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Information Intermediary and Marketplace Liability for Counterfeit Goods in E-Commerce

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Abstract

The article examines the evolution and the growing inadequacy of the historical immunity of information intermediaries (marketplaces) in the face of widespread counterfeiting in electronic commerce. The legal definition of an "information intermediary" consistently lags behind commercial reality—a phenomenon aptly described as the regulatory lag hypothesis. This lag implies that existing legal frameworks fail to adequately address modern business models grounded in complex logistical partnerships. The relevance of the study is determined by the transformation of platforms from passive hosts into integrated logistical ecosystems (e.g., FBA), necessitating an urgent revision of outdated liability standards. The article aims to analyze case law from the United States, the European Union, and the Russian Federation, as well as the underlying economic conflict between the prohibition of general monitoring and the emerging obligation of proactive due diligence mandated by new legislation. Judicial practice demonstrates a transnational shift in focus from actual knowledge to operational control and "constructive knowledge." The author's key contribution lies in proposing a risk-tiered liability model that dynamically correlates joint liability with the degree of the platform's involvement in logistics functions. The findings are intended for practicing lawyers, digital services regulators, and compliance professionals.

Keywords: counterfeit, e-commerce, information intermediary, intermediary liability, marketplace, trademark.

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1. Introduction

The development of e-commerce over the past decade has fundamentally changed the role of online platforms. Marketplaces have evolved from technically neutral bulletin boards into highly complex logistical and financial ecosystems. Today, these platforms function as "ideal storefronts for counterfeits," providing falsifiers with powerful tools to reach a broad consumer base.

This noted dual role generates doctrinal confusion. On one hand, platforms seek to retain the immunity historically intended for passive hosting providers, whose actions are exclusively technical and automatic. On the other hand, they aggressively participate in the transaction flow, offering fulfillment services (FBA), processing payments, and controlling advertising.

Despite colossal self-regulation efforts undertaken by the platforms themselves (e.g., blocking billions of suspicious listings), private measures have proven insufficient to prevent the massive trade in counterfeit goods. A key systemic deficiency is evident in that the traditional "notice and takedown" model is systematically circumvented by sophisticated infringers. Falsifiers use new tactics—applying "private labels" to counterfeit products. These goods mimic the design and

packaging of original brands but avoid the direct use of registered trademarks, allowing them to bypass automated filtering systems that rely on direct trademark matching.

The inability of reactive, fault-based liability systems to effectively counter this problem demonstrates the need to transition to a proactive, systemic model of due diligence.

2. Materials and Methods

The sources studied in preparing this article can be conditionally divided into three thematic blocks. The first covers the international legal and economic aspects of combating the circulation of counterfeit products in the digital environment [1, 2], emphasizing the systemic nature of the problem and the need for interstate harmonization of liability measures. The second group consists of publications dedicated to the evolution of legal liability regimes for online platforms in different regions [3-8]—analyzing case law (in particular, the Coty v. Amazon case) and legislative initiatives like the DSA and the SHOP SAFE Act, which increase the burden of proof and obligations to monitor goods. The third block is represented by comparative and theoretical studies on the status of the information intermediary in the context of copyright and related industries [9, 10], where the emphasis is placed on the different approaches of continental and Anglo-Saxon legal systems, as well as on attempts to balance the interests of rights holders and platforms. Modern authors actively apply economic-legal analysis, studying the relationship between the degree of platform participation in commercial turnover and the limits of its liability.

Among the contradictions, a lack of a unified concept in defining the boundaries of an intermediary's "awareness" of infringement and the criteria for its "active role" in the distribution of counterfeits is noted. Issues concerning the actual mechanism for verifying the authenticity of goods and the algorithmization of monitoring processes remain under-researched.

In addressing the topic, methods of comparative legal analysis, a systemic-structural approach, and an economic-legal interpretation of normative acts and judicial practice were used.

3. Results and Discussion

The global trade in counterfeit products continues to pose a serious threat to the economy, consumers, and supply chains worldwide. Clothing, footwear, and leather goods remain among the most at-risk sectors, collectively accounting for 62% of seized counterfeit goods (Figure 1) [2].

