internet or e-commerce to sell goods or services.¹²⁷ Article 2 of the ECL further provides that “‘e-commerce’ refers to business activities conducted on an information network, such as the Internet, to sell commodities or offer services.”¹²⁸ ECL Articles 10, 15 and 27 set forth certain registration requirements:

Article 10

E-commerce operators shall register themselves as market subjects according to the law ... [except for] odd small-amount transaction activities that do not require any license under the law, and other circumstances under which no registration is required under laws and administrative regulations.¹²⁹

Article 12

Where business activities conducted by e-commerce operators are subject to the relevant administrative approval as required under the law, they shall obtain the administrative license in accordance with the law.¹³⁰

Article 27

An operator of an e-commerce platform shall require business operators that apply to sell commodities or provide services on its platform to submit truthful information, including the identity, address, contact and administrative license, verify and register such information, establish registration archives, and have them verified and updated regularly.¹³¹

These provisions require all e-commerce business operators (i.e., vendors who sells products on e-commerce sites) to obtain administrative licenses and submit the licenses and other truthful

being banned from airline travel. Katie Canales, *China's 'Social Credit' System Ranks Citizens and Punishes Them with Throttled Internet Speeds and Flight Bans if the Communist Party Deems Them Untrustworthy*, BUS. INSIDER (Dec. 24, 2021, 11:00 AM), <https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4>.

¹²⁷ ECL, *supra* note 120, art. 9.

¹²⁸ *Id.* art. 2.

¹²⁹ *Id.* art. 10. Also excepted are “individuals selling self-produced agricultural and sideline products, or family handicrafts, individuals taking advantage of their own skills to engage in labor activities for the convenience of people.” *Id.*

¹³⁰ *Id.* art. 12.

¹³¹ *Id.* art. 27.

information to the operator of an e-commerce platform, such as Alibaba. These conditions must be satisfied before the business operator can lawfully sell goods or services through the e-commerce platform. Article 15 of the ECL also requires that the business operator display its business license on its homepage:

Any e-commerce operator shall always have information about its own business license, the administrative license issues for its business, and its status as a party that is not required to register itself as a market subject according to the provisions of Article 10 herein, or the link to a webpage with such information, published in a prominent position on its homepage.¹³²

B. Business License

The reference in ECL Articles 10 and 15 to administrative approval refers to matters governed by the Administrative Regulations of the PRC on the Registration of Enterprise Legal Persons (“AREP”). The AREP was most recently revised in 2016.¹³³ Article 3 of the AREP provides:

When an application for the registration of enterprise legal person status has been examined and granted by the competent authority for the registration of enterprise legal persons, the applicant shall obtain a Business License for Enterprise Legal Person and a legal person status, and its lawful rights and interest shall be protected by the law.¹³⁴

The “competent authorities” in charge of the registration mentioned in AREP Article 3, is the State Administration of Market Regulation (“SAMR”) at the central level, and the Administrations of Market Regulation (“AMRs”) at the local level.¹³⁵ Until recently, the SAMR was known as the State Administration of Industry and Commerce (“SAIC”) and the local entities were known as AICs.¹³⁶ The role of the SAMR is to regulate and promote commercial activity within China’s internal

¹³² *Id.* art. 15.

¹³³ Regulations of the People’s Republic of China on the Administration of the Registration of Enterprise Legal Persons (promulgated by the State Council, Jan. 8, 2011, effective Feb. 6, 2016) CLI.2.267123(EN) [hereinafter AREP].

¹³⁴ AREP, *supra* note 133, art. 3.

¹³⁵ The official website of the “SAMR” is available at <https://www.samr.gov.cn/>. The site is written in the Chinese language with no official English translation available.

¹³⁶ Interview with Wu Zhenguang, Dir. Gen., Anti-Monopoly Bureau of the State Administration for Market Regulation (SAMR), People’s Republic of China (May 2021). See Jingyuan Mao, *Competition Law in China: A Law and Economics Perspective* 168–72 (2020); Chow, *Barriers to Criminal Enforcement Against Counterfeiting in China*, *supra* note 37, at 8.

