

## Intellectual Property Update

### **eBay successfully defends counterfeit suit in Belgium**

Following the French ruling against eBay for sales made through its website of counterfeit products (Intellectual Property Update, June 2008), a similar case brought in Belgium by L’Oreal has yielded a significantly different result.

On 31 July 2008, a Belgian court ruled that eBay was not liable for the €500,000 damages claimed by Lancôme.

Lancôme had sought damages and an order restricting eBay from displaying adverts for Lancôme products on the Belgian eBay website [www.ebay.be](http://www.ebay.be). Lancôme considered these adverts to be illegal, including those where a professional eBay seller sold more than three cosmetic or perfume products bearing Lancôme’s brand names without indicating the seller’s full identity, legal form, geographical address and VAT number. In its defence, eBay contended that as a host of adverts, under Belgian (and European) law it was not bound to respect a general obligation to monitor the information that it hosts, and was exempt from liability for the content of the offers posted on its website. Lancôme, however, did not agree.

The court found that the activities which Lancôme complained of were those in which eBay hosted sellers’ adverts, and eBay therefore benefitted from exemption from liability. Furthermore, the court found that “*eBay does not have any general obligation to monitor the information that it thus hosts, nor any general obligation to actively look for facts or circumstances that come under illegal activities*”. Therefore, Lancôme’s request for a ban on the posting of certain sales offers on eBay’s website was contrary to the principles of Belgian and European law on electronic commerce.

In order to keep within the exemption of liability, eBay must not be aware of the illegal activity or information. If it becomes aware of such activity or information it must act promptly to remove the information or render access to it impossible. Lancôme claimed that this imposed an obligation on eBay beyond simply removing each offer identified as illegal, suggesting that eBay were obliged to take measures to prevent recurrence of such offers. Such a positive obligation is not imposed by the law.

As in the Tiffany & Co. case, the court noted that eBay had acted positively to notification from Lancôme in respect of the offending offers. The court also stated that it was reasonable for eBay to request verification from Lancôme as to the foundation for its claims before blocking content, and noted that eBay had provided evidence of the measures taken to protect its website and to cooperate with rights holders in respect of infringements.

Although successful in its defence on Lancôme’s claim, eBay failed in its counterclaim against Lancôme, for which it sought damages of €100,000. eBay had claimed that Lancôme committed harassment including the sending of daily complaints incriminating large numbers of offers which were legal. However, the court ruled that Lancôme had not acted with a “reprehensible lack of judgment” in initiating legal action.

Lancôme was ordered to pay 75% of eBay’s costs.

*See: Lancôme Parfums et Beautie & Cie v eBay International AG, eBay Europe S.A.R.L., eBay Belgium, 2008, A/07/06032*