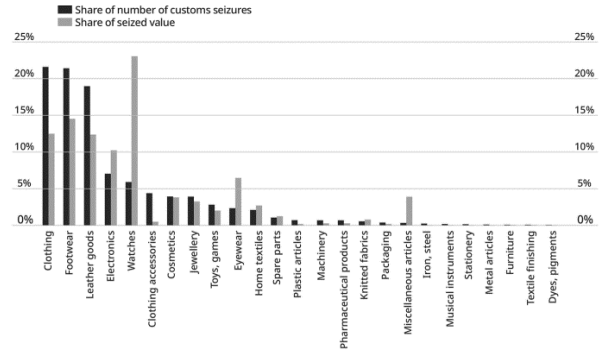

Fig. 1. Top 20 product categories for counterfeit and pirated goods [2]

In the US, a system has historically prevailed that provides broad guarantees of immunity for the development of free speech, competition, and innovation in the online space.

The fundamental judicial precedent remains the decision of the US Court of Appeals for the Second Circuit in Tiffany v. eBay (2010). Thus, the court held that market hosts were liable only for selling counterfeits if they knew, or should have known, of the specific fact of infringement [5, 10].

Practically, this sets a very high hurdle for liability because trademark holders must monitor use of the mark and look for counterfeits to protect their rights. Any legislative initiative aimed at changing this standard, such as the proposed SHOP SAFE Act, demonstrates growing dissatisfaction with the current high threshold and a desire to lower it to increase platform accountability [5, 10].

In the EU, service providers that merely transmitted or stored information without adding any content of their own were usually exempt from liability. This was particularly true of the prohibition in Article 15.1, which required that no general obligation to monitor content transmitted or stored at the request of third parties could be imposed, enacted to protect freedom of expression and prevent censorship of information [9].

Failure to meet the "safe harbor" conditions does not automatically lead to a presumption of liability. In such cases, it is necessary to prove the existence of requirements provided for by jus commune, including the presence of fault and a causal link between the intermediary's actions and the damage. Scholars have

long warned of the danger of eroding broad immunity in favor of strengthening the protection of copyright and related rights, which could have a "chilling" effect on freedom of speech and information exchange [10].

In the Russian Federation, information intermediaries, including marketplaces and hosting providers, are regulated by Article 1253.1 of the Civil Code. The liability threshold is similar to the concept of constructive knowledge—an intermediary can be held liable if it knew or should have known that information about counterfeit goods was posted on its internet platform and failed to take necessary and sufficient measures to stop the infringement after receiving written notification from the rights holder. Particular attention is paid to joint liability. If an infringement of an exclusive right is committed by the joint actions of several persons (for example, the seller and the marketplace), they bear joint and several liability to the rights holder (paragraph 6.1 of Article 1252 of the RF Civil Code).

It is appropriate to note that the Russian legal system, based on judicial practice, demonstrates functional similarity to the new European requirements. Both the Russian "should have known" standard and the new European requirements (e.g., verifying seller identity) place emphasis on actual knowledge as well as the failure to exercise reasonable due diligence expected of a professional service provider. The RF also participates in regional harmonization within the Eurasian Economic Union (EAEU), where a draft Agreement is being developed that provides for comparable liability measures for information resource owners and intermediaries to combat piracy [1].

Judicial practice of the Court of Justice of the European Union (CJEU) increasingly shifts away from the doctrine of absolute passivity.

For instance, in L'Oréal v. eBay (2011), the CJEU first held that the marketplace operator (eBay) did not "use" the trademarks itself but instead provided a technical environment in which others could use them. Liability was excluded as long as the platform's actions remained exclusively technical and automatic [6].

A question was referred to the CJEU in Coty Germany v Amazon (2020) on whether the trademark infringement arising from storing counterfeit goods in the EU for sellers who fulfilled orders through FBA could be said to be "using" a trademark. The court said that Amazon could not be liable if it was not aware of the infringement and did not intend further distribution. The Advocate General's opinion in this and related Louboutin case often suggested that the FBA constitutes an element of active use, revealing deep disagreement in its interpretation [3].

