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Research Article

CIVIL LEGAL PROTECTION OF TRADEMARKS IN THE DIGITAL ERA

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ABSTRACT

The role of online trading is gradually increasing in our lives. Expanding the capabilities of the Internet network allows you to trade in other countries. At the same time, the issue of consumer protection remains unsettled. In some cases, they are unaware that they are purchasing counterfeit products. This, in turn, provides an opportunity for unscrupulous online merchants to gain unjust enrichment. These facts are discussed in detail in this article from a scientific point of view, which is based on past court decisions.

KEYWORDS

Marketplace, administrator, online trading, counterfeit, trademark, domain name, online retailer, “Yandex Taxi”, “Tiffany”, “eBay”, “Louis Vuitton”, “L'Oreal”, “Davidoff”, “Amazon”.

INTRODUCTION

As a rule, by the purchase and sale of goods we mean the place where such transactions are made, which means a market where we can physically feel the goods and directly check their quality. At the same time, there is real information about the quality,

suitability, name and details of the manufacturer and seller, and there is also a real idea of how and where you can return the product if it does not meet the requirements. In Uzbekistan, it is customary to treat these relations as the usual trade relations, however,

from year to year; Internet resources penetrate deeply into the daily life of every citizen, from the sale and purchase of household goods to the provision of services. This speaks of the limitless possibilities of online trading.

The mass spread of the Internet gives rise to the emergence of new relationships. As a result of this, the market familiar to us is gradually spreading in online trading, which, on the one hand, creates certain conveniences for buyers that allow them to save time and costs for the purchase of a certain product. This gives advantages to “online markets” or “online shopping” over other types of trade. However, it is worth noting that online trading remains unregulated at the legislative level, since it has specific features and does not comply with the framework defined by law. In this regard, the emergence in our lives of such a reality as online trading sets us the task of legislative regulation of these relationships.

In the developed countries of the world, “online shopping” has already emerged as an established reality of everyday life.¹ Marketplace is considered to be a unified online trading platform. There are thousands of outlets here, where you can find millions of different goods and services from more than a hundred world brands². The relationship between marketplaces and sellers is built in various ways, where marketplaces can sell goods to end consumers both on their own behalf and on behalf of the seller. This condition must be included in the transaction.³

As an example of online trading, one can cite the Internet applications “Alif shop”, “Tovar.uz”, “Yandex-

taxi” successfully operating in Uzbekistan. The agreement with Yandex Taxi is referred to as the agreement for the provision of services to the marketplace, in accordance with the terms of which the Internet application as a marketplace undertakes to provide services for the transportation of goods or a passenger.

Most marketplaces include, when concluding agreements with sellers, conditions that in case of violation of the rights to a trademark and service mark, the damage caused is subject to compensation. In some cases, this condition is not provided for by the contract, since such signs of goods or services, as a trademark and service mark do not matter for the marketplace, because its main purpose is to make a profit.

One of the serious problems of trading through the marketplace is counterfeit products. Social studies show that citizens in most cases prefer cheap counterfeit goods, not paying attention to its quality. As it is known, demand breeds supply⁴, and the greater the demand for cheap and fake goods, the more offers of such goods in online auctions. At the same time, the question of quality and origin of goods becomes the last turn. This circumstance brings profit to manufacturers of counterfeit goods, but harms consumers.

In the course of a study by the Agency for the Fight against Monopoly of the Russian Federation, it was revealed that in the country in 2020, compared to 2019, the share of counterfeit products sold through

¹ M. Khalifa, V. Liu. Online consumer retention: contingent effects of online shopping habit and online shopping experience // European Journal of Information Systems. - 2007. - T. 16. - No. 6. - P.780.

² P. A. Riach, J. Rich Field experiments of discrimination in the market place //The economic journal. – 2002. – T. 112. – №.483. – P.480.

³ A.S. Vorozhevich. Disputes over violations of exclusive rights to trademarks in marketplaces. “Journal of the Intellectual Property Rights Court”, No. 2 (32), June 2021, - P.133.

