

Red soles and a red light for Amazon

European Court of Justice proceedings tighten platform liability for IP infringements.

Selected legal insight for the sporting goods and consumer goods sector.

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Red soles and a red light for Amazon in European Court of Justice proceedings By Dr. Jochen M. Schaefer 31 January 2023 The liability of the operators of online platforms in the area of intellectual property (IP) infringements have been substantially tightened in a recent ruling from the highest judicial authority of the EU. On Dec. 22, 2022 the European Court of Justice (ECJ) made what numerous legal experts are calling a “landmark decision”.

Amazon operates websites selling goods both directly in its own name, and indirectly, by providing a sales platform for third-party sellers: a so-called hybrid model. The shipping of goods offered for sale on that online marketplace may be handled either by sellers or by Amazon, which in this case stocks goods in its distribution centers and ships them to purchasers from its own warehouses.

The ruling In the case brought against Amazon by Louboutin, these third-party Amazon merchants are cited as regularly displaying advertisements for red-soled shoes which violate trademark rulings. The ECJ ruling hung on whether it was clear from Amazon’s hybrid business model whether a product was being sold and fulfilled by Amazon itself, or by a third-party seller. Ultimately, the ruling hinged on the question of whether “a well-informed and reasonably observant user of [a] site” has the impression that the operator is the advertiser and seller of goods rather than a third-party vendor because there is no clear distinction in websites. For example, the Amazon logo is present on third-party listings. In its ruling, the ECJ found that a marketplace can be held liable for marketing infringing products where this is the case.

The consequences for brands and e-comm platforms Whilst not an issue for sites such as Ebay – who act solely as a platform for thirdparty sellers – it does have implications for hybrid business models such as Amazon, whose own offerings as platform operator are mixed with those of its third-party partners. Prior to this Dec. 2022 judgment, marketplace operators were only liable if the platform did not remove infringing products on sale, despite having been informed thereof; or if they played an active role by, for instance, actively assisting in the optimization of offerings and the advertising of infringing products (see the judgment here). This new ECJ judgment will make it now much easier for IP rights owners to proceed against platform operators themselves and not against third-party sellers, who are frequently foreign sellers, and where a prosecution of such infringements rendered it difficult if not impossible to succeed in these kinds of legal actions. The ECJ verdict also makes clear that the times of platform operators such as Amazon conducting their commercial online activities unhampered to a major extent by European and national applicable law regulations are definitely over. Dr. Jochen M. Schaefer is a German practicing attorney based in the Munich area. For several years, he has been representing the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their legal counsel. He also chairs the WFSGI’s legal committee

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European selective distribution schemes. In case of any questions about this article (or in general), he can be reached at sj@sjlegal.de and at +49 151 1640 7932.

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