

Louboutin v Amazon does not apply to ordinary online marketplaces, says district court

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Legal updates: case law analysis and intelligence

- Audi and Volkswagen sued online marketplace Fruugo for trademark infringement
- The court held that the standard rule from *L'Oréal v eBay* still applied to ordinary online marketplaces such as Fruugo
- Fruugo had no active knowledge in relation to the products uploaded on its platform, and operated an efficient notice and takedown system

In *Audi v Fruugo* (Case C/09/622304), the District Court of The Hague has held that the recent judgment of the Court of Justice of the European Union in *Louboutin v Amazon* (Joined Cases C-148/21 and C-184/21) does not apply to ordinary (non-hybrid) online marketplaces. It confirmed the established rule from the *L'Oréal v eBay* judgment (Case C-324/09) that, while retailers on an online marketplace make use of the trademarks in their sales offers as part of their own commercial communications, online marketplaces do not.

Background

Fruugo is an ordinary online marketplace on which retailers upload their products. After Audi and Volkswagen found non-authorised products on Fruugo's website, they decided to initiate court proceedings, claiming that not only the retailers on the Fruugo platform, but also Fruugo itself infringed their trademarks.

Audi and Volkswagen claimed that the recent *Louboutin v Amazon* judgment had changed the liability of online marketplaces. According to them, it was unclear that it was the retailers - and not Fruugo itself - that sold the products on the Fruugo marketplace; therefore, it was Fruugo (rather than the retailers) that used Audi's and Volkswagen's trademarks in its own commercial communications.

Fruugo defended itself by stating that, according to the *L'Oréal v eBay* judgment, it is the retailer and not the platform operator that uses a trademark in its commercial communications. It also stated that the *Louboutin v Amazon* judgment explicitly and exclusively applied to so-called 'hybrid' marketplaces (such as Amazon), on which both the retailers and the marketplace operator offer products for sale. According to Fruugo, the judgment was therefore not applicable to 'classic' online marketplaces.

Audi and Volkswagen additionally claimed that Fruugo was an active platform that was not eligible for the exception to liability under Article 14(1) of the [e-Commerce Directive](#) (and its implementing provision in Article 6:196c(4) of the Dutch Civil Code), as well as under Article 6 of the (soon to be implemented) Digital Services Act.

Fruugo defended itself by stating that it:

1. was a neutral platform with no active knowledge of the products uploaded on its marketplace; and
2. had a well-functioning notice and takedown mechanism in place.

Decision

The District Court of The Hague held that the standard rule from *L'Oréal v eBay*, in which it was decided that an online marketplace does not use trademarks in sales advertisements in its own commercial communications, still applied to ordinary online marketplaces such as Fruugo. The *Louboutin v Amazon* decision had not changed this. The court therefore agreed with Fruugo's position that the *Louboutin v Amazon* judgment was applicable only to hybrid marketplaces. Further, the court found that it was sufficiently clear to customers of the Fruugo marketplace that they were buying products from the retailers, and not from Fruugo itself.

The court also held that Fruugo did not have any active knowledge in relation to the products uploaded on its platform, and that its notice and takedown system worked well. In that regard, the court emphasised that Fruugo took down the non-authorized Audi and Volkswagen products within one day of receiving a cease and desist letter from the companies. Fruugo was therefore also eligible for the exception to liability under the e-Commerce Directive. Looking ahead to the Digital Services Act, the court noted that Fruugo would also be eligible for the exception to liability under Article 6 of the act.

Comment

This is the first case in the Netherlands in which the claimant relied on the *Louboutin v Amazon* judgment, and the first to look ahead to the Digital Services Act, which is due to be implemented at the beginning of 2024.

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