⁴ Kostyrev A., Shchurenkov N. Counterfeit is a stubborn thing // Kommersant 2019. July 8. No. 117/P.



marketplace platforms increased by 20 percent⁵. Of the virtually sold goods, 35% are children's toys, 29% are clothes and shoes, 17.5% are headphones, chargers, covers and other small household goods and accessories for them, 12.5% are household chemicals, 10% are perfumes⁶. In addition, based on the results of studying this issue by BrandMonitor, it was found that more than 70% of products sold on the platform of 50 different marketplaces in Russia are counterfeit and introduced into civil circulation in violation of trademark and service mark rights⁷.

It is worth emphasizing that trading through marketplaces should not be confused with trading through regular domains. As you know, in Uzbekistan there are such electronic trading platforms as Texnomart, Elmakon, Openshop, Mediapark, Goodzone, which also carry out the purchase and sale of goods using online trading. The difference between these trading platforms and marketplaces is that there is no competition with this type of trading. In contrast, when trading using marketplaces, there is intense competition between manufacturers of goods⁸.

In the marketplace, each product manufacturer or seller has its own content (address) in the domain. The subjects of the marketplace are, on the one hand, an online retailer (administrator or owner of the marketplace), and on the other hand, a manufacturer of goods or a seller. The ability of the consumer to choose a product that meets his requirements from a large variety of products creates a lively competitive environment in this area. In other words, a

marketplace is a trading platform where various types of goods and services are located⁹.

An online retailer acts as a manager or administrator in the marketplace, whose functional duties include providing goods and services to the consumer for purchase, guarantees that goods and services belong to a specific manufacturer, and providing technical services for creating shopping content in the domain. At the same time, although the online retailer will provide technical support for the creation of content, it is not responsible to the consumer for its quality. This is explained by the fact that his duties include only guaranteeing that the goods belong to the manufacturer, which implies that the products are not counterfeit or counterfeit, guarantees for the protection of intellectual property rights.

One of the main issues in the activity of marketplaces today is their responsibility for violations of intellectual property rights and the sale of counterfeit products to end consumers. If the marketplace sells counterfeit products of its own production, its responsibility for these actions is inevitable, but the situation is aggravated when selling products from other manufacturers. In this case, the product is introduced into civil circulation by a manufacturer who has violated both intellectual property rights and consumer rights. Is it possible to hold the marketplace administrator liable in this case? If this is possible, what share of responsibility will be imposed on the marketplace administrator, and what share on the manufacturer?

⁵ Danilov D.B. Porokhov M.Yu. Trademark protection in the era of digitalization. Society and law. 2021. No. 2 (76). - P.156.

⁶ Hotbeds of counterfeit: Moscow wholesale markets and Youtube bloggers develop trade in illegal goods in Russia. Its volume exceeds 5 trillion rubles. // TiarCenter.com [Electronic resource]. – Access mode: <https://tiarcenter.com/counterfeit/> (date of access: 01/06/2021).

⁷ Vopilov, Yu. Test purchase of BrandMonitor: 7 out of 10 goods in the network are counterfeit // BrandMonitor.ru [Electronic resource]. – Access mode:

<https://brandmonitor.ru/materials/kontrolnaya-zakupka-brandmonitor-7-iz-10-tovarov-v-setikontrafakt/> (date of access: 01/03/2021)

⁸ Long C. Trademarks and Unfair Competition // The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law. – 2017. – P.220.

⁹ Salnikova A.V., Kudimova Yu.A. Cotrafact to the marketplace on the example of "Wideberry": problem statement. Bulletin of the University No. 2, 2021. - P.118.



Under these circumstances, there may be two versions. According to one, the marketplace administrator knew or should have known that the products were manufactured in violation of intellectual property rights and counterfeit products. According to another, the administrator did not know, and the circumstances of the case indicate that he could not have known about it.

In the first case, when the marketplace administrator knew and should have known about counterfeit products and violation of intellectual property rights, he is subject to civil liability on a general basis, which implies compensation for losses and moral damage.