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market.¹³⁷ One SAMR's major tasks is to create and administer a registration system for trademarks.¹³⁸ Under PRC law, the SAMR is the entity charged with the primary role of protecting trademarks,¹³⁹ as well as a gatekeeper for all business entities that wish to lawfully operate in China's internal market.¹⁴⁰ Under Article 3 of the AREP and Article 212 of the PRC Company Law, no business entity without a business license issued by the ARMs can lawfully operate.¹⁴¹

C. Deterrence Created by ECL and AREP

To obtain a business license, AREP requires that the applicant satisfy a review and approval process by the ARMs.¹⁴² At the end of the process, if all requirements are met, the ARMs will issue the business license.¹⁴³ As a basic requirement, the applicant must submit a certificate of approval for the business entity by the department in charge of the industrial sector.¹⁴⁴ China divides all industrial sectors of the economy into vertical sectors under the control of a supervisory

¹³⁷ U.S.-CHINA BUS. COUNCIL [USCBC], *State Administration for Market Regulation*, at 1 (May 2021), https://www.uschina.org/sites/default/files/samr_organization_chart.pdf.

¹³⁸ Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong, Apr. 23, 2019, effective Nov. 11, 2019), art. 2, 2019. Article 2 refers to the administrative authority as the administration department for industry and commerce ("AICs"), but the AICs have been replaced by the AMRs. For administration by the AMRs, see ch. III, arts. 28–38.

¹³⁹ *See id.* art. 2.

¹⁴⁰ *See* U.S.-CHINA BUS. COUNCIL, *supra* note 137.

¹⁴¹ AREP, *supra* note 133, art. 16 ("Where an entity files an application for registration for the commencement of business as an enterprise legal person, upon being approved and registered by the competent registration authority and granted a Business License . . . the enterprise is established."); Company Law (promulgated by the by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, rev'd Oct. 26, 2018), art. 7, 2018 P.R.C. LAWS (China) ("Company registration authorities shall issue business licenses of companies to the companies established under the law. The date of issuance of a business license for a company shall be the date of establishment of the company."). *See also* Marteen Beekers, *How to Verify a China Business License in 5 Steps*, CHINATRADEBLOG (Jan. 11, 2019), <https://chinatradeblog.org/china-business-license-verification/> ("Each business license . . . is an official certificate, that proves that a Chinese company has been registered with the authorities and operates legally"). The "competent authorities in charge of company registration are the AICs, see AREP Art. 4, now replaced by the ARMs. *See* Chow, *Barriers to Criminal Enforcement Against Counterfeiting in China*, *supra* note 37.

¹⁴² AREP, *supra* note 133, art. 3. The "competent authority" is now the ARMs, which has replaced the AICs.

¹⁴³ AREP, *supra* note 133, art. 16.

¹⁴⁴ DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 381 (2d ed. 2009).

authority.¹⁴⁵ For example, a business entity that wishes to establish a factory to manufacture laundry detergent must first submit an economic feasibility study to obtain permission from the Ministry of Light Industry or its local counterpart.¹⁴⁶ Only after a certificate of approval from the supervisory authority for a particular industry sector has been obtained can the applicant then obtain a business license from the ARMs.¹⁴⁷

The provisions of the AREP set forth in detail the documents that must be submitted to obtain a business license. In addition to the certificate of approval from the applicant's supervisory authority, the applicant must submit its articles of association, a certificate of creditworthiness, a verification of capital, a certificate of the identity of the legal representative of the enterprise, and a certificate of a right to use its domicile and place of business.¹⁴⁸ A vendor of trademarked goods must submit a trademark registration or a licensing agreement as proof of its lawful authority to use the trademark to sell the goods.¹⁴⁹ This last requirement should deter many counterfeiters from obtaining business licenses from the ARMs.¹⁵⁰

¹⁴⁵ *Id.*

¹⁴⁶ Economic feasibility means that the enterprise will have enough assets and personnel to achieve its purposed goals. *See* AREP, *supra* note 133, art. 7 ("Any entity that applies to be registered as an enterprise legal person must satisfy the following requirements ... the entity has funds and employees in conformity with State regulations and in line with its scale of production, operation, or service.").

¹⁴⁷ *Id.* art. 15(2) (requiring document of approval from supervisory authority).

¹⁴⁸ *Id.* art. 15.

¹⁴⁹ *Id.* ("other relevant documents and certificates").

