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Case Comment

Trade marks in online marketplaces: the CJEU's stance in L'Oreal v eBay

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Legislation: Directive 2008/95 on trade marks art.7, art.5
Directive 2000/31 on information society services, in particular electronic commerce, in the internal market art.14
Directive 2004/48 on the enforcement of intellectual property rights art.11
Regulation 207/2009 on the Community trade mark art.9, art.13

Cases: Portakabin Ltd v Primakabin BV (C-558/08) [2011] Bus. L.R. 1339 (ECJ (1st Chamber))
L'Oreal SA v eBay International AG (C-324/09) [2011] E.T.M.R. 52 (ECJ (Grand Chamber))
Google France Sarl v Louis Vuitton Malletier SA (C-236/08) [2011] Bus. L.R. 1 (ECJ (Grand Chamber))

*C.T.L.R. 37 Abstract

On July 12, 2011 the Court of Justice of the European Union (CJEU) gave its decision in L'Oréal v eBay *(C-324/09). The CJEU dealt with inter alia the following issues: (1) the aspects related to the nature of the goods sold by eBay's users; (2) the liability of eBay in connection with the said sales; (3) the availability of the "hosting provider" defence for eBay; and (4) trade mark owners' right to obtain injunctions against operators of online marketplaces in order to stop future sales of infringing products through their websites. Even though the actual liability of eBay will have to be established by the UK referring court, the CJEU's conclusions can already be considered a success for proponents of stricter online trade mark enforcement.*

Introduction and legal framework

On July 12, 2011 the Court of Justice of the European Court (CJEU) handed down its decision in *L'Oréal v eBay.*[1] The court dealt with several issues related to the sale of counterfeit and other infringing products on the famous online marketplace eBay. The CJEU faced inter alia the following issues: (1) the aspects related to the nature of the goods sold by eBay's users; (2) the liability of eBay in connection with the said sales; (3) the availability of the "hosting provider" defence for eBay; and (4) trade mark owners' right to obtain injunctions against operators of online marketplaces in order to stop future sales of infringing products through their websites.

The provisions interpreted by the CJEU in this case are many: e.g. (1) the provision on the scope of protection offered by a trade mark registration, i.e. art.5 Directive 2008/95 (former art.5 Directive 89/104) and art.9 Regulation 207/2009 (former art.9 Regulation 40/94)[2]; (2) the exception to exhaustion of trade mark rights under art.7(2) Trade Mark Directive and art.13(2) Trade Mark Regulation; (3) art.14 Directive 2000/31 (E-Commerce Directive) offering hosting providers an exemption from liability for the unlawful acts committed by their users; (4) the third paragraph of art.11 Directive 2004/48 (Enforcement Directive) which offers intellectual property right (IPR) owners the right to obtain injunctions against intermediaries whose services are used by third parties.

The above provisions have all been implemented in the United Kingdom, except for the third paragraph of art.11 of the Enforcement Directive. Indeed, in the United Kingdom the right to obtain injunctions was already (and is still) provided by s.37 of the Supreme Court Act 1981,

such provision stating that the High Court may grant injunctions "in all cases in which it appears to be just and convenient to do so".

Facts of the case

The case originated from a dispute before the High Court in London between the cosmetic company L'Oréal SA and its subsidiaries (L'Oréal) on the one hand and three subsidiaries of eBay Inc (eBay) together with certain individuals, on the other hand.[3] L'Oréal had claimed that (1) eBay did not do enough to prevent the sale of counterfeit goods, such as perfumes and cosmetics, bearing its trade marks and in any case of original L'Oréal products destined to non-European Economic Area (EEA) or European Union (EU) markets; (2) and that therefore it should be considered liable for damages for any trade mark infringing goods sold via its website.

The High Court stayed the proceedings and referred the case to the CJEU pursuant to art.267 of the Treaty for the Functioning of the European Union. The court asked the CJEU questions regarding the following issues: (1) the offer for sale through an online marketplace of original trade marked goods intended by the trade mark owner to be sold in non EEA or EU countries; (2) the offer for sale of testers and dramming goods as well as of unpackaged goods; (3) the advertisement by the operator of an online marketplace of its website and the products offered on it, through the use of search engine keywords; (4) the availability for the operator of an online marketplace of the "hosting provider" exemption under art.14 ***C.T.L.R. 38*** E-Commerce Directive; (5) the scope of the injunction against the said operator under art.11(3) of the Enforcement Directive.