Part one of Article 252 of the Civil Code of the Republic of Uzbekistan provides that in case of a joint and several obligation of debtors, the creditor has the right to demand performance both from all debtors jointly and from any of them separately, moreover, both in full and in part of the debt.

A creditor who has not received full satisfaction from one of the joint and several debtors has the right to demand what was not received from the other joint and several debtors.

Solidary debtors remain obligated until the obligation is fully discharged.

Under the circumstances set forth in the second version, the administrator's liability does not arise, since, given that he did not know and could not know about violations by the manufacturer, he did not have the intent to sell counterfeit products or violate intellectual property rights.

Thus, it can be argued that the marketplace can be held liable jointly and severally along with the manufacturer for the sale of goods in violation of applicable law. However, it is necessary to analyze some points of importance.

According to articles 11 and 1040 of the Civil Code of Republic of Uzbekistan, measures to protect civil rights

can be applied regardless of the fault of the infringer of intellectual property rights. Part one of Article 333 of the same Code provides that the debtor is liable for non-performance or improper performance of an obligation if there is fault, unless otherwise provided by law or the contract. The debtor is declared innocent if he proves that he has taken all measures depending on him for the proper performance of the obligation.

It follows from this that the marketplace administrator performing the task of the offending manufacturer, if his guilt is proven, is liable under the law for violating the exclusive rights of the owner of a trademark, service mark or copyright. This provision is not fixed by the current legislation in the field of protection of intellectual property rights, just as there is no concept of an information intermediary. This creates difficulties and ambiguities in law enforcement practice.

Article 1040 of the Civil Code of Republic of Uzbekistan stipulates that in case of violation of an agreement on the creation and use of the results of intellectual activity and means of individualization, the general rules on liability for violation of obligations are applied. On the basis of Article 252 of the Civil Code of Republic of Uzbekistan, in case of a joint and several obligation of debtors, the creditor has the right to demand performance both from all debtors jointly and from any of them separately, both in full and in part of the debt.

However, the information intermediary that places data on Internet resources is not responsible for violations of intellectual property rights in the following cases:

- If he did not know and should not have known about the infringement of intellectual property rights;
- If timely measures are taken on his part to eliminate violations of the right after receiving an application (objection) from the owner of intellectual property about the violation of his right, indicating the website address and details of the goods placed on the marketplace platform.



Third parties providing services for the placement of products on Internet resources are referred to as information intermediaries.

In this regard, when considering cases of this category, the courts should not apply to them the requirements established for other intermediaries. This raises a very pertinent question: Is it possible to equate the marketplace of an information intermediary?

The current legislation does not provide an answer to this question. However, based on the current state of affairs, it can be argued that persons providing services for the placement of goods and services on Internet resources and acting on the basis of the seller's instructions, but not participating in the auction, are information intermediaries.

In all this process, these persons, not intentionally, but indirectly, may take part in the commission of offenses, but they themselves do not know this. However, this cannot affect the court's decision on bringing to civil liability, since, as mentioned above; ignorance of the offense committed by the seller releases the marketplace administrator from liability.

In accordance with Article 27 of the Law of the Republic of Uzbekistan "On trademarks, service marks and appellations of origin of goods", the use of a trademark is considered to be its use on goods for which the trademark is registered, and (or) their packaging by the owner of the trademark or the person to whom such the right is granted on the basis of a license agreement.

The marketplace, acting on the instructions of the seller or manufacturer, facilitates the latest placement of goods and services on the platforms of the Internet network.

Here the following question may arise: by what criteria can the court determine whether the marketplace

knew or did not know about violations of the exclusive rights of intellectual property owners? To get an answer to this question, it is not at all necessary to demand or withdraw all information about the goods and services posted on the website, since this may lead to the suspension of the marketplace as a business entity or lead to excessive costs. In addition, even the courts are not in all cases unable to accurately determine whether there was an offense in this particular case.

