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Philipp Plein v. Rezon Ltd – The first Bulgarian decision related to liability of intermediaries

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The Sofia City Court, Commercial Division reached a landmark decision on November 15, 2018, when it issued a judgement holding that the company REZON Ltd., which manages and operates the on-line marketplace <bazar.bg>, violated the rights of the trademark owner PHILIPP PLEIN. The breach occurred through the use of these trademarks in the commercial activity of the Respondent which it carries out in relation to the management of the site. As a result of this finding, the Court ordered REZON Ltd. to suspend the use of the PHILIPP PLEIN trademark. The decision is not yet final, but it represents the first case ever in which Bulgarian courts have determined the liability of an intermediary for infringement of IP rights. While the decision is not binding on other chambers of the Sofia City Court or other courts, it is nevertheless expected to encourage other trademark owners to have confidence in the Bulgarian Rule of Law and to defend their rights on the basis of similar legal arguments.

The Case

As the owner of many EUTMs, PHILIPP PLEIN filed a lawsuit against REZON Ltd. on the basis of the sale of counterfeit goods by users of <bazar.bg>, by means of which both natural and legal persons have used the trademarks without permission. The filing of the case was preceded by a number of take-down notices filed on behalf of PHILIPP PLEIN, but ultimately, the Respondent refused to comply with the take-down notices and numerous additional letters which were sent.

The matter at issue is focused on the role of publishing ads for the sale of goods, namely whether the Respondent, in its role of site administrator, controls the information and maintains filters for it, or whether its activity is purely technical and has a “passive” character, i.e. does it have control over the stored information and the data in the sales ads published by third parties. In determining that, the court had to answer whether REZON Ltd. provides “optimization” support for the presentation of the proposed sales on the site.

The Court found that the Respondent did in fact assist certain users in the presentation and advertising of their proposals for the sale of counterfeit goods on the grounds of the following facts:

1. In the General Terms and Conditions of <bazar.bg>, there is a prohibition of the publication of sales announcements for electronics that are “replicas,” and such advertisements will be removed *ex officio*. However, such prohibition is missing for other goods. This excludes the “passive” role

of REZON Ltd., and it was obvious to the Court that the company not only has control over the published information but also has the resources to exercise it.

2. It has been proven that the Respondent receives detailed information from the delivery company about the sales made.
3. REZON Ltd. provides bonus points to persons who have posted sales announcements, if a sale is made. Until recently, the bonus points have been paid in cash, and then advertising services are provided as compensation.
4. Certain advertisements which are paid and based on this service are published as VIP or TOP, which proves the optimization of the way the adverts are presented; this is contrary to the Respondent's claim of having a passive role.

Based on these factual findings, the Court held that the conduct of REZON Ltd. can also be treated as “advertising of goods or services,” which is in accord with the Applicant's allegations. Furthermore, the Court entirely dismissed the Respondent's defense, based on Article 14 of Directive 2000/31/EC (e-Commerce Directive) by which Respondent was allegedly only hosting ads and had no actual knowledge of infringements, and ultimately ruled in favor of PHILIPP PLEIN.

Impact

This case is the first of its kind to be dealt with in Bulgaria and will have a significant impact on subsequent similar cases. This is, of course, in accord with the European Union law and practice, and such consistency reinforces confidence in the Bulgarian legal system. Should this or a future case reach the Supreme Court of Bulgaria, it may facilitate the formation of binding caselaw to provide the necessary degree of protection for trademark owners when counterfeits of their goods are being sold online.

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