

## The burden of proof in disputes between sellers and marketplaces: A comparative analysis of Russian and American approaches

Ivan Ivannikov \*

*LL.B., LL.M., Founder & Legal Strategist at MP Litigation Center, Expert in Marketplace Dispute Resolution, Irvine, California United States.*

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### Abstract

The article examines the issue of the burden of proof in disputes between sellers and marketplaces. The explosive growth of e-commerce has transformed these entities into key economic actors, but at the same time, it has generated a new, understudied area of legal conflicts between platforms and millions of sellers. The relevance of the topic is dictated not so much by the fact of these disputes themselves, but by the existing information and resource asymmetry, where the outcome of a case is often predetermined by the fundamental question of upon whom the court places the burden of proof. The aim of the article is to conduct a comparative legal analysis of approaches to the allocation of this burden in disputes between sellers and marketplaces in Russian and American jurisdictions. The author concludes that the Russian unified but vague approach is less effective. As recommendations, the work proposes moving away from a single model and legislatively establishing a differentiated legal status for marketplaces, directly linking the scope of their liability and, consequently, the burden of proof, to the degree of their actual economic participation in the transaction—from a passive "bulletin board" to a full-fledged fulfillment operator. The presented materials will be of interest to practicing lawyers working in e-commerce, researchers focused on digital law issues, and representatives of regulatory bodies shaping modern legislation in the field of electronic commerce.

**Keywords:** Burden Of Proof; Information Intermediary; Marketplace; Liability; Seller; Russia; Comparative Analysis; Judicial Practice; USA; e-Commerce

### 1. Introduction

The rapid development of the digital economy and changes in consumer behavior have led to a noticeable growth in e-commerce, with marketplaces becoming its central element. Platforms (specifically Amazon, eBay, Wildberries, Ozon) have ceased to be virtual storefronts, transforming into sufficiently complex ecosystems providing sellers with a wide range of services—marketing, payment processing, fulfillment, and delivery. These changes have engaged a new economic reality but, simultaneously, an additional area of legal conflicts.

Relationships between millions of sellers, often representatives of small and medium-sized businesses, and giant digital platforms are becoming an increasingly complex and conflict-ridden field. Disputes arise on a wide variety of grounds:

- loss or damage to goods in marketplace warehouses;
- fines deemed unlawful by sellers;
- account blocking;
- violation of intellectual property rights, etc. [1; 10].

\* Corresponding author: Ivan Ivannikov

The judicial resolution of these disputes directly depends on one of the fundamental institutions of procedural law—the allocation of the burden of proof. Precisely which party—the seller or the marketplace—is obliged to prove certain circumstances often predetermines the outcome of the entire case. The information and resource asymmetry between an individual entrepreneur and a transnational IT corporation makes the described question particularly acute.

The significance of addressing the research topic is determined, on the one hand, by the increasing economic role of marketplaces and, consequently, the increase in the number of litigations, and on the other hand, by the insufficient development and heterogeneity of legal regulation and judicial practice in this sphere (both in Russia and abroad). The goal is to conduct a comparative legal analysis of approaches to the allocation of the burden of proof in disputes between sellers and marketplaces in Russian and American jurisdictions. The choice of the USA is not accidental; it is a legal system that encountered the marketplace phenomenon earlier and has accumulated a significant volume of case law reflecting various, sometimes polar, doctrinal approaches. The author sets the following tasks:

- to identify key differences and similarities in regulation;
- to analyze fundamental judicial precedents and their influence on the formation of law enforcement practice;
- to evaluate the effectiveness of each approach from the perspective of protecting the rights of the weaker party—the seller.

Ultimately, based on the analysis conducted, the author formulates recommendations for improving Russian legislation aimed at creating a more balanced and predictable mechanism for dispute resolution in the dynamically developing e-commerce sector.

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## 2. Materials and methods

Modern studies devoted to revealing the substantive aspects of the topic can be expediently divided into semantic groups. One group unites works examining the specifics of the legal status of marketplaces and their contractual liability in the Russian jurisdiction. E.A. Abrosimova [1] and E.A. Yakovenko [10] emphasize that the marketplace acts as a hybrid subject—an intermediary and an auction organizer simultaneously, which generates uncertainty when establishing liability and proving guilt. Similar questions are touched upon in the works of T.B. Gulyaeva, K.A. Kocharyan, and R.O. Bayramova [3], as well as D.A. Danilova and Ya.A. Dmitrieva [4], where judicial practice is analyzed, showing that courts in the Russian Federation increasingly proceed from the presumption of platforms' awareness of sellers' actions. The second group covers comparative legal works. A.A. Onyanova [5] compares the approaches of the USA and France, identifying fundamental differences. The study by I.E. Titov [8] draws an analogy between Russian and German judicial practice in trademark protection disputes, where burden of proof issues are often resolved in favor of the rights holder. The third block of works is represented by applied materials concerning judicial cases [2; 6; 7; 9].

