

A Chinese Lesson in Combatting Online Counterfeits: The Need to Place Greater Obligations on Social Media as They Transform to E-Commerce Platforms

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I. INTRODUCTION

If you use screen time tracking apps or features on your smartphone, it is very likely that you find yourself spending most of your screen time on social media. In 2019, global users spent 50% of their mobile phone screen time on social networking and communication apps.¹ However, social media users these days gradually shift from purely “social” events to more purpose-led activities. While connecting with friends remains the main purpose for using social media, there is a usage trend towards news consumption.² In other words, many people use social media to “stay informed.”³

Today, when we scroll on our news feed, we come across anything and everything—major global events like trade wars, the coronavirus pandemic, the trendiest shows on Netflix, results of an exciting NFL game, and of course, fashion trends for the next season. Social media continue to merge entertainment and commerce, creating a hub for mass consumption that allows users to research and find products to buy.⁴ This is especially common among younger generations. A member of Chinese Generation Z,⁵ Yifei Du, said that she uses social media to follow up with trends and get shopping tips from influencers.⁶ She also sometimes generates content about her own shopping experience.⁷

Social media users’ craving for shopping content revived the fashion industry after the 2008 recession.⁸ Use of social media by luxury brands began to surge in 2009.⁹ Social media offer great interactivity that enables luxury brands to monitor customer reviews more closely, and accordingly build the brand by increasing awareness, involvement, and engagement with customers.¹⁰

1. Sarah Perez, *App Stores Saw Record 204 Billion App Downloads in 2019, Consumer Spend of \$120 Billion*, TECHCRUNCH (Jan. 15, 2020, 9:00 AM), <https://techcrunch.com/2020/01/15/app-stores-saw-record-204-billion-app-downloads-in-2019-consumer-spend-of-120-billion/> [<https://perma.cc/8SL3-FBBC>].

2. Viktoriya Trifonova, *How Do Consumers in the West Use Social Media for Shopping?*, GLOBALWEBINDEX (May 14, 2019), <https://blog.globalwebindex.com/chart-of-the-week/social-shoppers-in-the-west/> [<https://perma.cc/8WZR-EG9L>].

3. Olivia Valentine, *Top 10 Reasons for Using Social Media*, GLOBALWEBINDEX (Jan. 11, 2018), <https://blog.globalwebindex.com/chart-of-the-day/social-media/> [<https://perma.cc/U275-GB8P>].

4. Trifonova, *supra* note 2.

5. Generation Z (or Gen Z for short) refers to the generation that is born around mid-to-late 1990s to the early 2010s. This is a generation that has used digital technology since a young age and is generally comfortable with the Internet and social media. See *Generation Z*, WIKIPEDIA, https://en.wikipedia.org/wiki/Generation_Z (last visited Apr. 14, 2020) [<https://perma.cc/BF6E-E8YT>].

6. Christine Lee, *Wise Up: The Big Mistakes Luxury Brands Are Making with China’s Gen Z*, JING DAILY (May 28, 2018), <https://jingdaily.com/luxury-brands-china-gen-z/> [<https://perma.cc/3SAB-ZQRQ>].

7. *Id.*

8. See generally Iris Mohr, *The Impact of Social Media on the Fashion Industry*, 15 J. APPLIED BUS. & ECON. 17 (2013).

9. *Id.* at 18.

10. *Id.*

Social media shoppers also value customer reviews more than before.¹¹ These consumers are wary of one-sided advertisement, and they seek human interaction to develop trust in brands before a transaction.¹² Social media, in this context, offer easy access for consumers to collect authentic reviews from other individuals. Consumers can search postings or tags for a certain brand or product to navigate among brands, informing their shopping decisions along the way.¹³

However, brands and consumers are not the only ones benefiting from the emergence of social media. Social media have become the new battlefield for combating counterfeits. Counterfeiters constantly create new accounts and postings to sell fake luxuries at almost zero cost, which makes taking down online counterfeits merchandise a “whack-a-mole” game.¹⁴ Brand owners have to commit their limited time and resources to monitor their trademarks and continuously seek takedowns of the counterfeit listings.¹⁵

China, as the world’s most populated country and one of the most rapidly growing economic bodies, offers global luxury brands a major e-commerce market. The constant growth in the number of Chinese social media users also sparks new opportunities for global luxury brands to penetrate the market. However, the Chinese social media ecosystem presents a great difference from the one in the Western world and unique challenges to brands. While global brands navigate the distinctive Chinese social media ecosystem, recent legal reforms in China emphasize the importance of regulating e-commerce, including establishing cyber courts and issuing the 2019 E-Commerce Law.¹⁶ This Note will explore whether such reforms provide adequate guidance for global luxury brands to effectively enforce their trademark rights in China.

Part II of this Note will lay a foundation for discussing the common opportunities and challenges brought by social media to luxury brands. Part III will demonstrate the unique challenges brought by Chinese social media that place a greater burden on brands to monitor the market and enforce their rights. Part IV will analyze how the traditional enforcement methods in China are outdated by technological development, and how China’s recent legal

11. *Shopper Experience Index*, BAZAARVOICE 7 (2019), https://www.bazaarvoice.com/wp-content/themes/bazaarvoice/_sei-2019/static/downloads/BV19-SEI-Main-UK-Final.pdf [<https://perma.cc/BNY8-WCPK>].

12. *Id.* at 16.

13. *See id.* at 10.

14. James Ray, *Trademark Enforcement: A More Nuanced Game Than Whack-a-Mole*, IPWATCHDOG (Oct. 23, 2018), <https://www.ipwatchdog.com/2018/10/23/trademark-enforcement-whack-a-mole/id=102344/> [<https://perma.cc/8UPM-VXHX>].

15. Frederick Mostert, *Study on Approaches to Online Trademark Infringement*, WORLD INTELL. PROP. ORG. 7 (Sept. 1, 2017), https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_12/wipo_ace_12_9_rev_2.pdf [<https://perma.cc/4EG4-XAU9>].

16. *See, e.g.*, Sara Xia, *China’s New E-Commerce Law and Its Foreign Company Impacts*, CHINA L. BLOG (Apr. 11, 2019), <https://www.chinalawblog.com/2019/04/chinas-new-e-commerce-law-and-its-foreign-company-impacts.html> [<https://perma.cc/7YMY-RV7L>]; Dani Deahl, *China Launches Cyber-Court to Handle Internet-Related Disputes*, VERGE (Aug. 18, 2017) <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes> [<https://perma.cc/K4H9-NB7G>].

reforms fall short on online trademark enforcement. Finally, Parts V and VI will suggest an amendment to China's E-Commerce Law that includes social media platforms as e-commerce platform operators, with a hope to place a heavier burden on Chinese social media to assist in trademark enforcement. These sections will also suggest that China's experience may better prepare brands for their enforcement on other social media in light of the U.S.' recent efforts to strengthen e-commerce regulation.

II. SOCIAL MEDIA BRING OPPORTUNITIES FOR BRANDING, ACCOMPANIED BY CHALLENGES TO ONLINE TRADEMARK ENFORCEMENT.

The emergence of social media allows luxury brands to better facilitate the word-of-mouth marketing approach.¹⁷ Today, interpersonal communication about products and services is one of the most influential sources of marketplace information for consumers.¹⁸ A 2018 report highlighted that 40% of luxury purchases are influenced by what consumers see online, which emphasizes the impact of social media and online channels on a luxury brand's visibility and reputation.¹⁹

On the other hand, social media provide a powerful tool for luxury brands to survey the market for customer behaviors and trends. The latest fashion events, product launches, or celebrity appearances might spark customer discussions on social media.²⁰ Hashtags on social media also help luxury brands navigate and filter customer reviews or preferences. Accordingly, brands often use social media to monitor brand reputation via online influencers in order to attract customers that align with certain social values of the brands.²¹

However, counterfeiters also benefit from the convenience of social media. Social media provide not only easy access, but also an anonymity shield that allows counterfeiters to evade identification. Even when its postings are removed or its account gets blocked, a counterfeiter can easily set up a new account in little time at no cost to continue selling fake products.²² Furthermore, the sheer volume of counterfeit postings makes timely online monitoring and tracking extremely difficult. For example, it is estimated that Instagram might have as many as 95 million bot accounts posing as real accounts.²³ Many of these bot accounts upload an enormous

17. Mohr, *supra* note 8, at 18.

18. *Id.*

19. Sophia Guan, *93% of Consumer Engagement with Luxury Brands Happens on Instagram*, DIGIMIND (Nov. 30, 2018), <https://www.digimind.com/en/news/93-of-consumer-engagement-with-luxury-brands-happens-on-instagram> [<https://perma.cc/LL2C-W3JT>].

20. *Id.*

21. *Id.*

22. Mostert, *supra* note 15, at 3.

23. Andrea Stroppa, et al., *Instagram and Counterfeiting in 2019: New Features, Old Problems*, GHOSTDATA 6 (Apr. 9, 2019), https://ghostdata.io/report/Instagram_Counterfeiting_GD.pdf [<https://perma.cc/U9D8-Q5GR>].

amount of counterfeit postings every day, leading to chaotic user experiences.²⁴ These challenges make online trademark enforcement an unwinnable “whack-a-mole” game, where enforcers have limited whacking resources for unlimited moles.²⁵

Brands are exploring ways to identify counterfeiters. Typically, the identities of online counterfeiters are only known by the platform.²⁶ Yet given user privacy concerns, social media platforms are reluctant to reveal identifying information to law enforcement without a subpoena.²⁷ Most platforms implement a notice-and-takedown system that allows intellectual property right owners to report infringing conduct to the platforms. Take Facebook as an example. Currently, under Facebook’s trademark infringement reporting policy, only a trademark owner can report infringing content to Facebook, and in response, Facebook will take down infringing content and inform the fraudulent poster about the report.²⁸ The policy does not mention surrendering any poster’s information to the trademark owner, and thus fails to provide a mechanism for brands to identify counterfeiters.²⁹ As a result, brands cannot completely enjoin the counterfeiters from further unlawful activities, so instead they endlessly “whack the moles” by sending infringement reports to infinity and beyond.