¹⁵⁰ Counterfeiters, however, can work around this rule. A business entity might have a trademark certificate for one product but, once it receives a business license and opens an account with an e-commerce platform, the entity might begin to sell counterfeiting or infringing products under a different trademark, for which it does not have a certificate or a license agreement. If this occurs, the online merchant has operated outside the lawful scope of its business license, which only authorizes the sales of the product for which the online merchant has a trademark certificate. *See id.* art. 13 ("An enterprise legal shall engage in business activities within such scope of business as is approved and registered."). The sanction for operating outside the scope of the business license is a fine and cancellation of the business license. *Id.* art. 29(2) (providing that a business license can be canceled where "the enterprise carries out business activities beyond such scope as is approved and registered"); *see also id.* art. 29 (stating that a business license canceled "[w]here the enterprise carries out any illegal business activities"). The brand owner whose products were counterfeited can notify the AMRs, and the AMRs can enter sanctions against the offending business entity, including cancellation of the business license. *Id.* art. 29. The brand owner can also proceed directly against the legal representative of the business entity. *See infra* Section IV.D.

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Once the business license has been issued, the business entity must have an official seal or chop made.¹⁵¹ These seals are not a mere formality; seals replace signatures in China.¹⁵² After the seal is made, the seal must be registered with the ARMs, the Public Security Bureau (China's police), and the business entity's bank.¹⁵³ All of the company's documents must be stamped with its seal to be legally effective.¹⁵⁴ A signature by a company official alone is not sufficient.

These requirements create a significant deterrent and, in all likelihood, an insuperable barrier for counterfeiters to overcome. Most counterfeiters will not be able to satisfy the requirements to obtain a business license, and most counterfeiters will not even attempt to apply for a business license due to the likelihood that their conduct will attract the attention of PRC enforcement authorities, such as the Public Security Bureau, China's police. Most counterfeiters do not operate legitimate businesses that can satisfy the requirements of the AREP.¹⁵⁵

D. *Direct Recourse against the Counterfeiter*

The previous Section discussed the deterrent effects of complying with the ECL and AREP and showed that illegal underground factories operated by most counterfeiters cannot satisfy the requirements of the ECL and AREP to register and obtain the necessary business licenses. But there is another advantage created by the ECL and AREP for brand owners. The ECL and AREP allow brand owners to proceed directly against infringers and counterfeiters, and pass-by the NTDs established by e-commerce platforms.

¹⁵¹ AREP, *supra* note 133, art. 16; *see also* Claudia Ramadori, *What Are Company Chops in China and How to Use Them*, NEW HORIZON GLOB. PERSPS. (Jan. 19, 2021), <https://nhglobalpartners.com/company-chops-in-china-how-to-use/>.

¹⁵² *See* Ramadori, *supra* note 151.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ For example, Article 7 of the AREP provides:

Any entity that applies to be registered as an enterprise legal person must satisfy the following requirements:

1. the entity has its name, organizational structure and articles of association;
2. the entity has a fixed place of business and essential facilities;
3. the entity has funds and employees in conformity with State regulations and in line with its scale of production, operation or service;
4. the entity is able to bear civil liabilities independently; and
5. the entity has a scope of business in conformity with the provisions of the relevant laws, regulations and policies of the State.

It is highly unlikely that a counterfeiter will be able to satisfy requirements three or five of article 7.

Suppose that a legitimate business entity, who has complied with the ECL and AREP registration and licensing requirements, opens an online account and then decides to sell counterfeits. Or in what is a more likely scenario, the registered business entity produces a product that partially copies a trademark of a brand owner and sells it on an e-commerce marketplace. The registered business entity may not be necessarily acting in bad faith, but has nevertheless infringed upon a trademark owned by a U.S. brand owner.

Under the ECL, the business operator is required to display its business license information in a prominent place on its homepage.¹⁵⁶ Once the U.S. brand owner obtains the license identification number, the brand owner is able to obtain detailed information contained in the business license through publicly available websites, such as the Enterprise Credit Information System.¹⁵⁷ Among the information available through public websites is the address of the business entity that has been verified by the ARMs, and the name of the legal representative.¹⁵⁸ Every PRC citizen is issued a unique national identification number.¹⁵⁹ Persons identified with this number by the authorities find it difficult to evade detection and capture by authorities. With this identification number, PRC authorities will be able to track down the address, bank information, and relatives of the individual.¹⁶⁰

The concept of the legal representative under PRC finds no direct counterpart in U.S. law. The legal representative is designated by law as the natural person who has authority to bind the company.¹⁶¹ PRC lawmakers wanted to ensure that there was one designated person with clear authority to sign binding contracts on behalf of the company or

¹⁵⁶ ECL, *supra* note 120, art. 15.