Analysis of the decision

In analysing the CJEU's major findings the author will make reference to previous case law including the seminal *Google France* case.[4] Indeed, some of the findings reached by the CJEU in the present case build on that landmark decision.

The offer for sale of trade marked goods intended by the trade mark owner to be sold in non-EEA or EU countries

The first question faced by the CJEU is whether for the owner of a trade mark registered in a Member State of the EU or of a Community trade mark to be able to prohibit the offer for sale on an online marketplace of infringing goods which have not been marketed in the EEA (or in the case of a Community trade mark in the EU), it is sufficient that such offer is targeted at EEA or EU consumers; or must the owner give evidence that the products in question will be effectively marketed in the territory covered by the trade mark registration?

The court upheld the argument brought by L'Oréal, the UK, Italian, Portuguese and Polish governments and the European Commission: i.e. that trade mark infringement under art.5 Trade Mark Directive and art.9 Trade Mark Regulation occurs as soon as the offer for sale of the relevant good located in a non-EEA or EU country is targeted at EEA or EU consumers.[5] Otherwise, the CJEU noted, online sellers located in third countries would be able to avoid fulfilment of EU trade mark provisions merely by keeping the products outside the territory where the relevant rights are effective. And this scenario would have a negative impact on the effectiveness of the said provisions.[6]

How can we know if an online marketplace is targeting EEA or EU consumers? It is for national courts--noted the CJEU--to assess on a case-by-case basis whether there is any relevant factor on the basis of which it can be concluded that the offer for sale of the relevant goods is directed to EEA or EU consumers: e.g. if the online seller uses the country code domain name "co.uk", there is little doubt that that seller is targeting UK consumers.[7] A similar issue was dealt with in *PammerandHotel Alpenhof* in which a list of criteria useful to verify whether a company's activity is specifically directed to a Member State's market have been set out.[8]

The offer for sale of testers and dramming goods

Another issue dealt with by the CJEU is whether the supply of "testers" and "dramming products" by a trade mark owner amounts to such goods being put in the market pursuant to the Trade Mark Directive and Trade Mark Regulation, i.e. with a view to penetrating the market. Testers are products intended for demonstration to clients in authorised retail

outlets, whereas dramming goods are products (e.g. bottles) from which small quantities can be taken for supply to consumers as free samples.
The answer to the above question is relevant for "exhaustion" purposes. Indeed, if considered as goods put on the market within the meaning of the Trade Mark Directive and Trade Mark Regulation, the relevant rights would be inevitably exhausted with the release of the products in question in the EEA. The CJEU's answer has been straightforward and is in line with its previous decision in *Coty Prestige Lancaster v Simex*[9]: the sale of the above testers and dramming products does not amount to those goods being put on the market. In other words, trade mark owners' rights related to testers and dramming products are not exhausted with the release of such goods in the EEA and thus proprietors can validly enforce their rights to oppose the offer for sale and sale of the said products in an online marketplace.

**C.T.L.R. 39 The offer for sale of unpackaged products*

The CJEU was also asked whether the removal of the packaging of the products in question (namely, cosmetics) encroaches upon the exclusive rights of the owners of the trade marks affixed on those goods, so as to entitle the said proprietors to oppose the resale of such unpackaged products under art.5 Trade Mark Directive and art.9 Trade Mark Regulation.
It should first be noted that art.7(2) of the Trade Mark Directive and art.13(2) of the Trade Mark Regulation state that no exhaustion of trade mark rights occurs where there are "legitimate reasons" to oppose the further sale of the goods by independent traders, in particular where the condition of the goods has been changed or impaired after they have been put on the market. This provision includes the case of repackaging of products, as has been confirmed by the CJEU's case law.[10]
The court held that the trade mark proprietor is entitled to prevent the resale of the above unpackaged goods under art.5 Trade Mark Directive and art.9 Trade Mark Regulation where the consequence of the removal of the packaging is that material information, e.g. information concerning the identity of the producer or the seller of the cosmetic product, is missing. In cases where the removal of the packaging has not resulted in the absence of such information, the trade mark owner may nevertheless prevent the resale of an unboxed perfume or cosmetic good bearing his trade mark, if he shows that the elimination of the packaging has damaged the image of the goods and thus the reputation of the sign.[11] This clearly amounts to an exception to the exhaustion rule pursuant to art.7(2) of the Trade Mark Directive and art.13(2) of the Trade Mark Regulation.