Civil litigation is another available yet imperfect approach. Because many of the most popular social media—including Facebook, Instagram, and Snapchat—are owned and operated by U.S. companies, brands may turn to the U.S. courts for help. Some federal circuits allow a plaintiff to use a fictitious name designation against an unidentified defendant when filing a complaint and then to amend the complaint after revealing the defendant’s identity through discovery.³⁰ Some state court rules also allow such fictitious name designations.³¹ In practice, trademark owners often subpoena social media platforms as third-party intermediaries with whom infringers engage.³² However, even when involved in litigation, social media platforms may enforce their policies by prioritizing user information privacy over trademark owners’ needs to enforce their rights. For instance, in *Nine West Dev. Corp. v. Does 1-10*, Nine West, a popular apparel brand, reported twice to Facebook

24. *Id.*

25. Mostert, *supra* note 15, at 3.

26. Maia Woodhouse, *IP Enforcement in the Digital Age: Identifying Infringers in an Anonymous Online Environment*, IPWATCHDOG (Mar. 23, 2019), <https://www.ipwatchdog.com/2019/03/23/ip-enforcement-in-the-digital-age-identifying-infringers-online/id=107610/> [<https://perma.cc/HE48-59FS>].

27. *Id.*

28. *Reporting Trademark Infringement*, FACEBOOK, <https://www.facebook.com/help/440684869305015/> (last visited Nov. 30, 2020) [<https://perma.cc/B423-3L5B>].

29. *See id.*

30. Edward F. Sherman, *Amending Complaints to Sue Previously Misnamed or Unidentified Defendants After the Statute of Limitations Has Run: Questions Remaining from the Krupski Decision*, 15 NEV. L.J. 1329, 1345 (2015).

31. *Id.*

32. Woodhouse, *supra* note 26.

about “fake postings” that falsely indicated Nine West as the source.³³ Facebook took down the postings and further notified the fraudulent account owner at Nine West’s request.³⁴ Yet, Facebook refused to provide information regarding the identity of the creator of the fraudulent account.³⁵ In short, U.S. social media platforms rarely risk sacrificing their users’ privacy at any third-party requests.

The difficulty of identifying anonymous infringers is common across the Pacific. In China, the current legal framework does not require online platform operators to disclose identifying information of infringers to trademark owners.³⁶ Some e-commerce platforms, such as Taobao, implement their own rules to implead third-party sellers to avoid liability when sued by trademark owners, and Chinese courts tend to recognize such an approach and do not question its legality.³⁷ In light of this practice, platforms, not judges, have the discretion to disclose infringers’ identifying information, which may undermine the efficiency of trademark enforcement against the platforms. Nevertheless, how this approach expands to social media platforms remains to be examined through future judicial practice. Although China and the U.S. seem to have different priorities in balancing privacy rights and trademark rights, neither country’s approach eases brands’ burden to chase after anonymous online infringers.

III. THE UNIQUE ECOSYSTEM OF CHINESE SOCIAL MEDIA BRINGS A DIFFERENT SET OF CHALLENGES FOR LUXURY BRANDS TO ENFORCE THEIR TRADEMARKS.

Other than the common obstacles for online trademark enforcement across the world, brands also need to keep an eye on the specific challenges brought by the markets in different countries. Today, luxury brands conduct their business in the form of multinational companies (MNCs).³⁸ These

33. See Compl. at 10–14, ¶¶ 26–35, *Nine West Dev. Corp. v. Does 1-10*, No. 07-cv7533 (S.D.N.Y. Aug. 24, 2007), <https://www.courtlistener.com/recap/gov.uscourts.nysd.312057.1.0.pdf> [https://perma.cc/Y4XA-TAAB].

After bringing this suit, Nine West managed to obtain the identity of the defendants upon discovery. The court granted permanent injunction against such defendants. See generally *Permanent Inj. and J. on Consent, Nine West Dev. Corp. v. Armon Invento and Does 1-10*, No. 07-cv7533 (S.D.N.Y. Mar. 11, 2008).

34. Compl., *supra* note 33, at 11, ¶ 30; *Permanent Inj.*, *supra* note 33 at 14, ¶ 37.

35. *Permanent Inj.*, *supra* note 33 at 14, ¶ 36.

36. Yong Wan, et al., *Privacy Protection in China*, U. WASH. INTERMEDIARY LIABILITY RES. PROJECT 51 n.116, <https://www.law.uw.edu/media/1404/china-intermediary-liability-of-isps-privacy.pdf> [https://perma.cc/T4YE-9DUH].

37. *Id.* at 51–52 (providing that Taobao performs as a private judge to evaluate the trademark owner’s documents regarding a suspected infringing conduct, and then discloses the infringer’s identity to the court if it finds necessary).

38. Daniel C.K. Chow, *Trademark Enforcement in Developing Countries: Counterfeiting as an Externality Imposed by Multinational Companies*, in *TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY* 283, 283 (Irene Calboli & Edward Lee ed., 2014).

MNCs spend great efforts on developing their brands.³⁹ However, brand visibility does not only matter on U.S.-based platforms like Instagram, Facebook, or Snapchat. As the MNCs move forward to develop international marketing strategies, they must keep in mind which social media are the most popular platforms in each country and how the consumers in each country engage in online shopping under the influence of social media. Enormous population and growing purchasing capability make China a desirable market for global luxury brands. According to a Statista report, the number of social network users worldwide amounted to 3.4 billion in 2019.⁴⁰ Disaggregating this number, China possessed 882.23 million users and ranked first among all countries,⁴¹ while the United States ranked third with 219.86 million users.⁴²

With a combination of huge user numbers and platform variety, Chinese social media provide a significant opportunity for luxury brands to solicit large-quantity sales. For example, Burberry was recognized as the first luxury brand to use social media for flash sale marketing in China.⁴³ On August 17, 2018, China's Valentine's Day, Burberry launched a mini-program⁴⁴ on WeChat, the most popular social media platform in China, to sell two new handbags exclusive to the Chinese market.⁴⁵ Later that year, Christian Dior became the first luxury brand to leverage livestream to sell its beauty products on WeChat.⁴⁶ This hour-long livestream took place on November 16, 2018, and attracted more than three million visitors.⁴⁷

However, Chinese social media possess some significantly distinctive features, creating additional difficulty for global luxury brands to navigate. This sharp distinction stems from the implementation of the Great Firewall of China. Due to China's strict government control over Internet content, the global social media giants—Facebook, Twitter, and Instagram—are

39. *Id.* at 284.

40. *Social Networks in China*, STATISTA 2 (Nov. 7, 2019), https://www-statista-com.proxygw.wrlc.org/topics/1170/social-networks-in-china/#dossierSummary__chapter1.

41. *Id.* at 3, 8.

42. *Number of Social Network Users in the United States from 2017 to 2025*, STATISTA (July 15, 2020), <https://www.statista.com/statistics/278409/number-of-social-network-users-in-the-united-states/> [<https://perma.cc/WH3P-8WBC>].

43. Tasmin Smith, *Exclusive: Burberry Launches 2 Handbags Just for China on First WeChat Mini-Program*, JING DAILY (Aug. 3, 2018), <https://jingdaily.com/burberry-wechat-mini-program/> [<https://perma.cc/R8YY-VCBH>].

44. "Mini-programs" are lightweight apps that run inside another app, such as WeChat. They don't need to be downloaded or upgraded through app stores. They make it possible for one app to perform the service of many apps combined. Julianna Wu, *Mini Programs: The Apps inside Apps that Make WeChat So Powerful*, S. CHINA MORNING POST (Feb. 27, 2019, 6:11 AM), <https://www.abacusnews.com/who-what/mini-programs-apps-inside-apps-make-wechat-so-powerful/article/3000920> [<https://perma.cc/UR2M-LU5R>]; *see also infra* Part III. A.

45. Smith, *supra* note 43.

46. Yiling Pan, *In an Industry First, Dior Beauty Debuts Livestreaming Sales on WeChat*, JING DAILY (Nov. 16, 2018), <https://jingdaily.com/dior-livestreaming-wechat/> [<https://perma.cc/M6QW-FLMP>].

47. *Id.*

inaccessible in China.⁴⁸ In response, China's Internet companies gradually developed a different set of social media platforms that better adapt to Chinese users' needs and preferences.⁴⁹ As a result, brands may find their enforcement strategies on Facebook or Instagram non-applicable to the Chinese market. Thus, luxury brands are driven by the need to exploit the Chinese market to explore the unique features of Chinese social media.

A. The "All-In-One" Feature of China's Major Social Media Encourages Embedding In-App Checkout Methods, Which Creates a Closed-Up Environment for Social Shopping.

Many social media in China were created first as messaging or blog-posting platforms. However, many have evolved into an "all-in-one" hybrid, enabling users to accomplish all kinds of tasks within one platform.⁵⁰ Among all services provided on such hybrid platforms, the implementation of a quick and easy in-app checkout feature is most relevant here.

