Could Oberdorf Open the Door to Infringement Liability for Amazon
by Timothy Nichols

In *Oberdorf v. Amazon.com Inc.*, the Third Circuit held that Amazon is a "seller" of products offered by third parties through Amazon Marketplace and, in turn, could be strictly liable for harm caused by a defective dog collar purchased from the marketplace. *Oberdorf v. Amazon.com Inc., No. 18-1041,* 2019 WL 2849153 (3d Cir. July 3, 2019). Applying Pennsylvania law, the Third Circuit found that Amazon should be considered a "seller" based on the real-world anatomy of a sale on Amazon. *Oberdorf*, 2019 WL 2849153, at *2-10. Before *Oberdorf*, federal courts have repeatedly held that Amazon is not a "seller" for purposes of product liability and in other contexts because Amazon did not fit the definition of a "seller" according to the norms of traditional contractual analysis. The Third Circuit's decision is likely the first ruling of its kind and may represent the worst loss yet for Amazon over marketplace sales, exposing it to potentially massive liability.

While being a "seller" for product liability purposes involves unique public policy rationales, *Oberdorf* could also signal a shift in how and when courts decide to impose seller liability on Amazon and other online marketplaces. For example, courts could similarly find that Amazon is liable for infringing products sold on its marketplace. After all, an injury is an injury. Further, both product liability and intellectual property infringement generally require a "seller" or an "offer to sell" and hence factors such as Amazon directly profiting from product sales, issuing invoices, advertising products, fulfilling orders, and maintaining control over payments, communications, and product listings may apply to both under appropriate conditions.

Consider the case of Milo & Gabby in view of *Oberdorf*. In 2015, Milo & Gabby, LLC sought money damages from Amazon for its "offering to sell" products that allegedly infringed certain design patents. *See Milo & Gabby, LLC v. Amazon.com*, 144 F.Supp.3d 1251, (W.D. Wash. 2015). The Court ultimately found that Amazon was not liable for patent infringement because Amazon did not offer to sell the allegedly infringing products under the traditional contractual analysis (e.g., there was no manifestation of the willingness of Amazon to enter into a bargain). *See id.* at 1253, *aff'd on other grounds* 693 Fed. Appx. 879, 886 (Fed. Cir. 2017) (finding Amazon was not a "seller" because Amazon never held title to the accused

products). The Court expressed that it was troubled by its decision and stated that "[t]here is no doubt that we live in a time where the law lags behind technology" and "under the current case law, Amazon has been able to disavow itself from any responsibility for "offering to sell" the products at all. *See Milo & Gabby*, 144 F.Supp.3d. at 1253-54.

Time alone will tell if *Oberdorf*'s capability to look beyond traditional contract analysis effectuates broader developments in the law surrounding infringement liability for online marketplaces, but it has the attention of Amazon and other online marketplaces for now.