The advertisement of an online marketplace website and of the products offered on it (through the use of search engine keywords)

This is one of the central issues of the case. eBay purchased from the search engine Google so-called keywords which are identical to some of L'Oréal's registered trade marks. By doing that, the famous online market operator caused to appear--as soon as internet surfers carried out a Google search by inserting the said keywords--a sponsored link to its website as well as a message that its users had the opportunity to purchase through that site products bearing the trade mark searched for. In such a manner eBay has become an advertiser, i.e. it advertises not only certain offers for sale placed by its users but also its marketplace service as such.[12]
First, the CJEU noted that a keyword corresponding to a registered trade mark of a third party is the tool used by advertisers to trigger the display of his advertisement--and thus its selection and use should be considered as a use of a sign "in the course of trade" under art.5(1) Trade Mark Directive and art.9(1) Trade Mark Regulation.[13] This is in line with the decision in *Google France* and *BergSpechte,*[14] in which the issue of keywords was first dealt with by the CJEU.
Secondly, the court stressed that, in order to find out if a trade mark infringement has taken place, national judges should establish (1) whether the advertisement in question related to goods or services identical with those for which the trade mark is protected, and (2) whether such advertisements have an adverse effect on one of the functions of the trade mark (namely the function as badge of origin) or are liable to do so.[15]
In particular, where the advertisement by eBay relates to L'Oréal products being offered by its users/sellers, there is no doubt that such use is in relation to goods identical with the ones covered by L'Oréal's registered trade marks. In this regard the CJEU noted that the fact that

an economic operator uses a sign corresponding to a trade mark in connection with products which are not its own goods does not by itself prevent such use from falling within the relevant provisions of trade mark infringement law.[16] This is again in line with the previous CJEU case law.[17] And eBay's advertisements--added the court--created an obvious association between the trade marked products referred to in the advertisements and the possibility of buying those goods through eBay itself.[18]
Then, following its findings in *Google France* and *Portakabin,*[19] the CJEU found that where the advertisements in question do not enable reasonably well-informed and observant internet users, or enables them only with difficulty, to ascertain whether the products referred to in the ad originate from the trade mark owner (or from a company economically linked to it) or from a third party, such an advertisement adversely affects trade marks' functions and thus should be considered an infringement[20]; accordingly right owners have the right to oppose said activity under art.5(1)(a) ***C.T.L.R. 40** Trade Mark Directive and art.9(1)(a) Trade Mark Regulation. In other words, if the nature of an online marketplace operator is sufficiently communicated in the advertisement displayed with the search results of an internet search engine, the fact that some users of that marketplace may encroach upon trade mark rights is not relevant and the said operator cannot be considered liable.[21]

Is an operator of an online marketplace exempted from liability under article 14 E-Commerce Directive?

Another important issue faced by the CJEU relates to the liability of operators of online marketplaces for the unlawful acts committed by their users. As is known, art.14 of the E-Commerce Directive provides hosting providers with a shield from liability for the information channelled by their users, provided certain conditions are met. This exemption is very important as it is believed to contribute to the growth of internet-related business and activities and in particular to the development of information society services. Without such an exemption, internet service providers would experience enormous difficulties in offering their services.
The CJEU first noted that the exemption under art.14 E-Commerce Directive applies only if the internet operator service provides a mere technical and automatic process of data, without playing any active role of such a kind as to let him acquire knowledge of, or control over, those data.[22] The court had taken the same view in *Google France*.[23] The CJEU then specified that it is for the referring court to assess whether eBay played that active role. And the guidelines given by the court seem rather clear: where the operator of an online marketplace has offered assistance (e.g. optimisation of the presentation of the offers for sale and promotion of such offers), it should be considered not to have taken a neutral position between its customers/sellers and the buyer of the product, but instead to have taken an active role.
The court also acknowledged that in some cases eBay provides assistance aimed at optimising or promoting certain offers for sale and in particular at advertising goods sold on its marketplace using search engine operators such as Google to trigger the display of the ad.[24] This is a relevant point and may influence the decision from the UK referring court. Indeed, the latter as well as other national judges dealing with analogous litigations involving eBay's marketplace might eventually find that its role in these circumstances is not merely passive and neutral and that therefore no exemption under art.14 of E-Commerce Directive applies.[25]
The CJEU further noted that, even where the operator of the online marketplace is found to have taken a passive and neutral role, it may only be exempted under the provision in question provided that it has not had actual knowledge of illegal activity or information and, with reference to claims for damages, has not been aware of facts or circumstances from which the illegal activity or information is apparent or, having obtained such knowledge or awareness, it has acted expeditiously to remove or disable access to the information.[26] How could such awareness be acquired? The court explained that, in a case which may result in an order to pay damages (as the present case), it is sufficient, in order for the operator to be denied the entitlement to the exemption, for it to have been aware of facts or circumstances on the basis of which a "diligent operator" should have identified the unlawfulness of its user's activity.[27] In particular, awareness of infringing activities could be acquired, stressed the CJEU, through an investigation carried out by the operator of the online marketplace as well as a notification sent by the IPR owner to the former. In the latter case, the court

