



Information intermediaries and online marketplaces not liable for infringement of IP rights in Russia

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In two recent cases, the Russian courts supplied guidance on the qualification of information intermediary and its liability for infringement of IP rights (decision dated 21 February 2022, case A76-26921/2021, decision dated 01 April 2022, case A40-77522/2021).

1. The earlier decision concerned the claim of an entrepreneur against OZON, which owns and operates one of Russia's major retail online platforms (marketplaces) bearing the same name.

The trademark owner had found the offer for sale of goods affixed with its sign on the OZON marketplace infringing and had addressed the prescribed pre-judicial claim to OZON.

Since the infringement claim was not settled, the rightholder filed a lawsuit with the Moscow Arbitrazh Court, providing evidence that, according to the retail sale documents, OZON was the seller of infringing goods and the owner of the

domain name and administrator of the marketplace's website.

The first instance court ruled that OZON is an information intermediary and cannot be held liable for the infringement of trademark rights. The second instance court and the Russian Court for Intellectual Property (IP Court) upheld the ruling on appeal and cassation instance.

The IP Court reviewed the assessment of lower courts and confirmed that the marketplace did not properly sell infringing goods as its role was limited to providing the platform for the placing of an offer of sale addressed to businesses and entrepreneurs. It was also noted that OZON expressly provided an option for the placing of a sale offer as well as information that it had no intention to infringe the IP right of the claimant. The courts moreover confirmed that OZON had complied with the criteria applicable to the exclusion of liability of information intermediaries set out in article 1253.1 of the Russian Civil Code, namely, absence of knowledge of the unlawful use of the



IP right, and taking the necessary measures to put the infringement to an end based on a cease-and-desist letter of the rightholder.

2. A more recent decision on case A40-77522/2021 was taken by the IP Court in April 2022, and contributed to the characterization of online retail platforms as information intermediaries that are not liable for infringement of IP rights. In that case, the rightholder had claimed that AliExpress infringed its right in a relevant artwork by selling goods of similar appearance on website aliexpress.ru. The lawsuit was dismissed at first instance. The decision was challenged and upheld in the appeal and cassation instances.

AliExpress and its website aliexpress.ru was found to be a marketplace making available to sellers the technical capability to place information about their sale offers on the Internet and giving buyers the opportunity to choose goods and make direct purchase deals with the relevant sellers. The role of AliExpress was defined by the IP Court as an intermediary technical services provider that granted sellers the access to personal accounts and the opportunity to place sale offers as well as access to buyers, who would acquire knowledge of such offers and could place orders. Accordingly, the marketplace provided only an information environment where sellers and buyers could directly deal between them.

The claimant had argued that the marketplace had failed to take actions to stop the infringement upon receipt of its pre-judicial claim. However, the IP Court held that the claimant had failed to provide direct links to offers for sale of the infringing goods, so that it was unfeasible for AliExpress to identify and remove the allegedly infringing offers, as a result whereof the marketplace was found exempt from liability for failure to comply with the rightholder's request.

The IP Court also referred to the AliExpress user service agreement, which specified that responsibility for deals, including their terms and conditions, rested with the sellers and

buyers only. Consequently, the court confirmed that AliExpress had met the information intermediary requirements, was not aware of the infringement and could not be held liable for it.

The IP Court finally held that the claimant had failed to prove that the marketplace infringed copyrights and adjudged AliExpress an information intermediary and a defendant without *locus standi*, who was not responsible for sale of goods in the marketplace.

3. In the latter decision the IP Court cited earlier case A76-35010/2017, which was reviewed by the Russian Supreme Court on 11 January 2021. The Supreme Court ruling confirmed the decisions of lower courts.

Similarly to the abovementioned cases, the claimant had filed a lawsuit claiming compensation for the infringement of IP rights (copyright for photo pictures). This case was not related to a trading platform or marketplace, but claimed infringement by the domain name owner and its lessee. The copyright owner had filed a lawsuit against both the holder of the domain name and the company using it under a lease agreement.

The court found that the pictures had been provided for publication on the site by a client of the domain name lessee under a service agreement, and verified the criteria for there to be information intermediaries in the legal sense, as follows:

- neither the domain name owner, nor its lessee were aware that the pictures were infringing IP rights,
- neither of them had initiated the publication or changed the published pictures, and
- upon receipt of the rightholder's letter of claim the pictures were removed from the site.

Compliance with all of the above led the court to the conclusion that both companies were information intermediaries, but were not liable for the infringement.

Whilst this is not novel case law, the cases reported are significant because they supply the full legal reasoning

underlying the decisions. The open point that is left is that the correct identification of the infringer can remain an unsolved problem, as the true infringer may in real

life easily enough hide behind the name of the marketplace or that of the domain name owner.



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