Sellers who have expressed a desire to post information about a product on Internet resources and a public offer for the sale of goods or the provision of services are required to provide documents confirming that they have a certificate of permission from the owner of the intellectual property right or the manufacturer to use insignia or the product as a whole. In this regard, the failure to demand such a document from the marketplace administrator indicates that he knew about the violation of the exclusive rights of the owner of intellectual property.

This raises the question of what legal relationships may arise with sellers who do not have documents confirming permission to use goods that operate in full compliance with socio-economic principles.

In Russia, some marketplaces (Wildberries) allow the use of goods for which the seller does not have permission, provided that an application has been submitted for obtaining the appropriate certificate, but no response has yet been received¹⁰. A distinctive feature of this case is that the filing of an application does not yet mean the consent of the owner of the intellectual property right. It seems that some marketplaces take this risk in order to maximize profits and not lose their existing clientele.

The current legislation does not contain rules restricting such actions of the marketplace, since this is not necessary. In this case, the entire risk associated

¹⁰ Vorozhevich A.S. Disputes over violations of exclusive rights to trademarks in marketplaces. "Journal of the

Intellectual Property Rights Court", No. 2 (32), June 2021, - P.136.

with the illegal use of exclusive rights on the part of the sellers lies entirely with the marketplaces, which will be joint and several debtors in the event of an offense by the sellers.

However, this does not yet mean unnecessary problems for marketplaces, since when concluding agreements with sellers, they can provide for the condition that all costs of paying damages to owners of intellectual property rights are borne by the seller. This will be a reliable insurance against the risk of violations by unscrupulous sellers and will save marketplaces from excessive spending.

Assume a situation in which the marketplace, as an information intermediary, provides technical support to the seller for the sale of a certain product with violations of product quality requirements (counterfeit) or a violation of intellectual property rights. It should be borne in mind that when resolving such disputes, it is necessary to proceed from each specific situation. In particular, if the following factors are present in the actions of the marketplace, it is impossible to qualify its actions as an accomplice:

Firstly, the owner of the rights has the opportunity to apply to the marketplace administrator with a statement on the elimination of violated rights;

Secondly, the marketplace administrator must immediately respond to the application of the owner of the rights.

The above situation becomes sensitive when the subject is both marketplaces that carry out purchase and sale, and marketplaces that receive a share of sales. At the same time, it is important to pay attention to whether the marketplace had the opportunity to

independently place, correct, make changes and additions to the posted materials, and also whether it has a material interest in placing materials that violate intellectual property rights or consumer rights, knowing about it.

The Russian Intellectual Property Court, when prosecuting mediators of information on Internet platforms, considers it necessary to take into account the following circumstances:

First, as a source of income, there should be the actions of an information intermediary, which consists in ensuring the placement of materials about the product on the Internet and free access of potential consumers to this information;

Second, the person whose actions place the information on the Internet, that is, the marketplace administrator or a third party. This circumstance can be verified only after the information has been posted¹¹.

An even more conceptual idea was put forward by a judge of the Russian Intellectual Property Court, according to which it is necessary to distinguish sites that provide technical assistance in posting information about goods from sites that directly post information on the Internet.

According to the judge, if the intermediary does not participate in the conclusion of the contract and cannot influence its terms, he should be recognized as an intermediary of information, however, if his role is much larger and he participates as a party in contractual relations, then he is an intermediary¹².

So, if you follow the above thought, then marketplaces can be given the following definition:

¹¹ Minutes No. 10 of the Meeting of the Working Group of the Scientific Advisory Council at the Court for Intellectual Property Rights April 22, 2015 // <http://ipcmagazine.ru/official-cronicle/protocol-10-of-the-meeting-of-the-scientific-advisory-council-at-the-court-for-intellectual-property-right>

¹² Minutes No. 10 of the Meeting of the Working Group of the Scientific Advisory Council at the Court for Intellectual Property Rights April 22, 2015 // <http://ipcmagazine.ru/official-cronicle/protocol-10-of-the-meeting-of-the-scientific-advisory-council-at-the-court-for-intellectual-property-right>



- a) Provides services for direct participation in the placement of data on the Internet, making changes and additions to the bottom, adjustments, advertises products;
- b) Participates in the conclusion of sales contracts, prevents the introduction of counterfeit products into civil circulation and organizes relationships with consumers;
- c) Non-recognition as an intermediary of information of persons participating in the sale and purchase of goods on the basis of shared profit as the main goal of their activities. Accordingly, they cannot apply the rules on the responsibility of intermediaries of information.

