

Injunctions against Shopee?

Liability of Online Marketplaces for IP infringement by its Sellers

As e-commerce is booming, it will not be an overstatement to say that online marketplaces have disrupted the retail scene. For example, Amazon gets close to a global 6 billion views a month while in Southeast Asia, Shopee and Lazada attract over 400 million monthly views together¹.

However, while it is now easier than ever for sellers to connect with buyers, the readily available e-commerce platforms are accessible to both authentic and counterfeit sellers alike. Anyone may register an account and begin selling immediately, without the need to go through any scrutiny or due diligence.

Are Online Marketplaces liable for IP Infringement?

The High Court in *A&M Beauty Wellness Sdn Bhd v. Shopee Mobile Malaysia Sdn Bhd*² has recently delivered what may be some clarification on the extent of liability that online marketplaces such as Shopee and Lazada have regarding IP infringements by their sellers. Could Shopee or Lazada be made responsible for such wrongs by its sellers?

The plaintiff in *A&M Beauty (supra)* applied for a Court injunction against Shopee to prevent sales of goods bearing its “AM” brand by unauthorised third parties on Shopee, after receiving no favorable response to its complaints.

While the postings on Shopee were not disputed, the High Court refused to grant the injunction against Shopee on the following grounds:

- a) The Court acknowledged that it is impossible for Shopee to regulate all its sellers. Shopee does not have the technical capability or resources to pre-screen every single listing or apply “auto-blocks”. As the injunction sought requires a complete wipe out of listings with a specific criterion, the Court held that it was not performable or compliable. Further, such a precedent will have huge disruptions to e-commerce as a whole;

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- b) Merely providing the platform, Shopee is neither the seller of the products nor the agent/representative of the third party sellers;
- c) The Court needs to strike a balance between the injunction in the plaintiff's interest and the consequence to Shopee. If the injunction carries a higher risk of injustice, the Court ought not to grant it. In this case, the balance of convenience lies in favour of not granting the injunction as the plaintiff has failed to demonstrate why it is necessary. On the contrary, what has been demonstrated is the extreme difficulty and impracticality to manually remove the products from the marketplace. It is impossible for Shopee to comply with an order which requires it to prevent a listing from being published before it is even uploaded.

The Court also found that the plaintiff, not being the registered owner had no *locus standi* to seek such reliefs and failed to provide a meaningful undertaking as to damages. The Court was further of the view that monetary compensation is an adequate remedy in this circumstance.

Conclusion

Allowing the easy access and registration of thousands (or millions) of active seller accounts is a cornerstone of the online marketplace industry and one of the reasons for its success. This decision is a palpable relief for online marketplaces, the continued existence of which arguably benefits the public by encouraging competition and stimulating the economy.

Nonetheless, it is equally undisputable that counterfeiters are thriving, having been given more channels to spawn. Additional measures to curb counterfeits would be welcome.

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