An in-app checkout feature allows users to make a purchase without leaving the social media app and provides a smoother experience of social shopping.⁵¹ In China, WeChat serves as the most important portal to channel users for brands. Since 2017, WeChat has been experimenting a new model of e-commerce—it started to integrate "mini-programs," which are embedded inside the main WeChat app as sub-ports for merchants to further interact with their followers and potential customers.⁵² For brand owners seeking a more efficient and direct way to connect to buyers, mini-programs provide merchants with new ways to sell products.⁵³ Mini-programs grant freedom for brands to independently design their shop page interface and also access and analyze customer data as they please, which lowers customer acquisition costs for brands.⁵⁴ Also, along with other features embedded inside WeChat, such

48. *How Is Social Media Different in China from The West?*, MOBIVISTA (May 23, 2019), <https://www.mobvista.com/en/blog/social-media-different-china-west/> [<https://perma.cc/4A78-K6LW>].

49. *See Social Media and Censorship in China: How Is It Different to the West?*, BBC NEWS (Sept. 26, 2017), <http://www.bbc.co.uk/newsbeat/article/41398423/social-media-and-censorship-in-china-how-is-it-different-to-the-west> [<https://perma.cc/PM94-ARUS>].

50. *See, e.g., Yuan Ren, Know Your Chinese Social Media*, N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/fashion/china-social-media-weibo-wechat.html> [<https://perma.cc/N9E6-JUD3>].

51. *See Daniel Keyes, Instagram Is Moving Toward Becoming a Full-Blown E-commerce Platform*, BUS. INSIDER (May 2, 2019), <https://www.businessinsider.com/instagram-in-app-checkout-feature-2019-5> [<https://perma.cc/B6DG-XRT8>].

52. Mini programs are not exclusively designed for users who may act as online merchants. In fact, mini programs are available to general WeChat users and they provide more functions than marketplace.

53. Eva Xiao, *In WeChat, Sellers Are Experimenting with New Models of Ecommerce*, TECH IN ASIA (Jan. 19, 2018), <https://www.techinasia.com/wechat-mini-programs-ecommerce> [<https://perma.cc/KZL7-GU3A>].

54. *See Franklin Chu, Why China Ecommerce Is Going Crazy for WeChat Mini-Programs*, DIGIT. COMM. 360 (Apr. 16, 2019), <https://www.digitalcommerce360.com/2019/04/16/why-china-ecommerce-is-going-crazy-for-wechat-mini%E2%80%91programs/> [<https://perma.cc/RSJ4-ZHGE>].

as mobile wallet and group-chat sharing, mini-programs allow merchants to direct users from their subscription posts to the shop page and encourage users to share the link with friends to obtain group-shopping coupons, all of which can be done with a few taps, without leaving the one app.⁵⁵

More importantly, WeChat presents almost zero limitations for entities to open stores via mini-programs as long as required qualification documents are provided for verification.⁵⁶ This boosts e-commerce in China farther. In 2018, the number of mini-programs reached 1 million, which was half the size of the Apple App Store that year.⁵⁷ The next year, Tencent, the company that owns WeChat, announced that its users spent 800 billion Chinese yuan (\$115 billion USD) through mini-programs in 2019.⁵⁸ The company also intended to focus more on adding merchants and services to mini-programs in 2020, which seems to signal that Tencent is increasing its competitiveness in the e-commerce field.⁵⁹

On the other hand, dominant social media in other parts of the world are also exploring ways to integrate shopping features inside the platforms, but their approaches generally contrast with WeChat's openness to business entities. In 2018, Instagram allowed "shoppable posts," a feature that showed the price tag of the displayed products and a direct link to the shopping website.⁶⁰ This feature was somewhat cumbersome, because the users were re-directed to external links and had to experience the annoying checkout process every time they placed an order.⁶¹ One year later, Instagram enabled in-app checkout for those shoppable posts.⁶² The new feature allows users to purchase items with stored payment information without leaving the app, but it comes at the price of merchants paying a "seller's fee" to enable the

55. Xiao, *supra* note 53.

56. See generally *Service Categories Available for Mini Programs*, WECHAT OFF. DOCUMENTS (微 信 官 方 文 档), <https://developers.weixin.qq.com/miniprogram/en/product/material/#Service-Categories-Available-for-Mini-Programs-Owned-by-Entities-Other-Than-Individuals> (last visited Apr. 11, 2020) [<https://perma.cc/4PN8-AYGF>]. This page lists the required qualifications documents for non-individuals, individuals and overseas entities to apply for mini program operation. These documents are in general mandated by the Chinese government for regulating commerce, but not for WeChat's own purpose to review the qualifications of business operators.

57. Rita Liao, *WeChat Reaches 1M Mini Programs, Half the Size of Apple's App Store*, TECHCRUNCH (Nov. 7, 2018), <https://techcrunch.com/2018/11/07/wechat-mini-apps-200-million-users/> [<https://perma.cc/6JYJ-XGG5>].

58. Masha Borak, *WeChat Mini Programs Are Becoming a Lot More Important for Tencent*, S. CHINA MORNING POST: ABACUS (Jan. 9, 2020 8:39 PM), <https://www.scmp.com/abacus/tech/article/3045430/wechat-mini-programs-are-becoming-lot-more-important-tencent> [<https://perma.cc/4REY-JJZV>].

59. *Id.*

60. Arielle Pardes, *Instagram's New Shopping Feature Makes It a Digital Mall*, WIRED (Mar. 19, 2019, 8:00 AM), <https://www.wired.com/story/instagram-in-app-shopping-feature/> [<https://perma.cc/TK8K-HKFJ>].

61. *Id.*

62. Josh Constine, *Instagram Launches Shopping Checkout, Charging Sellers a Fee*, TECHCRUNCH (Mar. 19, 2019, 9:33 AM), <https://techcrunch.com/2019/03/19/instagram-checkout/> [<https://perma.cc/8BU9-74L8>].

“Checkout with Instagram” option, and is only available to selective partner brands.⁶³

In March 2019, Facebook also expressed an interest in social shopping by shifting its focus to building a one-stop shop messaging service that combines everything the company has to offer.⁶⁴ Although there are many differences between Facebook and WeChat, the “everything-app” ambition of the two companies seems to point in the same direction, which is to implement as many essential functions as possible to encourage users to stay within one app.⁶⁵

Meanwhile, Snapchat seeks to mine its way to social shopping by making use of online influencers, but only selective ones. In June 2019, Snapchat launched in-app stores for five of its most powerful influencers, namely Kylie Jenner (Kylie Cosmetics), Kim Kardashian (KKW Beauty), Shay Mitchell (Béis), Spencer Pratt (Pratt Daddy Crystals), and Bhad Bhabie (BHADgoods).⁶⁶ Snapchat users can now purchase directly from these brands with the swipe-up feature that is built inside the app.⁶⁷

Although U.S. platforms have started integrating in-app checkout features, the total revenue generated in this way contributes to a relatively small portion of online sales.⁶⁸ In 2018, social media commerce drew \$16.94 billion in the U.S., which was only 3% of the \$513.61 billion in online sales estimated by the U.S. Department of Commerce for the year.⁶⁹ In contrast, social media commerce in China counts for more of online shopping, comprising 8.5% of online sales in 2017.⁷⁰ Analysts project social media commerce to increase into 2022, reaching 15% of e-commerce, or \$413 billion in sales.⁷¹

That said, there are some underlying IP concerns despite the robust e-commerce growth on Chinese social media platforms. First of all, WeChat, like other social media, does not function as a search engine. The lack of organic search makes it harder for brands to monitor their trademark in the closed-up platform.⁷² Second, the in-app checkout feature replaces the

63. *Id.*

64. Nick Statt & Shannon Liao, *Facebook Wants to Be WeChat*, VERGE (Mar. 8, 2019, 1:12 PM), <https://www.theverge.com/2019/3/8/18256226/facebook-wechat-messaging-zuckerberg-strategy> [<https://perma.cc/8ZNY-NQMU>].

65. *Id.*

66. Kerry Flynn, *Ahead of “Shop” Button for Publishers, Snapchat Launches In-App Stores for Snap Influencers*, DIGIDAY (June 6, 2019), <https://digiday.com/marketing/snapchat-stores-influencers-shop/> [<https://perma.cc/VZK9-D7SH>].

67. *Id.*

68. Daniela Wei & Shelly Banjo, *The Future of Shopping Is Already Happening in China*, BLOOMBERG (Apr. 24, 2019, 4:00 PM), <https://www.bloomberg.com/news/articles/2019-04-24/china-s-gen-z-skips-the-stores-and-shops-on-social-media> [<https://perma.cc/GN4L-DLUN>].

69. *Id.*

70. *Id.*

71. *China’s Retail Sales Are Growing Fast on Social Media*, MARKETPLACE (May 7, 2019), <https://www.marketplace.org/shows/marketplace-tech/china-livestreaming-boosting-retail/> [<https://perma.cc/FY6K-QEAR>].

72. *See What is a WeChat Shop?*, WALKTHECHAT, <https://walkthechat.com/wechat-shops/> (last visited on Apr. 12, 2019) [<https://perma.cc/2JKR-NSGF>].

inbound links to merchants' websites outside the app, with which brands may track the domain name to the registration information and find out who the infringers are. Last but not least, the low threshold of registering a mini-program shop challenges WeChat's ability to screen the merchants.⁷³ Within only one year of the open test of mini-programs, WeChat shut down 875 mini-programs for selling fake goods.⁷⁴ It is unclear whether Tencent can effectively manage shops on WeChat mini-programs to address IP infringement issues like counterfeit goods.⁷⁵

B. The Social Media Landscape in China Is More Fragmented, Requiring Brands to Exert Greater Efforts to Monitor the Whole Market.