The court in Louboutin v Amazon (2023) was not mainly looking to the technical test of 'storage', but to broader considerations. It was as if the platform determined what was offered for sale, how and when it was delivered, and, in particular, whether a naturally observant consumer could differentiate Amazon's role from that of the third-party seller [6].

This precedent signals a definitive rejection of absolute immunity for platforms that blur the line between host and seller. The legal interpretation is thus shifting, recognizing that the market influence and comprehensive business integration characteristic of FBA essentially undermine claims of neutrality.

American case law in the sphere of product liability, while not in itself strictly focused on IP or rights issues, also seems to grapple with the hybrid status of platforms. Decisions such as Oberdorf v. Amazon, which treats Amazon as a 'seller' and therefore able to be held liable for the defective product, and McMillan v. Amazon, which takes the opposite view, show that the US, like the EU, is struggling to address the hybrid status of platforms as technical hosts and physical retailers [4].

When compared, it is found that jurisdictions diverge based on whether they prioritize the protection of free commercial flow or the protection of exclusive rights (Table 1).

Table 1 – Comparative Jurisdictional Standards of Liability for E-Commerce Intermediaries (compiled by the author)

Jurisdiction	Legal Basis	Liability Standard (Knowledge Threshold)	Main Immunity Provision
USA	Lanham Act / Common Law	Specific knowledge or willful blindness (*Tiffany v. eBay*)	DMCA Safe Harbors (Hosting)
European Union (Old Law / CJEU)	E-Commerce Directive / CJEU Case Law	Active role test (exceeding passive hosting)	Prohibition on general monitoring (Art. 15)
Russian Federation	RF Civil Code, Art. 1253.1	Knew or should have known	Timely removal after notification

Despite legal differences, a trend toward convergence is observed, in which systems (except the US) attach greater importance to the platform's ability to know, rather than exclusively to actual knowledge. This functional similarity reflects a philosophy of prioritizing the protection of exclusive rights and consumer safety by establishing a standard of reasonable professional negligence.

Over the past two decades, regulators have come to recognize that the current, reactive "notice and takedown" model is insufficient for achieving systems-wide compliance.

The European DSA has become a global model, with a framework much more thorough than the ex post facto process of the existing framework, institutionalizing IP risk management into the operational infrastructure of a platform (Table 2).

Table 2 – Key Requirements of the DSA (based on [7, 8])

Aspect	Description
Know Your Business Customer (KYBC)	Marketplaces are obliged to collect and verify information about third-party sellers to eliminate anonymity.
Against Recurrent Violators	Obligation to implement policies for suspending the activities of users who systematically post illegal content.
Proactive Measures	Requirement to make reasonable efforts for selective checks to ensure that goods have not been identified as illegal, and to inform consumers about the illegality of the products they purchased.

The provisions listed in the table shift the legal focus from post-factum removal to preventive systemic verification, calling into question the principle of prohibiting general monitoring [7, 8].

The drive for increased accountability is also observed in other jurisdictions. To that end, the US SHOP SAFE Act seeks to lower the standard for secondary liability, and the US INFORM Consumers Act seeks to lower the

information asymmetry between sellers and consumers. In the EAEU, the draft Agreement is likely to impose binding compliance obligations and a similar liability regime on all intermediaries, including the blocking of infringing content. Such measures are part of a wider trend towards accountability, and verification is evident in the KYBC [1].

Existing approaches are insufficient, as they either set an excessively high threshold of actual knowledge (US) or rely on an outdated "active/passive" binary distinction that fails to account for the continuum of involvement of modern platforms. The novelty of the proposed risk-level liability lies in dynamically correlating liability not just with knowledge, but with the level of the platform's actual operational control over seller identification and transaction logistics.

It is also proposed to make "safe harbor" immunity contingent upon the demonstrative, proactive implementation of a systemic due diligence (SDD) standard. This standard must include mandatory identity verification of all commercial sellers (KYBC) and mandatory pre-screening of high-risk categories using intelligent systems to analyze both trademark and trade dress infringement.

