

AIPLA

American Intellectual Property Law Association

March 11, 2020

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Department of Treaty and Law Affairs
Ministry of Commerce of The People's Republic of China
No. 6, East Chang'an Avenue
Beijing 100731
People's Republic of China

Via email tf_liutong@mofcom.gov.cn

Re: Comments regarding Draft Administrative Measures for Public Disclosure of E-commerce Information
《电子商务信息公示管理办法 (征求意见稿)》

Dear Sir or Madam,

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the draft Administrative Measures for Public Disclosure of E-commerce Information ("Draft Administrative Measures") published by the Ministry of Commerce ("MofCom"). The comment deadline is March 12, 2020. AIPLA's comments are provided below.

Founded in 1897, AIPLA is a national bar association of approximately 12,000 members engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

AIPLA commends these Draft Administrative Measures to provide guidance on administration of e-commerce information.

Due to time constraints, AIPLA focused its comments on relevant articles in Chapter 2 (Content and Requirements for Public Information Disclosure by E-commerce Business Operators) and Chapter 3 (Legal Liability) of the Draft Administrative Measures as detailed below. The absence of comments on other articles and other issues does not necessarily reflect support or lack of support of such articles or issues by AIPLA.

With respect to Chapter 2 (Content and Requirements for Public Information Disclosure by E-commerce Business Operators), AIPLA is unclear regarding the scope and specific operation of the notice and takedown provisions. Based on AIPLA's understanding of the proposed revisions, the proposed administrative measures do not appear to conform to international standards for notice and takedown of infringing content. Notice and takedown systems have evolved to ensure appropriate treatment of potentially infringing content while protecting internet service providers from vicarious liability for third-party content. Such systems typically involve the rights holder sending written notice to the Internet Service Provider ("ISP"). After receipt of an appropriate notice, the ISP must remove the potentially offending content within a specified period of time. The ISP then typically notifies the third party who posted the content ("third-party content provider") and provides a copy of the notice and explains that the content has been taken down. The third-party content provider then has a time period within which to respond. If the third-party content provider fails to respond, or responds ineffectively, the content remains taken down. If the third-party content provider responds with a reasonable explanation why the content does not infringe (lack of exclusive rights, non-infringement, or fair use are commonly cited as reasons), the ISP restores the content and the ISP is immune from liability for posting the offending content, pending resolution of the dispute by a competent authority. If the rights holder issuing the notice is not satisfied, then the rights holder may contact the third-party content provider directly or may pursue legal action against the third-party content provider but not the ISP. This system has been efficient and effective. AIPLA encourages MofCom to further revise the Draft Administrative Measures to mirror these generally accepted, international norms of notice and take down procedures.

With respect to Chapter 3 (Legal Liability), AIPLA requests that the social credit system not be employed at this early stage of a potential content dispute. At the point of notice and takedown, there has been no determination or adjudication of the merits of the infringement claim or defense by any competent authority. Invoking social credit consequences without these basic procedural safeguards may encourage misuse or gaming of the notice and take down system to damage a rival or target through adverse social credit penalties.

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We appreciate the opportunity to provide these comments on the Draft Administrative Measure, and we would be happy to answer any questions that our comments may raise.

Sincerely,



Barbara A. Fiocco

President

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