

THE RESPONSIBILITY OF AUCTION WEBSITES

A judgement by the French Court of First Instance on June 4, 2008 has brought some answers to the question of the responsibility of internet auction websites¹. The online auction website eBay allows users to buy and sell goods and services. It was recently sued by the luxury goods company, Hermès, for permitting its users to sell counterfeit Hermès bags on its website.

Although eBay receives commission on bids made, it was until now considered a third party in transactions because its involvement was limited solely to the hosting of announcements. However, this decision clarified the question of accountability. First, the Court had to decide whether eBay was a website host or a website editor. The Court found that it was both.

As a host, eBay acts as a neutral technical intermediary that makes available to the public services in online communication, storage signals, writing, images, sound or messages of all kinds supplied by the recipients of these services.

The Court first rejected the qualification of the website editor's contents. Usually, the website editor determines the content but in this case, it is the internet users who establish the content. Likewise, the construction of the website is not the result of editorial choice but of the technical restraints that enable it to gain legibility and clarity. Lastly, the condition of profit on the operation of the ads hosted is irrelevant because its acceptance would add a condition to the application of the law.

However, eBay is a website editor of online services because it receives a commission in return for the technical services it provides to users who put their goods up for sale on the website. These procedural means of participation is the architecture of the bidding service and the creation of rules that allow the website to function.

Consequently, the Court found that eBay is a website host in content and a website editor in terms of online services. As an editor, eBay must assure that its website is not used for reprehensible means, because of its two obligations as an intermediary:

- to implement technical measures to prevent, as well as search for, illicit content (i.e. counterfeiting) on its website
- to provide "complete and full" information regarding the use of the service in addition to the General Terms of Use.

If eBay had already put in place these technical means, they are proving ineffective against the ingenuity of certain users to by-pass them. All the same, informing users about the products offered for sale is not adequate.

Consequently, the Court found that eBay had not fulfilled its obligation to guard against the reprehensible use of its service by certain users. In this end, eBay was found liable and forced to pay Hermès 20,000 Euros in damages. The solution brought out by this judgement has the advantage of specifying the website editor's responsibility.

¹ Hermès International v. Mrs. Cindy F, SA eBay France and eBay International AG, French Court of First Instance, June 4, 2008, www.legalis.net

Thus, the editor's responsibility regarding the service will be engaged if it has not fulfilled its obligation of vigilance and information. EBay must protect Intellectual Property rights of trademark owners against the counterfeiting of products. However, the editor may escape potential criticism by demonstrating that it has carried out its obligations to prevent the dissemination of illicit content.

The judgment follows the recommendations issued by a French report² on the application of the LCEN³, which states that, *“between the host that is responsible for nothing and the editor that is responsible for everything, there must be an administrator status on auction websites where the administrator agrees to be responsible not for crimes, notably counterfeiting, which can express themselves on the website, but for fighting against these kinds of problems and preventing them.”*

Nathalie Dreyfus, Trademark Attorney

Expert for the Center for Arbitration and Mediation of the World Intellectual Property Organization

Dreyfus & associés

² Commentaire Dailymotion Lafesse TGI du 15 avril 2008

³ La Loi pour la confiance en l'économie numérique dite LCEN du 21 juin 2004