There should be a sliding scale of joint and several liability based on the level of platform involvement (e.g., whether the seller uses integrated logistics, so-called Fulfillment by Amazon (FBA)). Platforms that are acting as distributors, in the sense of not merely storing and packaging but also shipping (such as with FPS parcels), should be jointly and severally liable with the seller for trademark infringement. This conforms to the view that the party with the lowest transaction costs should bear the risk of loss.

Platforms of important size (analogous to VLOPs in the DSA) should be required to have their internal ranking and recommendation algorithms independently audited. The novelty of this recommended measure is manifested in addressing the problem of hidden, structural participation of platform technologies in the promotion of fraudulent listings, which may prioritize traffic volume over compliance.

4. Conclusion

An analysis of judicial practice and regulatory changes in key jurisdictions shows a clear global trend—the historical "immunity shields" for information intermediaries are weakening. They are being replaced by regulatory mandates for proactive due diligence (DSA) and judicial interpretations (CJEU in Louboutin), which prioritize operational control and consumer perception.

The comparative analysis showed a spectrum of approaches. The US maintains the highest knowledge threshold, while Russia and the EU are increasingly moving toward standards of constructive or mandated knowledge. This divergence reflects fundamentally different priorities—in the US, the protection of commercial freedom has historically prevailed, whereas in Europe and the RF, the emphasis on protecting exclusive rights and consumer safety is strengthening.

The future of IP management in e-commerce appears to lie not in traditional litigation based on the reactive "notice and takedown" system, but in the institutionalization of regulatory compliance. The transition to a risk-leveled liability model is a pragmatic solution. It allows jurisdictions to maintain incentives for innovation while simultaneously ensuring that those who derive the most profit from integrated sales processes (marketplaces) bear a commensurate share of the enforcement burden.

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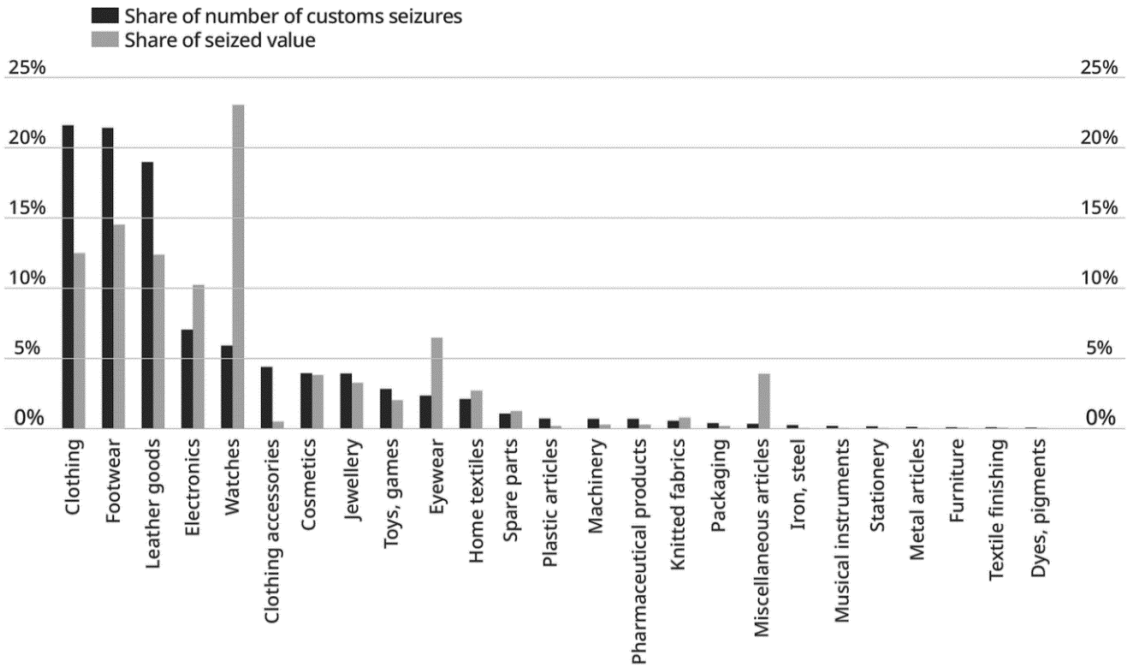
Figure



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