While WeChat remains the most popular "everything app" in China, there are other apps in the Chinese social media ecosystem that satisfy different user needs, making the social media landscape quite fragmented. One possible reason for fragmentation is that the domestic market in China is so big that platforms can fragment their appeal to demographic slices or geographic areas without competing against each other.⁷⁶ More and more social media are capitalizing on marketing to users' shopping needs. By implementing third-party in-app payment methods, these social media potentially enable counterfeiters to dilute the platform as a sales channel.⁷⁷

When it comes to shopping review app, perhaps the most popular one in China is "Xiaohongshu" (which is literally translated as "Little Red Book"). Created in 2013 as an online community to share product reviews and lifestyle posts, Xiaohongshu attracts millions of users who want to learn about others' shopping experiences before they make their own decision to purchase.⁷⁸ Also, users typically visit Xiaohongshu to see what is trendy. Thus, Xiaohongshu is a platform that thrives on user-generated content ("UGC"), and users can add "product tags" to their postings that further direct readers to a brand's page.

In response to users' strong desire to follow the trend by purchasing the products promoted by influencers, Xiaohongshu gradually expanded from a shopping directory to a hybrid social media and e-commerce platform.⁷⁹ It

73. See Borak, *supra* note 58.

74. Weixin Pai (微信派), *Guanyu Daji "Jiahuo, Gaofang" Lei Xiaochengxu de Gonggao* (关于打击“假货、高仿”类小程序的公告) [*Announcement on Cracking Down on "Fake and High Imitation" Mini-Programs*] (Jan. 23, 2018), <https://mp.weixin.qq.com/s/103kuKi9liQWLJwwsRYrPw> [<https://perma.cc/VQL6-YRNZ>].

75. Xiao, *supra* note 53.

76. *How is Social Media Different in China from The West?*, *supra* note 48.

77. See *Counterfeits on TikTok: IP Enforcement Best Practices*, WORLD TRADEMARK REV. (June 10, 2019), <https://www.worldtrademarkreview.com/brand-management/counterfeits-tiktok-ip-enforcement-best-practices> [<https://perma.cc/28ZA-P7U7>].

78. Chencen, *Xiaohongshu Is Becoming a Giant in Both Social Media and E-Commerce*, DAXUE CONSULTING (Mar. 22, 2019), <https://daxueconsulting.com/latest-facts-and-insights-about-xiaohongshu-2019/> [<https://perma.cc/VL74-BW4B>].

79. See generally *id.* (discussing the development of Xiaohongshu).

now embeds an in-app marketplace, the RED Mall, where users can search and purchase goods directly within the app.⁸⁰ It also provides “product suggestions” as shopping entries under a brand’s introduction page, which link to the UGC tagged with the brand’s name.⁸¹ Unsurprisingly, many brands leverage the platform to improve visibility and interaction with potential customers,⁸² and around 20,000 brands have set up official accounts on the platform, including some very well-known brands like Tom Ford Beauty, Tiffany & Co., and Guerlain.⁸³

However, the products supplied on the RED Mall face a credibility challenge. Some products are listed as “sold by verified merchants,” which creates an impression that users are purchasing from official stores. However, some users have complained that they bought counterfeits from “official stores” on the platform.⁸⁴ Apart from cheap knockoffs sold as “verified official products,” there are about 10,000 third-party sellers on the RED Mall, creating an additional set of problems for legitimate brands to monitor their trademarks.⁸⁵

Another example is Douyin/TikTok. Started as a short video platform where users share their life moments and creativity through 15-second clips, TikTok has swept both the Chinese and Western markets. Witnessing TikTok’s great success, loads of brands launched their content campaigns on this platform.⁸⁶ In April 2019, Hollister tested TikTok ads that included “shop now” buttons, which would bring users to shopping sites inside the app.⁸⁷ Other retailers, like Poshmark, have also advertised on the app.⁸⁸

While Western advertisers have dabbled with TikTok—without engaging its e-commerce functions—the Chinese version of this app, Douyin, succeeded in converting its user traffic to millions of dollars with a “shop now” button.⁸⁹ In 2018, Bytedance (the developer company of Douyin and

80. See Corsearch, *The Facts about RED (Xiaohongshu 小红书): Counterfeits, RED and Brand Enforcement*, MEDIUM (Jan. 16, 2020), <https://medium.com/@Corsearch/the-facts-about-red-xiaohongshu-%E5%B0%8F%E7%BA%A2%E4%B9%A6-counterfeits-red-and-brand-enforcement-pointer-brand-b912866e081> [<https://perma.cc/HP5F-7GPQ>].

81. See generally *Little Red Book: From User Experience to Strategy, Leverage Xiaohongshu Now!*, DIGIT. BUS. LAB (Jan. 28, 2019), <https://digital-business-lab.com/2019/01/leverage-little-red-book/> [<https://perma.cc/FCQ2-PE5R>].

82. See *id.*

83. See Corsearch, *supra* note 80.

84. See generally *Jiahuo Tousu Fanlan, Shenxian Xinren Weiji de Xiaohongshu Nengfou Poju?* (假货投诉泛滥 深陷信任危机的小红书能否破局?) [*With Complaints about Fake Goods Abound, Can Xiaohongshu Break Free from the Trust Crisis?*], SINA.COM (Apr. 29, 2019, 06:57 AM), <https://tech.sina.com.cn/i/2019-04-29/doc-ihvhiqax5630134.shtml> [<https://perma.cc/ZV43-5VJB>].

85. See Corsearch, *supra* note 80.

86. Cale Guthrie Weissman, *How Tiktok Is Testing In-app E-Commerce*, DIGIDAY (July 10, 2019), <https://digiday.com/retail/tiktok-testing-app-e-commerce/> [<https://perma.cc/8BF8-PELS>].

87. *Id.*

88. *Id.*

89. James Hale, *TikTok Is a Mostly Untapped Space for Western Ecommerce — But Chinese Companies are Using it to Make Millions*, TUBEFILTER (July 10, 2019), <https://www.tubefilter.com/2019/07/10/tiktok-douyin-ecommerce-marketing-does-tiktok-monetize/> [<https://perma.cc/7YJH-LTEM>].

TikTok), partnered with e-commerce company Alibaba, which owns Taobao, the largest online shopping platform in China. Together, Bytedance and Alibaba offered a “Shop Now” button embeddable in short videos to Douyin accounts with more than one million followers.⁹⁰ The button redirects viewers to Taobao via a single-click product link. This new feature brought great profits in a short amount of time. In December 2018, Bytedance said that adding the button generated considerable sales in just one day, amounting to 200 million Chinese yuan (\$29 million USD).⁹¹ Subsequently, Douyin made the function available to more users, “lowering the threshold from those with one million followers down to just eight thousand followers and more than ten posts.”⁹²

As a result, this content sharing platform has become another outlet to display counterfeits. A search for keywords such as “luxury” and “prestige watches” on Douyin would likely return plenty of postings of fake luxury goods.⁹³ Some suspected fake product videos even receive Douyin’s algorithmic recommendations.⁹⁴ What’s more, the core functions of Douyin—short videos and live streaming—can easily evade the traditional IP enforcement methods relying on text and image searches.⁹⁵ Hence, traditional enforcement tactics relying on automated scraping tools to collect data for review become “obsolete,” resulting in greater difficulty for trademark monitoring.⁹⁶

Other social media also target specialized markets based on a certain type of product or service. Even though they are not necessarily tied to the luxury market, they underscore that the line between social media and e-commerce platforms in China is vanishing. Bilibili, for example, exemplifies how video platforms comparable to YouTube monetize user traffic. Bilibili is one of the most popular video sharing platforms in China, themed around animation, comics, and gaming (“ACG”) culture, where users can submit, view, and add commentary subtitles on videos.⁹⁷ It also integrates an in-app marketplace that sells event tickets and ACG derivative products.⁹⁸ Users can directly purchase goods within the app with embedded third-party payment methods. According to Bilibili’s first-quarter report of 2019, the profits

90. *Id.*

91. *Id.*

92. *Id.*

93. Eva Yoo, *Short Video Platforms Douyin, Kuaishou Accused of Showing Counterfeit Products*, TECHNOD (Mar. 26, 2018), <https://technode.com/2018/03/26/douyin-kuaishou-counterfeit-products/> [<https://perma.cc/T9YW-ZLVU>].

94. *Id.*

95. *Counterfeits on TikTok*, *supra* note 77.

96. *Id.*

97. Steffi Noel, *The Commercialization of the Bilibili Platform with a New E-commerce Function*, DAXUE CONSULTING (June 24, 2019), <https://daxueconsulting.com/commercialization-bilibili-platform/> [<https://perma.cc/WHH3-VH9R>].

98. *See id.*

derived from e-commerce consisted of 7% of the total quarterly revenue of the company, amounting to 15 million dollars.⁹⁹

Other examples of apps with in-app markets include “Netease Cloud Music,” a music streaming service like Spotify with user comment features. Netease Cloud Music has a plugged-in store in its app that allows users to buy sound recording products, musical instruments, and many other music-related items.¹⁰⁰ Another app, “Xiachufang,” an online recipe-sharing community, also has a marketplace where cooking stencils and meal kits are being sold.¹⁰¹ Users reading recipes, for example, may find links directing them to purchase the materials for a dish they are interested in, of course, without leaving the app.

How much profit these actions will generate remains to be tested, but it is an obvious, growing trend that Chinese social media are trying to forge a new e-commerce approach by combining the socializing behaviors and shopping desires of users. Facing the challenges brought by this new trend, luxury brands must develop counterfeit combating tactics that are able to keep pace with technological developments.