¹⁵⁷ AREP, *supra* note 133, art. 23 (“Competent registration authorities shall publicize the registration-related information and information for record-filing purposes of enterprise legal persons to society through the enterprise credit information publicity system.”).

¹⁵⁸ See, e.g., NATIONAL ENTERPRISE CREDIT INFORMATION PUBLICITY SYSTEM, REPORT ON ZHENG TONG INVESTMENT COMPANY 2 (Sept. 20, 2021) (copy on file with Seton Hall Law Review).

¹⁵⁹ All Chinese citizens have a permanent 18-digit identification number. Knowing a citizen’s number will allow access to their information, such as the person’s date of birth, place of birth, and gender. All PRC citizens are also required to carry a Resident Identity Card that carries additional information, such as the person’s permanent address. See Matt Slater, *China ID Card – An Introduction*, CHINA CHECKUP (Oct. 31, 2018), <https://www.chinacheckup.com/blog/china-id-card>.

¹⁶⁰ This observation is based on this Author’s own experience working in China.

¹⁶¹ AREP, *supra* note 133, art. 11 (“The legal representative of an enterprise legal person . . . shall be the signatory who exercises functions and powers on behalf of the enterprise.”).

otherwise legally bind the company with his or her actions.¹⁶² PRC lawmakers also wanted to ensure that there was a natural person who would bear civil and criminal liability for the acts of the business entity and that ultimate liability did not rest with a legal fiction.¹⁶³ Article 49 of the PRC General Principles of the Civil Law provides:

Under any of the following circumstances, an enterprise as legal person shall bear liability, its legal representative may additionally be given administrative sanctions and fined and, if the offence constitutes a crime, criminal responsibility shall be investigated in accordance with the law:

- (1) conducting illegal operations beyond the range approved and registered by the registration authority;
- (2) concealing facts from the registration and tax authorities and practicing fraud;
- (3) secretly withdrawing funds or hiding property to evade repayment of debts;
- (4) disposing of property without authorization after the enterprise is dissolved, disbanded or declared bankrupt;
- (5) failing to apply for registration and make a public announcement promptly when the enterprise undergoes a change or terminates, thus causing interested persons to suffer heavy losses;
- (6) engaging in other activities prohibited by law, damaging the interests of the State or the public interest.¹⁶⁴

As Article 49 indicates, the legal representative in its personal capacity is concurrently liable for the illegal acts committed on behalf of the enterprise. If the enterprise sells counterfeit goods, the legal representative can be held personally liable under both civil and criminal law.¹⁶⁵ The brand owner can proceed directly against an identified natural person and is not relegated to suing a business entity.

¹⁶² *See id.*

¹⁶³ General Principles of the Civil Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2009) art. 49, 2009 P.R.C. LAWS (China) (repealed 2021) [hereinafter GPCL].

¹⁶⁴ *Id.* The General Principles of the Civil Law were repealed by the new PRC Civil Code, which went into effect as of January 1, 2021. The Civil Code does not appear to have an equivalent provision to Article 49 of the GCPL. Despite this, most PRC Law experts believe that this is an apparent oversight and does not change the legal liability of the legal representative. Moreover, experts believe that GPCL Article 49 still provides a good set of guidelines for liability, and they even continue to refer to Article 49 of the GPCL post January 1, 2021. *See, e.g., Understanding the Role of a Legal Representative in China*, INTEGRA GRP., <https://www.integra-group.cn/role-of-legal-representative-in-china/> (last visited Feb. 3, 2022).

¹⁶⁵ GCPL, *supra* note 163, art. 49.

A U.S. brand owner who finds counterfeit or infringing products on an e-commerce site following the ECL regulations can immediately identify the legal representative, a natural legal person, through required information on the homepage of the vendor.¹⁶⁶ The brand owner can proceed directly against the legal representative by sending a cease and desist letter or by naming the legal representative in a lawsuit filed in China or in the United States, assuming jurisdictional requirements are met. The brand owner can either by-pass the use of the NTD altogether or use the NTD in conjunction with taking direct steps against the legal representative of the counterfeiter or infringer.

