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ONLINE MARKETPLACE OPERATORS: HOSTS OR PUBLISHERS?

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Following a reference for a preliminary ruling filed by the High Court of Justice (England & Wales), the Court of Justice of the European Union (CJEU) had to answer the question whether “the service provided by the operator of an online marketplace is covered by Article 14(1) of Directive 2000/31 (hosting)”? This issue is central because the recognition of a host status results in lighter rules of liability.

Indeed Directive 2000/31/EC on e-commerce defined exemptions of liability for operators whose services are limited to activities of a “mere technical, automatic and passive nature”, and whose therefore do not have the power to control or regulate the content of the information published on their sites.

In the present case the claimants - L'Oréal SA and UK, Lancôme parfums and Laboratoire Garnier - accused the European eBay websites of allowing users to sell some of their perfumes, in violation of their distribution network granting exclusivity solely to authorised distributors.

Besides the fact that the litigious products were sold out of the L'Oréal's official distribution network, L'Oréal considered the selling of these products on eBay's websites as an act of infringement of its trademark rights, the products in question being not intended for sale (samples, demonstration products, etc.) or being intended for selling in the USA.

As a result, the matter was whether or not ebay was acting as a host while processing its customers-sellers data and allowing sales governed by its own terms and conditions.

In its judgment dated July 12, 2011, the Court answered positively and recalled the conditions for qualifying as a host. First, the online service provider must be an “intermediary service provider”. Second, if activities such as the storing of offers for acts of selling on its server or the setting of terms for its service may fall within the scope of Article 14 of Directive 2000/31, it is only where these activities are of a “mere technical, automatic and passive nature”.

Applying these principles, the CJEU considered that where an online service provider “has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale.” Therefore, all online services whose operator has the capacity to control the hosted content are governed by the rules of liability applying to publishers, and not by those applying to hosts.

The referring court has now to examine whether or not, with regard to the facts of this case, eBay played an “active role” as described above in relation to the offers at stake in the main proceedings.