IV. THE CURRENT LEGAL SCHEMES IN CHINA CANNOT PROMISE A POSITIVE EXPECTATION FOR TRADEMARK ENFORCEMENT

A. *Traditional Trademark Enforcement Methods Cannot Adequately Adapt to the Context of Social Media.*

To address the criticism of weak IP protection, China tries to improve its IP enforcement methods to stay aware of the nation’s growing economy.¹⁰² The current enforcement methods remain the same as before the rise of social media: administrative raids, civil actions, and criminal prosecutions.¹⁰³ However, social media enable new infringing behaviors that old legal

99. See *BZhan Fabu 2019nian Q1 Caibao: Zongyingshou Dadao 13.7yi Yuan, Youxi Shouru Zhanbi 64%* (B 站发布 2019 年 Q1 财报: 总营收达到 13.7 亿元, 游戏收入占比 64%) [*Bilibili Released Q1 Financial Results in 2019: the Total Revenue Reached 1.37 Billion Yuan, with Game Revenue Accounting for 64%*], BILIBILI.COM (May 14, 2019), <https://www.bilibili.com/read/cv2686898/> [<https://perma.cc/2C2C-JZ69>].

100. Netease Cloud Music has a web version of its store, which is the same as the one in the mobile app but with a different interface. The web version is available here: NETEASE CLOUD MUSIC, <https://music.163.com/store/product> (last visited Dec. 1, 2020) [<https://perma.cc/WN7M-59BZ>].

101. See Yingzhao Zhu, *A UI/UX Design Walk-Through of Xiachufang, a Leading Chinese Recipe App*, MEDIUM (Oct. 18, 2019), <https://medium.com/@yingzhaozhu/a-ui-ux-design-walk-through-of-xiachufang-a-leading-chinese-recipe-app-32bbe7fdf3db> [<https://perma.cc/X8DQ-8V4E>].

102. Jennifer Lei, Note, *Makeup or Fakeup?: The Need to Regulate Counterfeit Cosmetics Through Improved Chinese Intellectual Property Enforcement*, 88 *FORDHAM L. REV.* 309, 317 (2019).

103. See generally *id.* at 317–22.

schemes failed to anticipate, and thus bring new challenges to the existing enforcement framework.

1. Raids by Administrative Agencies

The most frequently utilized enforcement method in China is administrative raids on warehouses.¹⁰⁴ The State Administration for Market Regulation (“SAMR”) carries out this function by working with local law enforcement to raid stores, factories, and warehouses containing counterfeit products upon trademark owners’ petitions.¹⁰⁵ SAMR has the authority to determine infringement while executing the raids and, upon an infringement finding, SAMR can opt to destroy or confiscate infringing goods, or fine the infringers.¹⁰⁶

Because of the public exposure and the fast and inexpensive results, foreign companies tend to enforce their rights through raids.¹⁰⁷ Yet, despite the popularity, administrative raids barely deter counterfeit goods, because counterfeiters can easily return after the raids with a similar name or mark.¹⁰⁸ As discussed in Part II above, the rise of social media worsens the situation. The “whack-a-mole” game perpetuates because of the low cost and high efficiency of setting up new accounts on social media platforms.¹⁰⁹ Furthermore, the failure to identify an anonymous online counterfeiter often hinders brands’ ability to seek administrative raids, because there is “no one” to enforce against.¹¹⁰

2. Civil Actions Against Counterfeiters and Trademark Infringers

Since the implementation of specialized IP courts in Beijing, Shanghai, and Guangzhou since 2014, China has witnessed a drastic increase in IP litigation.¹¹¹ However, foreign companies do not rely on litigation to enforce trademark rights because of the lengthy proceeding or the lack of preliminary injunctions.¹¹² Besides, damages are typically low, thereby disincentivizing litigation.¹¹³

Social media presents other challenges to enforcing trademark rights through civil actions. Although filing a complaint requires at least some basic information to identify the counterfeiter, there is no legal mechanism

104. *Id.* at 317.

105. *Id.* at 318.

106. *Id.*

107. Lei, *supra* note 102, at 318–19; Adela Hurtado, Note, *Protecting the Mickey Mouse Ears: Moving Beyond the Traditional Campaign-Style Enforcement of Intellectual Property Rights in China*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 421, 436–37 (2018).

108. See Lei, *supra* note 102, at 319.

109. See generally *supra*, Part II; see also Mostert, *supra* note 15, at 3, 7.

110. See Woodhouse, *supra* note 26.

111. Lei, *supra* note 102, at 320.

112. *Id.* at 320–21.

113. *Id.* at 321.

available to compel the social media platforms to provide identifying information.¹¹⁴ Besides, the sheer volume of fake luxury product accounts on the platforms makes it impractical for brands to chase after every infringer, so the volume of counterfeit products and their potential harm to the market is unidentifiable merely from an account itself. From a management perspective, brands will seldom choose to chase after a single counterfeiter account in the face of a huge cost of litigation.

3. Criminal Prosecution

Criminal prosecution for IP enforcement is possible under China's Criminal Law, but it is practically unviable due to the scattered nature of counterfeit storages.¹¹⁵ The government will often ignore small and medium scale infringing activities as insignificant, but instead prosecute infringers for large operations that violate the rights of the biggest brands.¹¹⁶ In China, criminal prosecution of trademark cases consisted of less than 1.50% of all IP cases in 2018.¹¹⁷

B. China's New Cyber Courts and E-Commerce Law Improve Online Infringement Enforcement, Yet They Still Fall Short on Trademark Enforcement on Social Media.

Given the huge progress and great economic growth achieved in e-commerce, China has been experimenting with new ways to better regulate this area. In the past few years, China made several groundbreaking changes to its legal system. The most significant changes are the implementation of cyber courts and the issuance of the e-commerce law.

China established its first cyber court in 2017 in Hangzhou, known as the "capital of Chinese e-commerce," where the e-commerce tycoon Alibaba and many other Internet companies sit.¹¹⁸ By creating the cyber court, China addressed the drastic increase in the number of Internet-related claims.¹¹⁹ Within one year, the Hangzhou Court of the Internet accepted more than

114. See *supra* Part II.

115. Lei, *supra* note 102, at 321.

116. *Id.* at 322.

117. 2018 *Xinshou Zhishi Chanquan An Chao 33wan Jian* (2018 新收知识产权案超 33 万件) [More than 330,000 New IPR Cases Were Received in 2018], XINHUA.NET (Apr. 23, 2019, 7:25 AM), http://www.xinhuanet.com/tech/2019-04/23/c_1124401581.htm [<https://perma.cc/W2FP-7A7U>].

118. Dani Deahl, *China Launches Cyber-Court to Handle Internet-Related Disputes*, VERGE (Aug. 18, 2017, 4:33 PM), <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes> [<https://perma.cc/Y25K-NP8J>].

119. See *id.*

12,000 Internet-related cases and concluded more than 10,000 of them.¹²⁰ Shortly after the establishment of the Hangzhou Court of the Internet, China launched two more cyber courts in Beijing and Guangzhou to further explore implementing high technology to improve judicial efficiency.

The difference between cyber courts and traditional courts mainly lies in the procedures. The cyber courts do not require physical attendance.¹²¹ All documents, including filings, evidence submission, payment, and service of documents, are processed online.¹²² The courts also adopt video conference technology to conduct hearings and mediations.¹²³ These changes lower costs for parties to attend judicial proceedings and thus improve the courts' efficiency.¹²⁴

Another groundbreaker is the issuance of China's new statute governing e-commerce, the P.R.C. E-Commerce Law.¹²⁵ China passed the E-Commerce Law in August 2018 and effectuated it on January 1, 2019.¹²⁶ It hikes pressure on online retailers to tackle counterfeit products on their platforms.¹²⁷ This new law applies to three types of operators: e-commerce platform operators, third-party merchants who utilize e-commerce platforms to sell goods and services, and online vendors "operating their own websites or doing business via other network channels, such as social media sites."¹²⁸ This last category indicates that the law extends to merchants who sell goods through WeChat or Douyin/TikTok.¹²⁹ The law also addresses the compliance requirements for platform operators and merchants, such as identity

120. *Zuigao Renmin Fayuan: Gongzheng & Xiaolü, Zai Wangluo Hulian Hutong—Xiezai Hangzhou Hulianwang Fayuan Guapai Chengli Yizhoumian Zhiji* (最高人民法院: 公正&效率, 在网络互联互通——写在杭州互联网法院挂牌成立一周年之际) [*Supreme People's Court: Justice and Efficiency Intersecting on the Internet—A Message for the First Year Anniversary of the Inauguration of the Hangzhou Court of the Internet*], SUP. PEOPLE'S CT. (Aug. 20, 2018, 08:53 AM), <http://www.court.gov.cn/zixun-xiangqing-112931.html> [<https://perma.cc/4JD7-77KE>].

121. Paolo Beconcini, *More "NetCourts" Opening in China*, SQUIRE PATTON BOGGS (Nov. 14, 2018), <https://www.iptechblog.com/2018/11/more-netcourts-opening-in-china/> [<https://perma.cc/6UWH-ANB2>].

122. *Id.*

123. *Id.*

124. *China Opens Its First "Cyber Court"*, YAHOO.COM (Aug. 18, 2017), <https://www.yahoo.com/entertainment/china-opens-first-cyber-court-110619464.html> [<https://perma.cc/GAH6-TM2H>].

125. *Zhonghua Renmin Gongheguo Dianzi Shangwu Fa* (中华人民共和国电子商务法) [P.R.C. E-Commerce Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019), translated in CHINA LAW TRANSLATE.COM (<https://www.chinalawtranslate.com/en/p-r-c-e-commerce-law-2018/> [<https://perma.cc/5Z2A-HUGB>]) [hereinafter E-Commerce Law].

126. Zen Soo, *Here's How China's New E-Commerce Law Will Affect Consumers, Platform Operators*, SCMP (Jan. 1, 2019, 6:02 AM), <https://www.scmp.com/tech/apps-social/article/2180194/heres-how-chinas-new-e-commerce-law-will-affect-consumers-platform> [<https://perma.cc/9YQN-2RC8>].