E-commerce platforms in China are required to follow the ECL. Nothing prevents U.S.-based e-commerce platforms such as Amazon or eBay from requiring China-based merchants to follow the ECL. In fact, requiring Chinese merchants to comply with the ECL is the best method for ensuring that the Chinese merchant is a lawfully constituted, legitimate, and viable business entity in China. The U.S.-based e-commerce platform has the assurance of knowing that any Chinese merchant who satisfies the ECL has successfully completed multiple layers of official reviews and approval by PRC authorities. Moreover, U.S.-based e-commerce platforms can require by contract that all China-based merchants comply with the ECL and other related laws.

E-commerce platforms can also include a dispute resolution clause in their contracts that requires the legal representative to submit to binding arbitration or litigation in China or the United States. Such a clause will allow brand owners to proceed directly and immediately against an identified natural person if counterfeits or infringing goods are found on a listing.

E. *Lax Enforcement of the ECL*

Although the ECL is a mandatory law, the ECL is still a relatively new law and does not have a high level of compliance. For example, some Chinese e-commerce platforms, such as Alibaba, currently do not faithfully follow its regulations.¹⁶⁷ An examination of the homepage of Chinese merchants selling their products on Alibaba reveals that these

¹⁶⁶ ECL, *supra* note 120, art. 15 (requiring display of business license). The name of the company's legal representative is set forth in its business license. *See supra* note 155.

¹⁶⁷ STATE ADMIN. OF INDUS. & COMMERCE, WHITE PAPER ON ALIBABA GROUP HOLDINGS ADMINISTRATIVE GUIDANCE WORK SITUATION (Jan. 28, 2015), <https://qz.com/335675/the-chinese-government-has-erased-a-damning-report-on-alibaba-but-you-can-read-it-here/> [hereinafter SAIC WHITE PAPER] (A complete copy of the SAIC White Paper is on file with the Seton Hall Law Review).

homepages do not display the merchants' business licenses as required by ECL Article 15.¹⁶⁸ The PRC government has criticized Alibaba for only paying "lip service" to verifying information and for being careless in its examination of business licenses.¹⁶⁹ Alibaba has been found to accept bribes from Chinese online merchants, and it is possible that this practice is being used to evade registration requirements of the ECL.¹⁷⁰ Amazon does not require Chinese business operators to comply with the ECL, AREP, or other provisions of PRC law,¹⁷¹ but allows merchants to set up an Amazon account using totally fictitious information.¹⁷² Failure to comply with the ECL by companies such as Alibaba and Amazon allows counterfeiters and other unscrupulous sellers to easily circumvent legal requirements and to open accounts with internet platforms using false information.

V. CONCLUSION

The PRC currently provides the tools designed for brand owners to combat counterfeiting on the internet. The ECL, AREP, and other laws were designed by PRC law-makers to create rigorous requirements that only legitimate and viable business entities can fulfill. The application of these laws should deter counterfeiters, most of who operate illegal underground factories, from obtaining the necessary legal approvals to operate lawfully on e-commerce sites. Counterfeiters and other criminals in China seek to operate clandestinely and are typically protected by disguises, false identities, and fictitious locations. The ECL, AREP, and other PRC laws are designed to create transparency and

¹⁶⁸ This Author recently examined numerous webpages on the Chinese language website of Taobao, an Alibaba subsidiary. No merchant displayed a business license. For example, Amazing Song, a seller of women's handbags, did not display its merchant's business license. See TAobao, *Amazing Song*, https://detail.tmall.com/item.htm?spm=a211oj.23070166.7913690490.d3.7bc35215bTawg0&id=638691799579&scm=1007.12144.215053.17591495_0_0&pvid=8be6870c-728c-467d-a5c6-2fddb8980157&utparam=%7B%22x_hestia_source%22:%22tm_fen_floor%22,%22x_object_type%22:%22item%22,%22x_hestia_subsource%22:%22default%22,%22x_mt%22:8,%22x_src%22:%22tm_fen_floor%22,%22x_pos%22:4,%22wh_pid%22:242647,%22x_pvid%22:%228be6870c-728c-467d-a5c6-2fddb8980157%22,%22scm%22:%221007.12144.215053.17591495_0_0%22,%22x_object_id%22:638691799579,%22tpp_buckets%22:%22144#0#215053#0%22%7D (last visited Mar. 15, 2022).