These criteria for determining marketplaces are advisory in nature, and therefore, the court, when considering cases related to disputes in this category, may be guided by the specific circumstances of the case.

Absolutely appropriate is the question of what measures and actions should the marketplace take when accessed by the owner of the rights? Civil law stipulates that if an information intermediary has taken all measures in his power, then he is exempt from liability.

In addition, the information intermediary must request from the seller documents evidencing permission to use the right, as well as provide detailed information to the owner of the rights about the offender. Also, the information intermediary is obliged to remove from the site the posted information about goods and services, during the use of which a violation of the right was made.

In Uzbekistan, the legal status of the marketplace has not been defined, the procedure for the operation of this type of online trading has not been regulated, and there is no judicial practice on disputes in this category. However, in foreign countries this type of trade is

regulated at the legislative level, and there is also an established judicial practice of law enforcement in this area of trade.

As an example, we can cite cases considered by the courts of various far-abroad countries.

The US court heard a dispute between Tiffany and eBay¹³ over trade violations. From the case file, Tiffany accused eBay of infringing the exclusive right to use a trademark. In particular, Tiffany accused eBay of posting information about counterfeit products on its website and thereby helping to sell them to consumers. Tiffany said eBay has been warned against counterfeiting and could be subject to scrutiny. To this statement, eBay responded with the objection that only the owner of the exclusive right, and not the marketplace, has the right to monitor counterfeit goods. Based on the circumstances of the case, the court concluded that the arguments of the eBay company were reasonable and considered that the company did not know and could not know about the counterfeit goods. In addition, the facts established by the court revealed that eBay did not commit violations of the rules of trade, and if there were sufficient grounds, all measures would be taken to prevent them. The strong evidence in the case was the development and implementation by eBay of the information system VeRO, which allows timely detection of counterfeit products.

However, when the case involving the same eBay¹⁴ company was considered by the same court, it showed that the information system VeRO developed and implemented by this company turned out to be ineffective and did not give the expected results.

As another example, a French court heard a lawsuit filed by Louis Vuitton against eBay for trademark infringement. At the trial, the plaintiff accused eBay of creating conditions for third parties to sell counterfeit goods. Based on the results of the consideration of this

¹³ Tiffany No.04 Civ. 4607 at 1.

¹⁴ 1 SA Louis Vuitton Malletier v eBay Inc and eBay International [2010] E.T.M.R.10.

case, the French court, unlike the US court, took the side of the plaintiff - “Louis Vuitton” and determined that the measures taken by eBay to prevent the posting of information about counterfeit products on the site were ineffective. The court concluded that the defendant should not act as a market participant, but should assist its subjects as an intermediary. In this regard, the defendant violated the norms of the law on the protection of intellectual property rights and he is liable.

Similarly, a French court, in another case in which eBay¹⁵ was sued, ruled that eBay be held liable in solidarity with the seller, Hermes International v Cindy Feitz, for infringement of the owner's intellectual property rights.

In 2011, the European Court considered a case related to the company “L’Oreal” (the owner of the right)¹⁶. In the lawsuit, the owner of the right indicated that the online store on the Internet platform sells goods in violation of its exclusive rights. The court recognized the online store as an information intermediary, and therefore the owner of the right has the right to demand that it eliminate violations. According to the court, the courts have the right not only to demand compensation for damage, but also to impose an obligation to further prevent violation of exclusive rights. The court also ruled that similar statements of the court must be effective, proportionate, effective and must not prevent further trading on the Internet. If these requirements are followed, marketplaces may be exempted from liability.