127. *Id.*

128. *Id.*

129. *Id.*

verification, recordkeeping, tax conformance, and intellectual property protection.¹³⁰

It seems likely that the establishment of the cyber courts and the passage of the E-Commerce Law would allow global brands to bring trademark infringement or unfair competition claims more easily against Chinese counterfeiters. But in practice, several limitations hinder the quick and effective enforcement that global brands seek.

1. Issue One: Jurisdiction of Cyber Courts

The Internet allows a huge number of parties at different locations to enter into one business affair at the same time. If any dispute arises, it is impractical to track every anonymous party in the cyberworld to its real identity in the physical world. The establishment of the cyber courts aims to bypass the difficulty of locating the defendant in Internet-related cases, but still, it does not help much for identifying an anonymous infringer.

Traditionally in China, a plaintiff must provide the defendant's residential information to satisfy territorial jurisdiction to file a suit in a certain court.¹³¹ Otherwise, a plaintiff must prove that the dispute relates to a particular territory to show subject-matter jurisdiction.¹³² The Internet places an extra burden on both issues. Defendants often reside in jurisdictions from the jurisdictions of online platforms, and it takes great effort to locate a specific Internet service user even with IP address trackers.¹³³ And since the Internet is borderless, it is difficult to pin a "place" where a dispute arises.¹³⁴ The Supreme People's Court of China ("SPC") explained that the "location" of a tort on an information network includes where the computer and other pieces of information equipment used to commit the alleged tort are located.¹³⁵ Consequently, the omnipresence of Internet service infrastructure creates multiple connections between a tort and a variety of jurisdictions,

130. See generally E-Commerce Law, *supra* note 125.

131. See Lin Yifu, *Rethinking the Territorial Jurisdiction of the Chinese Internet Courts*, STL L. REV. BLOG (Apr. 17, 2019), <https://stllawreview.com/index.php/2019/04/17/rethinking-the-territorial-jurisdiction-of-the-chinese-internet-courts/> [<https://perma.cc/7Z9C-MK6M>].

132. See *id.*

133. Xiao Jianguo (肖建国) & Zhuang Shiyue (庄诗岳), *Lun Hulianwang Fayuan Shewang Anjian Diyu Guanxia Guize de Goujian* (论互联网法院涉网案件地域管辖规则的构建) [*Rule Construction on the Territorial Jurisdiction of the Cyber Courts*], 3 J. L. APPLICATION 16, 17 (2018).

134. *Id.* at 16–17.

135. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [*Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*] (Jan. 30, 2015), art. 25, translated in IPKEY (<https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf>) [<https://perma.cc/DTQ9-W9YN>]. SPC's judicial interpretation is a source of law in China that has less authority weight than statute. But in practice, many lawyers rely on SPC's judicial interpretation for detailed explanation of vague statutory language.

enabling defendants to transfer their cases to jurisdictions that serve their best interests.

In contrast, the cyber courts lessen the burden of proving territorial jurisdiction over a defendant. The cyber courts have cross-regional jurisdiction over all Internet-related cases that fall within the subject-matter jurisdiction categories.¹³⁶ As long as a plaintiff (namely any foreign brand owner in this context) can show a “genuine connection” with respect to Hangzhou, Beijing, and Guangzhou, the cyber courts obtain territorial jurisdiction.¹³⁷ Arguably, a plaintiff can easily prove a connection because a majority of Internet companies with thriving business are headquartered or have their principal place of business in these three cities.¹³⁸ Therefore, foreign brand owners no longer need to pin down an ultimate territory to bring a valid claim. Rather, they may satisfy the territorial jurisdiction requirement simply by connecting any disputes to the social media platform’s principal place of business.

However, foreign brand owners may nevertheless suffer from the limitations posed by subject-matter jurisdiction of the cyber courts. Currently, the cyber courts only have jurisdiction over an exclusive list of issues:

- Disputes regarding online purchases of goods, online service agreements, and small-amount loan agreements that will be further performed via online services;
- Disputes regarding “Internet copyright” ownership and infringement;
- Infringement on personal rights (*e.g.* defamation) using the Internet;
- Product liability claims for goods purchased online;
- Domain name disputes;
- Disputes arising from Internet-based administration; and
- Other civil and administrative cases concerning the Internet assigned to the Cyber-court by a higher court.¹³⁹

A plain reading of the subject-matter jurisdiction categories of the cyber courts does not favor foreign brands owners’ position. The dispute between

136. Xiao & Zhang, *supra* note 133, at 18; *see infra* note 139 for the “subject-matter jurisdiction categories.”

137. *Id.* at 21.

138. Lai Lin Thomala, *Distribution of Unicorn Companies from Internet and Information Technology (IT) Industry in China as of December 2019, by Region*, STATISTA (Aug. 27, 2020), <https://www.statista.com/statistics/1129137/china-share-of-unicorn-internet-and-information-technology-companies-by-region/> [<https://perma.cc/9HLX-X3UX>].

139. Sara Xia, *China Establishes Its First Cyber-Court in Hangzhou: Thank You Alibaba*, HARRIS BRICKEN (Aug. 16, 2017), <https://www.chinalawblog.com/2017/08/china-establishes-its-first-cyber-court-in-hangzhou-thank-you-alibaba.html> [<https://perma.cc/9PJN-PXY2>]. The cited list above is condensed from the eleven categories provided by the Supreme People’s Court’s announcement. *See* *Zuigao Renmin Fayuan Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding* (最高人民法院关于互联网法院审理案件若干问题的规定) [Provisions of the Supreme People’s Court on Several Issues Concerning the Hearing of Cases by Internet Courts] (promulgated by Sup. People’s Ct., Sep. 6, 2018, effective Sep. 7, 2018).

brands and counterfeiters is trademark infringement, but the cyber courts take cases concerning “online purchases of goods” and “online service agreements,” which are more akin to contractual disputes. Moreover, a later judicial interpretation by SPC explicitly excludes contractual disputes arising from social media within the jurisdictional scope of cyber courts. The interpretation answers the question of “what is *not* subject to the cyber courts’ jurisdiction,” including an online purchase fulfilled via social media.¹⁴⁰ In other words, the cyber courts do not hear trademark infringement cases where plaintiffs bring claims only against social media platforms.

Without a viable option to hold online platforms secondarily liable for trademark infringement, brands have few options to identify the infringers and sue them directly. Currently, China has a real-name registration scheme, which requires Internet service providers to request and verify their users’ real identity information.¹⁴¹ However, real-name registration serves more for administrative purpose to regulate the cyberspace, placing heavier burdens on Internet service providers to monitor and report illegal content to the administration.¹⁴² The cyber courts say nothing about indemnification for users’ infringing conduct, and it is still up to the online platforms to use their discretion in revealing users’ registration information.¹⁴³ Therefore, the establishment of cyber courts does not provide a valid cause of action for brands to enforce against online counterfeiters, and thus fails to provide the stronger enforcement mechanism that brands have long sought.

2. Issue Two: “Safe Harbor” for E-Commerce Platforms

China’s E-Commerce Law is a similarly weak enforcement mechanism. The E-Commerce Law aims to crack down on the problem of online counterfeits by creating joint liability on e-commerce platform operators. But at the same time, the Law creates a “safe harbor” provision to balance the necessity of regulation and platforms’ burden to monitor. With the safe harbor protection, platforms lack the incentive to cooperate with brands to enforce against infringers with stricter mechanisms.

The E-Commerce Law applies to three types of operators, e-commerce platform operators, third-party merchants, and online vendors.¹⁴⁴ The statute

140. Hu Shihao (胡仕浩), et al., <Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding> de Lijie yu Shiyong (《关于互联网法院审理案件若干问题的规定》的理解与适用) [*Understanding and Applying the Provisions of the Supreme People’s Court on Several Issues Concerning the Hearing of Cases by Internet Courts*], 28 PEOPLE’S JUDICATURE 24, 25 (2018).

141. Catherine Shu, *China Doubles Down on Real-Name Registration Laws, Forbidding Anonymous Online Posts*, TECHCRUNCH (Aug. 28, 2017, 1:07 AM), <https://techcrunch.com/2017/08/27/china-doubles-down-on-real-name-registration-laws-forbidding-anonymous-online-posts/> [<https://perma.cc/PLY8-D9V2>].

142. See *id.* (indicating that the tech companies in China are pressured to serve as the government’s gatekeepers).

143. See *supra* Part II.

144. Soo, *supra* note 126.

defines “e-commerce platform operators” as entities that “provide two or more parties to a transaction in e-commerce with services such as network business venues, deal-makings, and information distribution, for the two or more parties to the transaction to independently carry out business activities” (such as online shopping platforms like Amazon and Taobao).¹⁴⁵ A plain reading of the statute suggests that e-commerce platforms serve primarily for business transactions. The Law goes further by addressing the liability of the platforms in the case of IP infringement by third-party merchants. If platforms fail to take necessary methods, such as deleting, blocking links, or stopping transactions to the infringing merchants at trademark owners’ notice, they are jointly liable for the infringing conduct by third-party merchants.¹⁴⁶ This provision creates a “safe harbor” for the e-commerce platform operators. Under Article 42 of the E-Commerce Law, if platforms have implemented a notice-and-takedown mechanism to respond to infringement reports and have performed accordingly, they are effectively immune from third-party action.

