



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-324/09
L'Oréal and others v eBay

Advocate General Jääskinen considers that eBay is generally not liable for trade mark infringements committed by its users on its electronic marketplace

However, if eBay has been notified of the infringing use of a trade mark, and the same user continues or repeats that infringement, the internet marketplace company can be held liable for it

eBay operates a global electronic marketplace on the internet where individuals and businesses can buy and sell a broad variety of goods and services. To attract new customers to its web site, the company has bought keywords, including well-known trade marks, from paid internet referencing services (such as Google's AdWords) so as to direct clients to its electronic marketplace.

L'Oréal, owner of a wide range of well-known trade marks, accuses eBay of being involved in trade mark infringements committed by sellers on its internet marketplace. L'Oréal alleges that, by buying keywords corresponding to L'Oréal trade marks, eBay directs its users to infringing goods offered for sale on its website. Moreover, L'Oréal is of the view that the efforts taken by eBay to prevent selling infringing products on its electronic marketplace are inadequate. L'Oréal has identified different forms of infringement including the trade of counterfeit and unpackaged products as well as the sale of non-European Economic Area (EEA) source products to the EEA countries¹ and the sale of product samples not intended for sale to consumers.

The High Court, before which the dispute is pending in the UK, has asked the Court of Justice a range of questions as to the nature of the infringing products identified by L'Oréal. Moreover, the High Court also wishes to know what an operator of an internet marketplace can be expected to do to prevent trade mark infringements by its users.

In his Opinion delivered today, Advocate General Niilo Jääskinen finds, first of all, that testers and dramming bottles, often marked with the words 'not for sale' or 'not for individual sale', which are not intended for sale to customers and are supplied without charge to the trade mark proprietor's authorised distributors cannot be considered as being goods put on the market with the consent of the trade mark proprietor. It is therefore still up to the trade mark proprietor to decide if he intends to put these products on the market and he can also prohibit the sale of such products.

Similarly, trade mark protection can also be invoked where the goods offered for sale on the electronic marketplace have not yet been put on the market within the EEA by or with the consent of the trade mark proprietor insofar as the offer for sale is targeted at consumers in EEA countries.

As to the effects of the unboxing of trade marked cosmetic products, the Advocate General states that in the case of luxury cosmetics it cannot be excluded that the outer package of the product constitutes a part of the condition of the product due to its specific design which includes the use of the trade mark. According to Mr Jääskinen, in such cases the trade mark proprietor is entitled to oppose further commercialisation of the unpackaged goods insofar as the removal of the package impairs the functions of the trade mark of indicating the origin and quality of goods or damages its reputation.

¹ The 27 EU Member States plus Iceland, Liechtenstein and Norway.

Then, the Advocate General analyses eBay's role in the trade mark infringements. In this context, he considers that although eBay does not itself sell L'Oréal goods on its website, it nevertheless offers an alternative source for buying them which coexists with the distribution network of the trade mark proprietor. Therefore, by reserving L'Oréal's trade marks as keywords leading customers to its internet marketplace, eBay uses these trade marks in relation to goods marketed by L'Oréal under these signs.

However, according to the Advocate General, the use of the disputed trade marks as keywords by eBay does not necessarily result in misleading the consumers as to the origin of the goods offered. He finds that in cases where the ad itself is not misleading as to the nature of the advertising internet marketplace operator, the function of the trade mark of indicating the origin of the product is not likely to be jeopardised.

The Advocate General also makes it clear that if the use complained of by the trade mark proprietor consists of the display of the sign on the website of an operator of an electronic marketplace itself rather than in a sponsored link of a search engine, it cannot be deemed as use of the trademark in relation to goods by the marketplace operator, but by the users of the marketplace. In effect, in such cases, the marketplace operator merely allows its clients to use signs which are identical with trade marks without using those signs itself. Hence, the potential adverse effects to the trade mark resulting from the listing of trade mark protected goods by users of an electronic market place cannot be attributed, under EU trade mark law, to the marketplace operator.

Finally, the Advocate General discusses the interpretation given by the Court in the Google case² according to which an information service provider storing information at the request of its client is exempted from liability for this information only if it remains neutral in relation to the hosted data. While noting that eBay may not be neutral in this sense because it instructs its clients in the drafting of the advertisements and monitors the contents of the listings, **Mr Jääskinen does not consider that such an involvement in the preparation of the clients' listings should result in losing the protection granted to businesses storing information uploaded by users.** The Advocate General points out nevertheless that whilst eBay is generally exempted from liability for information stored by its clients on its website, it still remains liable for the content of data it communicates as an advertiser to a search engine operator. The exemption from liability does not apply either in cases where the electronic market place operator has been notified of the infringing use of a trade mark, and the same user continues or repeats the same infringement. In that latter case, a judicial injunction can also be given against the electronic marketplace operator to prevent the continuation or repetition of the infringement.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the Opinion are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106

² Joined Cases [C-236/08 to C-238/08](#) Google (see also Press Release No [32/10](#)).