Sources maintain a divergence regarding the degree of independence of marketplaces. A number of authors view them as neutral intermediaries [1; 5], while others see them as active participants in economic relations upon whom the burden of proving good faith should be placed [3; 8]. The issues of algorithmic transparency and the interaction of platforms with foreign counterparties are insufficiently illuminated.

In the course of exploring the topic in this article, methods of comparative legal analysis, content assessment of judicial practice, and legal interpretation of regulatory provisions in the context of digital contractual relations were used. Systemic and functional approaches, as well as generalization, were also employed.

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## 3. Results and discussion

The Russian legal system, regarding issues of allocating the burden of proof, proceeds from the general principle of the adversarial nature of parties, which is enshrined in Art. 65 of the Arbitration Procedure Code of the Russian Federation and Art. 56 of the Civil Procedure Code of the Russian Federation. According to this guiding provision, each person participating in the case must prove the circumstances to which they refer as the basis for their claims and objections. However, the application of this general rule in disputes involving marketplaces is complicated by the uncertainty of their legal status.

The key question courts have to resolve is whether the marketplace is merely an "information intermediary" providing a technological platform, or whether it acts as a full-fledged participant in trade turnover, comparable to an agent or commission agent. The distribution of liability and, consequently, the burden of proof directly depends on the answer to this question [3; 4].

Russian legislation (Art. 1253.1 of the Civil Code of the Russian Federation) provides for a special regime for information intermediaries. They are exempted from liability for intellectual property rights violations if two conditions are simultaneously met:

- they did not know and should not have known about the illegality of the content placement;
- upon receiving a written statement from the rights holder, they timely took necessary and sufficient measures to stop the violation.

The described approach is actively applied by courts in disputes regarding the sale of counterfeit goods. The burden of proving that the marketplace knew or should have known about the violation, as well as that it did not take measures on time, falls on the plaintiff (the rights holder). For the marketplace, in turn, to be exempted from liability, it is sufficient to prove the fact of blocking the card of the disputed product after receiving the claim.

At the same time, judicial practice is heterogeneous. In a number of cases, courts refuse to recognize the marketplace as an information intermediary, pointing to its deeper involvement in the transaction. Criteria for this may serve as:

- receipt of payment for the goods by the marketplace to its own account;
- participation in logistics and storage;
- direct income (commission) from the sale of a specific product [8].

In such situations, courts may impose joint and several liability on the marketplace together with the seller as a joint tortfeasor.

In other categories of disputes, the distribution of the burden of proof also depends on specific circumstances and contractual relations.

Thus, in disputes regarding the loss of goods transferred to the marketplace warehouse (fulfillment), the characterized burden is distributed as follows. The seller must prove the fact of transferring the goods to the marketplace by providing transfer and acceptance acts. In turn, the marketplace, to relieve itself of liability, justifies that the goods were either sold to the buyer, returned to the seller, or are safely in the warehouse. The inability to provide such evidence is interpreted as confirmation of the fact of the loss of goods [2; 7].

When challenging fines imposed by the marketplace (for example, for incorrect labeling or the sale of prohibited goods), the burden of proving the disproportion of the fine and other circumstances relevant to the case falls specifically on the seller. The marketplace, meanwhile, must substantiate the very fact of the violation by the seller [9].

Thus, the Russian approach can be appropriately characterized as flexible but not always predictable—it largely depends on the court's interpretation of the platform's role in a specific transaction (Table 1).