The concept of “safe harbor” originally comes from the copyright regime, which limits online service provider immunity from third-party users’ infringing conduct.¹⁴⁷ In practice, many courts in China extend this theory to the trademark regime.¹⁴⁸ Some scholars point out that copyright and trademark protection share some common purposes and enforcement methods in the cyber world, but e-commerce platforms possess some distinctive features that suggest a heightened liability standard.¹⁴⁹ Many e-commerce platforms directly profit from the contractual relationship with third-party merchants by allowing them to list products and facilitate sales to customers, while in the context of copyright, most online services primarily provide storage or transmission of content.¹⁵⁰ In other words, trademark rights aim at preventing unfair competition and thus promoting a more robust market, which is distinct from copyright’s purpose of encouraging creativity. So, the commercial nature of e-commerce platforms should deprive them of the safe harbor immunity given to other neutral online service providers.¹⁵¹

After all, current judicial practice does not inquire further into the question of whether the E-Commerce Law’s “safe harbor” should be uniformly applied to all types of platforms. The “safe harbor” essentially leads brands back to the “whack-a-mole” situation. If platforms have fulfilled the obligation to delete, block, disconnect links, or end transactions or services to the alleged infringers upon notice, they are released from liability.¹⁵² Thus,

145. E-Commerce Law, *supra* note 125, ch. II, sec. 1, art. 9.

146. *Id.* at ch. II, sec. 1, art. 45.

147. Yu Xiaoping (于晓萍), *Shilun Dianshang Wangluo Fuwu Pingtai de Jianjie Shangbiao Qinquan Guize—Jiantan Bifenggang Yuanze Zai Shangbiao Qinquan Zhong de Shiyong Wenti* (试论电商网络服务平台的间接商标侵权规制——兼谈避风港原则在商标侵权中的适用问题) [*Secondary Liability of E-Commerce Platforms—A Discussion of the Application of Safe Harbor Doctrine to Trademark Infringement*], 1 J. BEIJING C. POL. & L. 44, 46 (2018).

148. *Id.* at 47.

149. *Id.*

150. *Id.*

151. *Id.* at 49.

152. E-Commerce Law, *supra* note 125, ch. II, sec. 2, art. 42.

the E-Commerce Law does not give brands more leverage against platforms to impose greater obligations to assist with online trademark enforcement.

V. CHINA SHOULD AMEND ITS E-COMMERCE LAW TO IMPOSE THE JOINT LIABILITY REQUIREMENT ON SOCIAL MEDIA PLATFORMS THAT INCORPORATE IN-APP SHOPPING FEATURES.

Even though the establishment of the cyber courts and the implementation of the E-Commerce Law inadequately address the issue of online trademark enforcement, they provide some guidance for policing trademark on social media. Because the line between social media and e-commerce platforms is vanishing, there is a strong need for more powerful mechanisms to protect trademark owners' rights in response to the developing technology in the cyber world. This Note suggests amending China's current E-Commerce Law to classify social media platforms with in-app shopping features as e-commerce platforms. Along with the amendment, this Note also proposes other obligations, such as adopting a notice-and-takedown mechanism and a "three-strike" rule to deny access to repeat infringers on social media to better assist with trademark enforcement against counterfeiters.

In addition, the legal reform in China provides a lesson for the U.S. to strengthen trademark protection on e-commerce platforms. The cyber courts in China have been experimenting with blockchain for preserving and submitting digital evidence, which may improve litigation efficiency with regard to Internet-related disputes.

A. *Amending China's E-Commerce Law*

A key question is whether social media, especially those embedding in-app shopping features, fall within the definition of e-commerce platforms. Different business models on each social media platform may lead to different answers. For instance, WeChat's mini-programs spark a debate as to whether the platform should be liable for infringing behavior occurring on its sub-ports. Some practitioners argue that WeChat acts as a basic network service provider for mini-program developers.¹⁵³ It serves the developers with access and technical support to programming framework, and it is the developers who make and operate mini-programs on their own and engage in business activities.¹⁵⁴ In this sense, the mini-program developers, instead of WeChat,

153. Yang Yi (杨祎), *Weixin Dianshang Lei Xiaochengxu Kaifazhe Wei Pingtai Nei Jingyingzhe Weixin Ying Chengdan Pingtai Zeren* (微信电商类小程序开发者为平台内经营者 微信应承担平台责任) [*Mini-Programs Developers Are Intra-Platform Operators, and WeChat Should Undertake Platform Responsibility*], CHINA MKT. REG. NEWS (May 28, 2019), <http://www.cicn.com.cn/zggsb/2019-05/28/cms117957article.shtml> [<https://perma.cc/6VFE-W5MP>].

154. *See id.*

should be deemed “e-commerce platform operators.” This line of argument analogizes the relationship between an app store and individual mobile applications.¹⁵⁵ Mini-programs function similarly as self-built websites or mobile applications that are spawned from a basic technological structure. They merely transfer the setup process from users’ devices to WeChat’s server, but all the other functions do not differ much from that of independent apps or programs.¹⁵⁶ Thus, the highly self-directed operation of mini-programs should strip contributory liability from WeChat as merely a technologically supportive platform.¹⁵⁷ A Hangzhou Intermediate People’s Court¹⁵⁸ ruling supports this position, the first and only case concerning infringing conduct in a mini-program. In *Hangzhou Daodou Network Tech. Co. v. Changsha Baizan Network Tech. Co.*, the court ruled that WeChat only provided a basic access point to mini-program developers, and thus it should not be forced to delete the infringing materials, which were not even stored on WeChat’s server.¹⁵⁹ Rather, it should provide adequate assistance for IP protection within its technological capability.¹⁶⁰

Another view argues that mini-programs thrive because of how much users trust and accept WeChat.¹⁶¹ WeChat’s popularity provides a basis for mini-program developers to attract more users to their services, and this is why consumers tend to choose a mini-program in WeChat over other apps in an app store.¹⁶² Therefore, WeChat has a closer relationship with these mini shops and should take responsibility. This argument probably applies more accurately to cases in which social media platforms do not use sub-ports, but instead operate their own in-app shopping malls on their servers. For example, Xiaohongshu’s RED Mall functions similarly to other traditional e-commerce platforms, such as Taobao, where merchants come and open stores to engage in commerce with users. Such social media platforms deliberately set up a section to encourage in-app transactions and therefore behave more like e-commerce platform operators.

This second view is more compatible with the fact that social media platforms directly profit from the platform-merchant relationship.¹⁶³ Therefore, this Note suggests amending the current E-Commerce Law to

155. *See id.*

156. *See id.*

157. *See id.*

158. An intermediate people’s court is the second lowest local people’s court in China. It hears relevantly important cases on trial and appeal cases from primary people’s courts, the lowest local courts.

159. Hangzhou Daodou Wangluo Keji Youxian Gongsi Su Changsha Baizan Wangluo Keji Youxian Gongsi, Shenzhenshi Tengxun Jisuanji Xitong Youxian Gongsi (杭州刀豆网络科技有限公司诉长沙百赞网络科技有限公司, 深圳市腾讯计算机系统有限公司) [*Hangzhou Daodou Network Tech. Co. v. Changsha Baizan Network Tech. Co. Ltd, Shenzhen Tencent Tech. Co.*] (Hangzhou Interim. People’s Ct. Nov. 5, 2019), at 15.

160. *Id.* at 15–16.

161. Yang, *supra* note 153.

162. *See id.*

163. *See, e.g., Verification Service Fee, Weixin Mini Program Verification Guidelines, WEIXIN GUANFANG WENDANG (微信官网文档) [WECHAT OFFICIAL DOCUMENTS]* (last visited Sept. 13, 2020), <https://developers.weixin.qq.com/miniprogram/en/product/renzheng.html> [<https://perma.cc/CX93-RGSC>]; Constine, *supra* note 62.

recognize social media platforms embedding in-app shopping features as a variation of e-commerce platforms. Under the current law, many social media platforms linger in the grey area between communication service providers and commercial service providers. Because in-app shopping features promote greater user activity that in return benefits the social media platforms, the platforms should take more responsibility to regulate the e-commerce segments of their service. If such social media platforms are classified as e-commerce platforms, the notice-and-takedown system and joint liability for failing to take actions should also apply, thereby placing more obligations on social media to curb the problem of online counterfeits.

In addition, two other trademark protections should be implemented to supplement the amendment. First, some scholars suggest introducing a “three-strike” mechanism to impose a heightened standard on e-commerce platforms to monitor repeat infringers.¹⁶⁴ The E-Commerce Law requires platforms to establish a merchant verification archive as well as periodically update their verification system.¹⁶⁵ Platforms shall also record and store transactional information of the goods or services provided by merchants.¹⁶⁶ Under these provisions, platforms should have the capability to keep records of merchant information. If the platforms have received repeat infringement reports from a trademark owner against the same merchants, the platforms should be flagged and use their discretion to deny the infringers the ability to open any new stores.¹⁶⁷ Currently, some e-commerce platforms have their own “three-strike” rule, but whether the platforms enforce this rule and its effectiveness remain questionable.¹⁶⁸ Therefore, if a “three-strike” rule can be statutorily adopted, e-commerce platforms may have better incentive to strictly monitor repeat trademark infringers to avoid potential joint liability.

A second suggestion is to improve public information transparency on social media platforms. China’s administration is exploring a viable approach in this direction. In February 2020, the Ministry of Commerce of the People’s Republic of China (“MOC”) issued a notice to solicit public comments on “Measures on the Management of E-Commerce Information Notices.”¹⁶⁹ MOC proposed a draft regulation to supplement the E-Commerce Law to better protect the legal rights of consumers and IP rights holders.¹⁷⁰ The draft proposes a requirement for e-commerce platform operators to publicly disclose any decisions concerning intellectual property infringement on their platforms.¹⁷¹ This approach is likely to help brands police their trademarks

164. Yu, *supra* note 147, at 50.

165. E-Commerce Law, *supra* note 125, ch. II, sec. 2, art. 27.

166. *Id.* at ch. II, sec. 2, art. 31.