The courts of Germany and the European Court of Justice have also considered other cases related to disputes over infringements in the use of trademarks in marketplaces. The case file of cases heard by these courts in a lawsuit filed by Coty Germany GmbH against defendant Amazon contains evidence that Coty is a

perfume distributor and Davidoff is a trademark licensee. The Amazon Marketplace is a trading network that provides technical support for posting information about the goods sold on the Internet.

Here, the sale and purchase agreements of the placed goods are concluded directly between the buyer and the seller. Amazon also offers warehousing services for merchants. Delivery of goods to buyers is carried out by specialized companies that are not related to the marketplace. According to the revealed data of Coty on the website, Davidoff was engaged in the sale of perfumes under the name Davidoff Hot Water on the website www.amazon.de. This violated the owner's trademark rights. In response to these actions, Coty demanded that Amazon immediately stop selling this perfume. After being rejected by Amazon, Coty went to the German Land Court, which dismissed the lawsuit. The court found that Amazon did not use the Davidoff trademark, but instead stored the goods on hosted Internet resources. In turn, the European Court also upheld the decision of the German court and concluded that the use involves active actions, and Amazon's actions do not show signs of violating the exclusive rights of the trademark owner.

From the above, it can be seen that the European courts do not have a unified approach to assessing the actions of marketplaces in the event of a dispute with the owners of the right, and there are also no unified principles for assessing their activities. The activity of marketplaces is limited only by technical assistance to the seller in placing their goods on Internet resources. This circumstance allows marketplaces to avoid liability in case of violation of the rights of trademark owners.

In general, the marketplace is considered an innovation in the national market for goods and services and in the legal field of our legislation. It can be considered a virtual transnational platform that

¹⁵ Hermes International v Cindy Feitz and eBay, RG No.06/02604.

¹⁶ Vorozhevich A.S. Disputes over violations of exclusive rights to trademarks in marketplaces. “Journal of the

Intellectual Property Rights Court”, No. 2 (32), June 2021, - P.139-140.



erases borders and distances, which allows you to freely sell and purchase goods and services anywhere in the world. It is on these grounds that the marketplace is a complex legal process that requires the integration and globalization of the legislative framework of various countries.

Based on this position, you can define a marketplace as follows:

“Marketplace is a virtual trading platform with its own trading content for manufacturers of goods and sellers in the domain system.”

“An online retailer is a manager who controls the course of trading in marketplaces and guarantees that the goods belong to a certain manufacturer.”

When conducting online bidding, an online retailer must fulfill the following responsibilities:

- Check the registration of the trademark and the manufacturer of the goods when placing the goods in the relevant trade content;
- Determine whether there has been a violation of the intellectual property rights of this trademark;
- Provide guarantees to the consumer associated with the risk of non-compliance with the quality of the goods and its defectiveness;
- Create conditions for a healthy competitive environment. Avoid unequal conditions for the use of trademarks, the use of a trademark with the predominant use of meta tags in the domain name. This means that it is inadmissible to grant privileges to a certain seller in the form of the withdrawal of goods from one manufacturer in the first place, while goods of the same type are refilled, and there are several sellers. For example, let's say that a consumer has searched the laptop marketplace, and the marketplace, granting privileges to the seller under the “Lenovo” trademark, displays the products of this brand first, and the remaining trademarks after it;
- Combating unfair competition. Unfair competition in marketplaces can manifest itself in the

prohibition or coercion of the seller to perform certain actions under the threat of removing the domain from the content.

The online retailer must be accountable to the consumer and the competition authority. Responsibility comes from the considerations that the online retailer is a guarantor of the conformity of the quality of the product and its belonging to a certain manufacturer to the consumer.

For the identified shortcomings of the goods sold through the marketplace platform, along with the seller, the online retailer should also be jointly and severally liable, since it is the guarantor. This is due to the fact that the consumer is not a specialist and does not have the skills to identify counterfeit products.

Only the online retailer and the seller of the product can know that the product is counterfeit. It is for this reason that all responsibility should be placed on them.

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