**Table 1** Russian approach to the burden of proof in disputes between sellers and marketplaces (based on [3; 4; 10])

Dispute Type	Circumstances proven by the seller (plaintiff)	Circumstances proven by the marketplace (defendant)
Violation of Intellectual Rights (Counterfeit)	The fact of violation; that the marketplace knew or should have known about the violation and did not take measures (if the marketplace is recognized as an info-intermediary)	Status of information intermediary; taking timely measures to stop the violation (e.g., blocking the product)
Loss/Damage of Goods in the Warehouse	Fact of transferring the product to the marketplace (acts)	Fact of sale, return of goods to the seller, or presence in the warehouse; absence of fault in the loss
Challenging Fines Imposed by the Marketplace	Disproportion of the fine; absence of grounds for its imposition	Violations by the seller that served as the basis for the fine; proportionality
Abuse of Dominant Position	Presence of a dominant position by the platform (considering network effects); abuse (e.g., imposing unfavorable terms)	Admissibility of its actions in accordance with antimonopoly legislation

In turn, the American legal system, which is based on case law, demonstrates a more dynamic evolution of approaches to marketplace liability. The distribution of the burden of proof here was largely formed under the influence of two key legal acts and series of court decisions in different spheres—internet intermediary immunity and product liability.

Thus, fundamental to disputes in this area is the case of *Tiffany (NJ) Inc. v. eBay Inc.* (2010). The court established that marketplaces do not bear direct liability for trademark violations by sellers using their platform. To be held indirectly liable, the plaintiff must prove that the marketplace either intentionally induced the violation or continued to provide services to the seller while knowing or having reason to know of the violation being committed. Furthermore, the judicial body ruled that general knowledge that counterfeit products might be sold on the platform is insufficient. The rights holder is obliged to notify regarding specific instances of violation. Thus, the court placed the burden of monitoring and identifying counterfeits on the rights holders themselves, not on the marketplace. The characterized approach significantly protects platforms, requiring a heightened standard of proof from the plaintiff [6].

In trademark violation cases in the USA, the plaintiff (rights holder) bears the burden of proving three main elements:

- possession of a valid and protected trademark;
- priority in its use;
- likelihood of consumer confusion due to the defendant's actions.

A completely different trend is observed in cases regarding harm caused by defective goods sold through marketplaces. Historically, platforms, particularly Amazon, successfully defended themselves by asserting that they are not "sellers" in the traditional sense and are protected by Section 230 of the Communications Decency Act, which provides immunity to providers of interactive computer services from liability for third-party content.

However, in recent years, courts in several states have begun to reconsider this approach. In landmark cases—*Bolger v. Amazon.com, LLC* (California, 2020), *Loomis v. Amazon.com LLC* (California, 2021)—appellate courts recognized Amazon as an integral link in the "supply chain," especially within the framework of the Fulfillment by Amazon (FBA) program, where the marketplace controls storage, packaging, and delivery of products. Courts concluded that Amazon may bear strict liability for defects in goods sold on its platform. Thanks to the described approach, the burden of proof is effectively redistributed. It is sufficient for the consumer (or the seller in a recourse claim) to prove the fact of harm caused by a defective product sold through the platform, and the marketplace will bear liability regardless of fault. This motivates platforms to control sellers and the quality of their products more thoroughly [5].

Table 2 presents a similar characterization as above, but regarding the USA.

**Table 2** American approach to the burden of proof in disputes between sellers and marketplaces (based on [5; 6])

Dispute Type	Circumstances proven by the seller (or other plaintiff)	Circumstances proven by the marketplace (defendant)
Violation of Intellectual Rights (Counterfeit)	Possession of a valid mark, priority of use, likelihood of confusion, presence of specific knowledge of the violation by the marketplace and its inaction	Absence of specific knowledge of the violation, taking measures after notification. The burden of general monitoring lies with the rights holder
Harm from Defective Goods	Fact of harm caused, presence of a defect in the product; that the product was sold through the marketplace (in jurisdictions applying strict liability)	In jurisdictions with strict liability, defense is extremely difficult. In others—proving "non-seller" status and defense under Section 230 CDA
Disputes Regarding Refunds (Chargebacks)	The seller bears the burden of proving the legitimacy of the transaction (data on goods, date, amount, buyer)	In the absence of evidence from the seller, the refund to the buyer occurs automatically

A comparison of Russian and American approaches helps identify fundamental differences conditioned by the specifics of the legal systems.

Thus, the US approach, based on precedents, shows greater polarization. On one hand, there is a very high level of protection for marketplaces in the sphere of intellectual property (the *Tiffany v. eBay* precedent), placing the main burden of control on rights holders. On the other, there is a growing trend toward imposing strict liability on platforms for harm from defective goods, which effectively removes a significant part of the burden of proof from the plaintiff. This dualism reflects the courts' attempt to balance the stimulation of innovation (broad immunity) and consumer protection (strict liability).