167. *See* Yu, *supra* note 147, at 49.

168. *Id.* at 50.

169. *Guanyu <Dianzi Shangwu Xinxi Gongshi Guanli Banfa (Zhengqiu Yijian Gao)> Gongkai Zhengqiu Yijian de Tongzhi* (关于《电子商务信息公示管理办法（征求意见稿）》公开征求意见的通知) [*The Notice on Soliciting Public Opinions on the Administrative Measures on Electronic Commerce Information Publicity (Draft for Public Opinions)*], Ministry of Com. of People’s Public of China (Feb. 12, 2020) (the draft is attached in <http://tfs.mofcom.gov.cn/article/as/202002/20200202935276.shtml>).

170. *Id.* at draft ch. 1, art. 1.

171. *Id.* at draft ch. 2, art. 21–24.

online and take worthwhile actions against specific counterfeiters. If the burden of keeping records of repeat trademark infringers shifts to the platforms, brands may selectively enforce against those that cause greater damages by continuing to sell counterfeits in different “mole holes.”

Both supplementary protections—the “three-strike” mechanism and disclosure requirements—work better for trademark enforcement in the online context along with a recognition of social media platforms with in-app shopping features as e-commerce platforms. Because current e-commerce regulations provide brands with some viable enforcement mechanisms to patrol traditional e-commerce platforms, granting brands similar measures on social media may help enhance the protection of their trademarks.

B. China’s Approach as a Lesson for the U.S. to Better Regulate the E-Commerce Market in Light of the SHOP SAFE Act.

Combating online counterfeits is not a China-exclusive challenge. Brands also seek powerful enforcement mechanisms on other mainstream social media platforms, as well as procedural support in litigation. By experimenting with cyber courts and blockchain-stored evidence, as well as adopting the E-Commerce Law, China’s legal reform may provide some guidance for regulating online marketplace in light of recent efforts in the U.S. to propose the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce (SHOP SAFE) Act.

In early March 2020, the U.S. House of Representatives introduced a bipartisan bill aimed at incentivizing e-commerce platforms “to adopt best practices designed to limit the sale of counterfeits that pose a risk to consumer health and safety.”¹⁷² The SHOP SAFE Act seeks to amend the Trademark Act of 1946 “to provide for contributory liability for certain electronic commerce platforms for use of a counterfeit mark by a third party on such platforms.”¹⁷³ The bill uses vague language, leaving space to be filled up with more detailed definitions. For example, the bill defines “electronic commerce platform” as “any electronically accessed platform that includes publicly interactive features that allow for arranging the sale, purchase, payment, or shipping of goods, or that enables a person other than an operator of such platform to sell or offer to sell physical goods to consumers located in the United States.”¹⁷⁴ This definition is too broad. Under a plain reading, any platforms that enable or facilitate in-app transaction would be considered e-commerce platforms.

The SHOP SAFE Act does not appear to designate social media as e-commerce platforms, and currently there is no example among U.S. social media that acts similarly as a shopping platform like WeChat or Xiaohongshu.

172. Press Releases, H. Comm. on the Judiciary, Nadler, Collins, Johnson & Roby Introduce Bipartisan SHOP SAFE Act to Protect Consumers and Businesses from the Sale of Dangerous Counterfeit Products Online (Mar. 2, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2838> [<https://perma.cc/T5AJ-2LSE>].

173. H.R. 6058, 116th Cong. pmb., § 2 (2020).

174. *Id.* § 2.

Even though popular social media like Instagram and Snapchat venture their way into the e-commerce field, they only provide in-app transaction features to selective merchants or brands. Yes, when you scroll through the Instagram shop page or Facebook marketplace, you can see thousands of third-party postings selling knock-offs of luxury goods. But if you tap on those postings, the page will redirect you to an outside website, leading users away from the social media platforms. However, as more social media platforms become interested in exploring new possibilities to promote business activities within the app, China's experience in dealing with counterfeiters on social media may provide the U.S. with some insight.

Another groundbreaking legal development in China is worth mentioning to assist trademark litigation against online counterfeiters. China recognizes blockchain data as a legitimate method to preserve and submit electronic evidence. When addressing Internet-related disputes, courts have been concerned about the authenticity and integrity of electronic evidence, which affects its admissibility.¹⁷⁵ As e-commerce continues to thrive, lots of evidence, such as infringing postings, communication between merchants and users, and transactional records, are displayed and stored in an electronic format. Yet, online counterfeit listings are time sensitive because they are typically posted for only a few hours or days to avoid being monitored, which results in greater difficulty for timely tracking.¹⁷⁶ Besides, it is easier to alter or forge electronic evidence, which further burdens judges when determining its authenticity and integrity.¹⁷⁷ Without the ability to examine electronic evidence accurately, Chinese judges often rely on experts, which increases litigation costs.¹⁷⁸

Blockchain technology may totally change the game in the field of electronic evidence. Blockchain's key features are irreversibility and incorruptibility.¹⁷⁹ Once a block of data is added to a ledger, it cannot be altered in any way, but can only be complemented with new blocks. The new blocks are added sequentially and time-stamped, creating a transparent view of the entire ledger history to preserve data integrity.¹⁸⁰

In the context of online infringement, blockchain greatly improves the efficiency of disputed parties to preserve key evidence and jump the hurdle of evidence admissibility. In China, the traditional way to preserve electronic evidence is through notary agencies.¹⁸¹ A valid notarization grants the authenticity of a piece of evidence, but the process is manual and takes a long

175. See Hong Wu & Guan Zheng, *Electronic Evidence in the Blockchain Era: New Rules on Authenticity and Integrity*, 36 COMPUT. L. & SEC. R. 1, 1 (2020).

176. Mostert, *supra* note 15, at 3.

177. Wu & Zheng, *supra* note 175, at 1.

178. *Id.* at 1–2.

179. *The Admissibility of Blockchain as Digital Evidence*, CONCORD L. SCH. (Apr. 23, 2019), <https://www.concordlawschool.edu/blog/news/admissibility-blockchain-digital-evidence/> [https://perma.cc/2LZM-LGKU].

180. *Id.*

181. Zhou Qing (周庆) & Niu Ruifeng (牛瑞峰), *Qukuailian Canyu Wangluo Dianzi Zhengju Baoquan Gongzheng Chutan* (区块链参预网络电子证据保全公证初探) [*Preliminary Study on the Notarization of Online Electronic Evidence Preservation by Blockchain*], 40 J. HENAN INST. OF SCI. & TECH. 37, 39 (2020).

time.¹⁸² In many cases, before a notary agency starts the preservation process, the relevant evidence may be lost or destroyed, leaving no ground for the notary agency to intervene.¹⁸³ If courts admit blockchain data, parties can upload electronic evidence by themselves to a designated system or server. They can also freely examine the evidence that has been stored with the courts and thus avoid potential damage to the original evidence.¹⁸⁴

Chinese courts have set up a judicial blockchain system along with the establishment of the cyber courts.¹⁸⁵ The first court to adjudicate blockchain-facilitated electronic evidence was the Hangzhou Court of the Internet, which confirmed that electronic data stored on a blockchain could be admitted as electronic evidence.¹⁸⁶ Subsequently, in a 2019 case, *Huatai Yimei Ltd. v. Yangguang Feihua Ltd.*, that court admitted blockchain-generated evidence, which is different than evidence merely stored on blockchain, as authentic and integral.¹⁸⁷ The acknowledgement of blockchain data as evidence further serves China's goal of accelerating the adjudication process of Internet-related cases.

Several states in the U.S. have explored ways to implement blockchain technology in the field of evidence. In 2016, Vermont passed legislation declaring that "digital record electronically registered in a blockchain shall be self-authenticating pursuant to Vermont Rule of Evidence."¹⁸⁸ Arizona and Ohio passed similar legislation acknowledging the "legal effect, validity or enforceability" of blockchain records.¹⁸⁹ It is foreseeable that additional states will start to consider the legal effect of blockchain-stored/generated data in courts in light of technological development and e-commerce progression. Therefore, China's judicial precedents provide U.S. practitioners with positive results in terms of embracing blockchain data for litigation purposes.

VI. CONCLUSION

In response to the drastic increase in the volume of e-commerce and the related increasing number of e-commerce-related lawsuits, China experiments with new methods to better regulate this area. The establishment of the cyber courts in China is a breakthrough virtually unmatched by any other country in the world. However, a mere simplification of procedures does not adequately help to break down the barrier to trademark enforcement in China. While China's enactment of the E-Commerce Law is a positive development in the fight against intellectual property infringement online, it

182. *Id.*

183. *Id.*

184. Li Jie (李杰), *Hulianwang Fayuan de Xianzhuang Yiji Qukuailian Cunzheng Quzheng Yanjiu* (互联网法院的现状以及区块链存证取证研究) [*Research on the Current Situation of the Cyber Courts and Evidence Preservation by Blockchain*], 29 J. SICHUAN VOCATIONAL & TECH. COLL. 13, 16 (2019).

185. Wu & Zheng, *supra* note 175, at 2.

186. *See id.*

187. *See id.*

188. VT H.868 (Act 157) (2018).

189. *The Admissibility of Blockchain as Digital Evidence*, *supra* note 179.

falls short in addressing trademark enforcement, especially on social media. Given that China thrives on international business transactions, including luxury goods, China should further improve its intellectual property regime by amending the E-Commerce Law and incentivizing social media to adopt stronger monitoring and enforcement methods to combat trademark infringement of global brands. Doing so would obtain trust and invite future collaboration and investment in the Chinese market.