recognised that notifications such as warning letters may often be flawed, insufficiently precise and inadequately substantiated. Nonetheless, it added, they represent a factor which should be taken into consideration by national courts when it comes to verifying whether the operator of the online marketplace has acquired knowledge or awareness of the infringing activity.[28] Thus one of the questions which national courts should answer is the following: is the warning letter sent by trade mark owners to the operators of online marketplaces sufficiently clear and substantiated so as to make the former aware of the infringing activity carried out by its users? If so, and provided that the operator of the online marketplace has expeditiously removed the information in question, the exemption under art.14 E-Commerce Directive applies and the operator of the marketplace should be considered exempted from liability for the infringement committed by its users.[29]

*C.T.L.R. 41 The injunctions against the operators of online marketplaces

The CJEU finally gave its interpretation of art.11 of the Enforcement Directive, which requires EU Member States to make sure IPRs owners have a right to obtain injunctions against infringers. The crucial point here was to determine whether injunctions against operators of websites (including operators of online marketplaces) through which IPRs have been violated can be obtained in order to prevent future infringements, and not only to stop an ongoing violation.

The issue probably arose from the unclear wording of art.11 Enforcement Directive. Indeed, the wording in art.11(3) (devoted to measures against intermediaries) is slightly different from the one used in the art.11(1), which instead refers to the injunctions against direct infringer of IPRs. The latter uses the words "injunction aimed at prohibiting the continuation of the infringement" whereas in the former the scope of injunctions against intermediaries is not clearly defined.[30] A clarification from the CJEU was therefore needed.

The CJEU went beyond a literal interpretation of art.11 and held that national courts should be always allowed to grant measures that contribute not just to stop an already existing infringement committed through the online marketplace, but also to prevent future violations. In other words, the court held, injunctions aimed at prohibiting future infringements should be available not only against direct infringers but also against intermediaries whose services are used by third parties. The CJEU reached this conclusion by relying on a broad and all-embracing interpretation of the Enforcement Directive. Indeed a narrow interpretation would have been at odds with both Recital 24 and art.3(2) of this directive: the former states that, depending on the particular case and if justified by the circumstances, measures aimed at preventing future IPRs infringements must be provided for, whereas the latter provides that the measures in question should be effective and dissuasive.[31] The court also stressed that regard should be taken of art.18 E-Commerce Directive which requires Member States to make sure that measures against information society services could be adopted rapidly in order to terminate any alleged infringement as well as to prevent any further impairment.[32] A literal and restrictive interpretation of art.11(3) Enforcement Directive would therefore be against the former article--and this would be contrary to the provision contained in art.2(3) E-Commerce Directive which states that the Enforcement Directive should not affect the E-Commerce Directive.[33]

Concluding remarks

This ruling will have implications for all online sites which allow vendors to sell branded goods. First of all, operators of online marketplaces which target EEA or EU consumers cannot avoid a finding of trade mark infringement by locating its servers and "infringing" products outside the jurisdiction of the trade mark itself.

Even though the actual liability of eBay will have to be established by the referring national court, the CJEU's conclusions can already be considered a success for proponents of stricter online trade mark enforcement. Indeed eBay--which purchases keywords from the search engine Google--has been considered by the CJEU as an advertiser. And, as also held in *Google France* and *Portakabin,* if the advertisements do not enable reasonably well-informed and observant internet users, or enable them only with difficulty, to ascertain whether the products referred to in the ad originate from the trade mark owner or from a third party, such an advertisement should be considered an infringement. This finding thus compels eBay and other similar online operators to adopt all those measures which are necessary to communicate to the public the nature of their platform and to avoid any confusion and

association with trade mark owners' business. Of course, such measures will entail additional costs for eBay, which in turn will be passed on their users.
Moreover, eBay and other operators of online marketplaces will have concerns as to the extent to which they will now be required to expeditiously act on notifications of infringement in order to enjoy the exemption from liability under art.14 E-Commerce Directive. As soon as they are deemed to be aware of an infringement, they could be liable. One of the crucial points will be to determine whether the warning letter sent to them by the trade mark owners is sufficiently clear, detailed and substantiated--but this might turn out to be a difficult matter. Indeed, with millions of users posting advertisements of countless products, eBay and other online operators face a big challenge to set up a mechanism which allows them to handle innumerable notifications at the same time.