In Russia, the state of affairs appears more unified, but at the same time, less certain. Central is the concept of "information intermediary" from the Civil Code of the Russian Federation, which judicial bodies attempt to apply to various situations. This leads to a lack of uniform practice—under similar circumstances, the same marketplace can be recognized as a simple intermediary or a joint defendant. The burden of proof "floats" depending on judicial discretion and the interpretation of the degree of the platform's involvement in the transaction. Unlike the USA, a clear division of approaches for IP disputes and product quality disputes has not yet formed in the Russian Federation.

Based on the analysis conducted, it seems appropriate to formulate recommendations for improving Russian legislation and law enforcement practice (Table 3).

**Table 3** Proposals for improving the regulatory framework and law enforcement practices in Russia regarding the burden of proof in disputes between sellers and marketplaces (compiled by the author)

Direction	Description
Introduction of differentiated legal status for marketplaces	<p>It is proposed to move away from the single category of "information intermediary" at the legislative level and introduce a gradation of statuses depending on the degree of platform integration into the seller's business processes. For example, it is possible to distinguish:</p> <ul style="list-style-type: none"> <li>- "Classifieds" (minimal involvement)—preservation of information intermediary status with the current liability regime;</li> <li>- Agent Platform (participation in settlements, marketing)—introduction of a presumption of joint and several liability with the seller, which the marketplace can refute by proving that it took all reasonable measures to verify the seller's good faith;</li> <li>- Fulfillment Operator (storage, packaging, delivery)—application by analogy of norms regarding the storage contract and placing on the marketplace the burden of proving the absence of fault in the loss or damage of goods, as is already emerging in practice.</li> </ul>
Establishment of a presumption of marketplace fault in product quality disputes	<p>Following the example of progressive American states, to protect consumers and bona fide sellers, a presumption of marketplace liability for harm caused by defective goods sold through its ecosystem (especially when using fulfillment services) should be established. This will shift the burden of proof and force platforms to implement more effective quality control and seller selection systems.</p>
Raising the standard of proof for exemption from liability	<p>Instead of the formal requirement to "take measures" after notification of a violation (e.g., in IP disputes), it is appropriate to legislatively establish the duty of the marketplace to prove that proactive and sufficient measures were taken to prevent violations (e.g., seller verification, spot checks of products). This will partially transfer the burden of preventive control from sellers and rights holders to platforms possessing greater resources for this.</p>

The novelty and purpose of the formulated recommendations are manifested in the proposal of a systemic approach to solving the problem, based on the economic functionality of the marketplace rather than formal legal status. This will help create a fairer, more predictable, and balanced environment where the burden of proof will be distributed proportionally to the degree of control and participation of the party in the legal relationship, stimulating marketplaces toward more responsible policies and protecting the rights of small and medium-sized businesses.

## 4. Conclusion

Through the conducted research, it is shown that the issue of allocating the burden of proof in disputes between sellers and marketplaces is at the center of a complex process of adapting traditional legal institutions to the realities of the digital economy.

The comparative analysis of Russian and American approaches allowed for identifying the presence of two fundamentally different models of responding to this challenge. The system in the USA, driven by judicial precedents, demonstrates a high degree of adaptability but also significant polarization—from almost total immunity of marketplaces in some spheres (intellectual property) to the imposition of strict liability in others (product quality). This model, on one hand, effectively solves specific tasks (consumer protection), but on the other, creates certain legal uncertainty due to differences in approaches between states. The system in the Russian Federation, in turn, attempts to operate with a single legislative construction of the "information intermediary," which generates instability and contradictory judicial practice. The absence of clear legislative criteria for distinguishing marketplace roles leads to the distribution of the burden of proof being largely left to the court's discretion, which reduces the predictability of justice and increases risks for the weaker party—the seller.

The practical significance of the study lies in the development of specific recommendations for improving Russian legislation. The proposed differentiated approach to defining the legal status and liability of marketplaces, based on the degree of their involvement in the transaction, is capable of introducing much-needed clarity into legal relations and creating a more balanced system for allocating the burden of proof.

Future research in the analyzed area is proposed to be oriented toward a more detailed elaboration of antitrust aspects of marketplace activities, as well as the study of legal regulation in other jurisdictions, particularly in the European Union, which, with the adoption of the Digital Services Act and Digital Markets Act, offers its own, third way of solving these complex legal questions.

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