¹⁶⁹ See SAIC WHITE PAPER, *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ Amazon's policies and rules of conduct do not make any mention of these laws. See AMAZON, *Selling Policies and Sellers' Code of Conduct*, https://sellercentral.amazon.com/gp/help/external/G1801?language=en_US (last visited Mar. 15, 2022).

¹⁷² See SEMUELS, *supra* note 115.

accountability, which are requirements that counterfeiters both loath and fear.

The ECL and AREP can be a benefit to U.S. brand owners in two distinct, but related ways. First, the ECL, AREP, and other laws can create an effective barrier to counterfeiters opening online accounts on China-based e-commerce platforms, such as Alibaba. U.S.-based e-commerce platforms can require as a matter of contract, that Chinese merchants comply with the ECL, AREP, and all applicable PRC laws. Such a requirement would be a significant improvement over the current situation in which operators can gain access to e-commerce sites using totally fictitious information. Second, the ECL, AREP and other PRC laws will allow U.S. brand owners to proceed directly against the legal representative of the counterfeiter without the need to first obtain the cooperation of a U.S.-based e-commerce platform. All the information necessary to pursue the counterfeiter directly is required by the ECL to be on the homepage of the suspected counterfeiter. Being able to proceed directly against the counterfeiter will spare the brand owner the misery of having to use cumbersome NTDs, which are now required by some U.S.-based e-commerce sites. Of course, the brand owner can proceed simultaneously against the counterfeiter and use the NTDs.

The benefits of the ECL will redound to brand owners, however, only if the ECL is rigorously enforced. Some e-commerce sites in China are known to apply lax requirements for obtaining and maintaining an online account, which is in direct contravention of the ECL. Such lax attention paid to legal requirements by some business entities is not uncommon in China's current business culture that is riddled with many forms of petty corruption.¹⁷³ For example, the PRC government has reported incidents of applicants for online accounts making payments to managers at e-commerce sites in exchange for favorable treatment.¹⁷⁴ E-commerce sites in the United States have ignored the ECL and are in favor of simplifying NTDs instead. E-commerce sites based in China and the United States might not have the strongest incentive to rigorously enforce the ECL, as reducing counterfeits would also diminish their sales and their revenue, a suspicion that brand owners have long held about e-commerce sites.

Brand owners are the parties that have the greatest incentive to promote rigorous enforcement of the ECL. Yet, curiously, they have not attempted to induce PRC authorities to step up enforcement of the ECL

¹⁷³ Daniel C.K. Chow, *Cultural Barriers to Effective Enforcement of the Foreign Corrupt Practices in China*, 48 U. Tol. L. Rev. 551, 552 (2017).

¹⁷⁴ See SAIC WHITE PAPER, *supra* note 167.

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and related laws. Rather, brand owners have concentrated on inducing e-commerce sites to simplify their NTDs. Simplifying and improving NTDs, however, only offers a partial solution and has serious limitations. Perhaps brand owners are wary of relying on PRC authorities because that is unfamiliar terrain as opposed to the comfort of pleading with U.S.-based e-commerce sites. Yet, brand owners, not e-commerce platforms, appear to have the greatest incentive to induce rigorous enforcement of the ECL. Whether PRC authorities will be responsive to lobbying by brand owners for full enforcement of ECL is yet to be seen. But enacting the ECL is a part of the Communist Party's overall efforts to strengthen its control of the internet, which is one of China's most important segments of industry. The ECL is also part of a far-reaching Party initiative for increasing its supervision of all business and social activities in China.

U.S. brand owners must understand that compliance with the ECL and related laws is the best way to ensure that an online merchant is a lawfully constituted and legitimate business entity in China. Seeking compliance with the ECL would also be consistent with traditional concepts of choice of law, which provides that the law of the place in which a business entity is organized should be applied to determine the legality of a business entity.¹⁷⁵ Brand owners should realize that rigorous enforcement of the ECL and related laws should result in a noticeable deterrent effect on counterfeits sold on China-based and U.S.-based e-commerce marketplace sites.

¹⁷⁵ See *Corporations*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/corporations> (last visited Feb. 3, 2022) ("A corporation is a legal entity created through the laws of the state of its incorporation.").