

LVMH wins in France over eBay for commercial link grievance this September

On September 18, 2009, the Paris Court of First Instance ruled trademark infringement against eBay Inc. and eBay International AG. They reserved on several search engines (GOOGLE, MSN and AOL SEARCH) key words reproducing and imitating trademarks hold by several companies of the LVMH Group such as “*Ange ou demon*”, “*Hot Couture*”, “*L’heure bleue*”, “*(parfum) Habit rouge*” or “*Kenzo*” which drove internet users to *eBay.fr* and *eBay.com* websites.

eBay International AG and eBay Inc. argued that no direct and personal use of the marks had been committed on their side. They also pointed out that the public perfectly understood that the reproducing and imitating signs served the sole purpose of presenting the products being offered for sale on eBay websites. Using the plaintive trademarks was consequently presented as a necessary mean for providing to the public clear and complete information as to the availability of the products on their websites. They added that the position of the advertisings on the search engines and the reputation attached to eBay excluded any possible confusion in the mind of the public.

For the Court, use of the trademarks in the pages of eBay websites for designating products was not the question to deal with (regardless of whether these products were authentic or not). The sole aspect that the Court specially considered was the non-authorized use of a trademark as key word generating a commercial link to eBay websites. In this context, use of the marks was regarded as serving only a promotional purpose and excluded any informative approach. The judge considered that only an informative approach could have rendered necessary a reference to the marks involved. The Court granted to the LVMH Group a total of 60.000 € as damages and 20.000 € as an award on costs.

eBay companies indeed directly and actively intervened to personally own keywords which were identical and very similar to already existing trademarks so as to drive a traffic to their own websites. This approach could not be regarded as neutral and as falling on the same level than the mere indication of brands for products being offered for sale on the auction websites.

This is the second time that LVMH Group wins over eBay companies. On June 30, 2008, eBay was ordered to pay around 40 million Euros as damages to LVMH Group because their system involved was in breach of the selective distribution networks set up by the plaintiffs (the Appeal is currently pending).

Would the current handling by the CJEC of GOOGLE ADWORDS system question and recent conclusions of the Advocate General relating thereto (saying that there was no trademark infringement) affect this possible angle of action against eBay ? This pending matter involves directly GOOGLE and its system but it is not directed against the advertisers using the GOOGLE ADWORDS system (eBay was indeed acting as an advertiser in the proceeding above). Whatever the issue of the GOOGLE proceeding is, acting against advertisers for trademark infringement will remain a reliable ground of action.

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