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1.
L'Oréal SA, Lancôme parfums et beauté & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL and eBay (UK) Ltd (C-324/09) [2011] E.T.M.R. 52.
2.
Hereinafter reference will be made to Directive 2008/95 (Trademark Directive) and Regulation 207/2009 (Trademark Regulation).
3.
In recent years L'Oréal started objecting the sale of allegedly trade mark infringing products through the online marketplace eBay. In several countries such as Belgium, France, Spain, Germany and the UK, L'Oréal has recently instituted legal proceedings against eBay, arguing that the latter facilitates trade mark infringement and profits from it: this would be enough--L'Oréal stresses--for eBay being considered responsible and ordered to take measure to stop the infringing activity. See inter alia the following cases: *Louis Vuitton Mallettier v eBay International AG* , French Court de Cassation, November 16, 2010 [2011] I.L. Pr. 16 (debating jurisdictional issues); the German cases *Internet Auction I* I ZR304/01; I ZR 35/04 [2007] E.T.M.R. 70 (*Internet Auction II*); I ZR 73/05 Unreported April 30, 2008 (*Internet Auction III*); *Christian Dior Couture SA v eBay Inc, eBay International AG* , RG No.2006077807 (Paris Tribunal de Commerce), June 30, 2008; *eBay International AG, eBay Europe Sàrl and eBay Belgium v The Polo/Lauren Company LP* , Court of Appeal of Brussels, 9th Chamber, Belgium [2010] E.T.M.R. 1; *Pragon Ltd & Co v eBay International AG* , Case 312 O 803/07, District Court of Hamburg (12th Civil Division), January 3, 2008 [2008] E.T.M.R. 61.
4.
Google France and Google Inc v Louis Vuitton Malletier SA, Google France v Viaticum SA & Luteciel Sàrl and *Google France v CNRRH, Pierre-Alexis Thonet, Bruno Raboin & Tiger Sàrl* (C-236/08, C-237/08, C-238/08) [2011] Bus. L.R. 1. For a comment on this case see Christian Volkmann, "Trademark Use and Liability of Referencing Service in Keyword Advertising -- Google Adwords and Trademark Law" (2011) 3 *European Journal of Risk Regulation* 447; Stephen Ott and Maximilian Shubert, "It's the Ad text, stupid': cryptic answer won't establish legal certainty for online advertisers" (2011) 6(1) *Journal of Intellectual Property Law & Practice* 25; Paul Przemyslaw Polanski, "Technical, Automatic and Passive: liability of search engines for hosting infringing content in the light of the Google ruling" (2011) 6(1) *Journal of International Commercial Law and Technology* 42; Sophie Stalla-Bourdillon, "Uniformity v diversity of internet intermediaries' liability regime: where does the ECJ stand?" (2011) 6(1) *Journal of International Commercial Law and Technology* 51.
5.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [61] and [62].
6.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [62]. See also [127] of the A.G.'s Opinion, stressing that "otherwise activities targeting EU markets could escape the application of EU rules concerning, for example, consumer protection, protection of intellectual property rights, unfair competition and product safety by merely situating the activity or the site of the company responsible for the activity in a third country".
7.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [65]-[66].
8.
Pammer v Reederei Karl Schluter (C-585/08) and *Hotel Alpenhof v Heller* (C-144/09) [2011] 2 All E.R. (Comm) 888. In that case it was held that, in order to verify if a trader's activity is directed at a particular country, one should preliminarily verify whether before the conclusion of the contract with the costumer it is apparent from the seller's website and its overall economic activity that the trader meant to do business with clients residing in another country (see [54] of the A.G.'s Opinion of May 18, 2010). The A.G. also noted that some specific criteria might be taken into consideration in order to ascertain if the seller of goods established in another country is targeting other states' consumers. Some relevant criteria are the following: (1) the use of a language or currency different from the ones generally used in the Member State where the seller is established; (2) the possibility for consumers to make and confirm their reservations in that other language; (3) the mention of a telephone number with an international code; (4) outlays of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States; (5) the adoption of a top-level domain name other than that of the Member State in which the seller is established; and (6) the mention of international customers domiciled in various Member States.
9.

Coty Prestige Lancaster Group GmbH v Simex Trading AG (C-127/09) [2010] E.T.M.R. 41 at [43], [46] and [48]. In this case it was held that when a trade mark owner marks items such as perfume testers with the words "demonstration" or "not for sale", that precludes (in the absence of any evidence to the contrary) a finding that the owner impliedly consented to those items being marketed. See also *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-137; [2009] E.T.M.R. 28 at [20]-[22], in which it was held that, where the trade mark owner affixes that sign to items that it gives away, free of charge, in order to promote the sale of its products, such items are not distributed with the purpose of them penetrating the market.

10.
This is case law predominantly related to pharmaceutical products. See, e.g., *Bristol-Myers Squibb v Paranova A/S* (C-427/93) [1996] E.C.R. I-3457, [1997] 1 C.M.L.R. 1151; *Pharmacia and Upjohn v Paranova A/S* (C-379/97) [1999] E.C.R. I-6927, [2000] 1 C.M.L.R. 51; *Boehringer Ingelheim v Swingward* (C-348/04) [2007] E.C.R. I-3391, [2007] 2 C.M.L.R. 52; *Orifarm v Merck Sharpe & Dohme; Paranova v Merck Sharp & Dohme* (C-400/09 and C-207/10) July 28, 2011. That repackaging of trade marked products can be invoked as an exception to the exhaustion of trade mark rights had been confirmed by the CJEU even before the Trade Mark Directive: see *Hoffmann-La Roche & Co AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnlsse mbH* (102/77) [1978] E.C.R.1139, [1978] 3 C.M.L.R. 217; *Centrafarm BV v American Home Products Corp* (3/78) [19789] E.C.R. 1823, [1979] 1 C.M.L.R. 326; *Pfizer Inc v Eurim-Pharm GmbH* (1/81) [1981] E.C.R. 2913.

11.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [83].

12.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [85].

13.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [87].

14.
Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v Günter Guni, trekking. at Reisen GmbH (C-278/08) [2010] E.T.M.R. 33.

15.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [88].

16.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [91].

17.
See again *Google France* [2011] Bus. L.R. 1 as well as *UDV North America Inc v Brandtraders NV* (C-62/08) [2009] E.T.M.R. 25.

18.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [93].

19.
See *Google France* [2011] Bus. L.R. 1 at [99]; and *Portakabin Ltd and Portakabin BV v Primakabin BV* (C-558/08) [2010] Bus. L.R. 1339 at [54].

20.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [94].

21.
See *L'Oréal v eBay* [2011] E.T.M.R. 52, A.G.'s Opinion at [118].

22.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [113].

23.
See *Google France* [2011] Bus. L.R. 1 at [114] and [120].

24.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [31] and [114].

25.
For example a Belgian court found that eBay exercised various roles in addition to hosting, including roles as "content author" and "sales and purchase advisor": see *Lancôme Parfums et Beaute & Cie v eBay International AG and eBay Europe Sàrl and SPRL* (Belgium, Comm. Bruxelles) Unreported May 28, 2008. Also a French court described eBay as "publisher", "author" and as a "broker" playing a "very active role" in increasing the proliferation of transactions on its website: see *Louis Vuitton* RG No.2006077799, June 30, 2008. See also Anneka Bain, "Is it an infringement of trade mark law for the operator of an online marketplace (such as eBay) to allow countefeit goods to be sold? As a matter of policy, should it be?" [2011] E.I.P.R. 164.

26.
See E-Commerce Directive art.14(1)(a)(b).

27.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [119] and [120].

28.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [122].

29.
From the facts of the present case it results that on May 27, 2007 L'Oréal had sent eBay a letter expressing its concerns about the massive infringement of its IPRs on eBay European websites (see *L'Oréal v eBay* [2011] E.T.M.R. 52 at [32]). Thus the referring national court should verify inter alia whether such letter was sufficiently clear and substantiated in order to determine if eBay can enjoy the exemption under art.14 E-Commerce Directive.

30.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [128].

31.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [134] and [136].

32.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [132]-[133].

33.
See *L'Oréal v eBay* [2011] E.T.M.R. 52 at [133].