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Advocate General's Opinion C-148/21 and C-184/21 | Louboutin (Use of an infringing sign on an online marketplace)

Online sale of counterfeit Louboutin high-heel shoes: according to Advocate General Szpunar, the specific features of Amazon's business practices do not support the finding that a sign has been used within the meaning of EU law

Although its commercial offering includes services ranging from the publication of offers for sale to the shipping of goods, that online intermediary cannot be held directly liable for infringements of the rights of trade mark owners taking place on its platform as a result of commercial offerings by third parties

The Amazon group is both a renowned distributor and the operator of a marketplace. As such, Amazon publishes on its online sales website both advertisements relating to its own goods, which it sells and ships under its own name, and advertisements from third-party sellers. Furthermore, it offers third-party sellers the additional services of stocking and shipping goods advertised on its platform while informing potential purchasers that it will be responsible for those activities.

Mr Christian Louboutin is a French designer of footwear whose best-known goods are high-heeled women's shoes. The red outer sole, for which they are known, is registered as an EU and Benelux trademark.

The Amazon websites regularly display advertisements for red-soled shoes which Mr Louboutin claims relate to goods which have been placed on the market without his consent. By means of two actions brought in Luxembourg (C-148/21) and Belgium (C-184/21) against Amazon, he claims that that platform has used a sign that is identical to the trade mark of which he is the proprietor for goods or services which are identical to those for which the trade mark in question is registered, and emphasises in particular the fact that the advertisements at issue form an integral part of Amazon's commercial communication.

In the context of an assessment of Amazon's hybrid business model, the two referring courts ask, in particular, whether the operator of such an online sales platform can be held directly liable for the infringement of the rights of trade mark proprietors on its platform. That issue, unlike the issue of indirect liability, is subject to harmonised rules in EU law.¹

In his Opinion delivered today, Advocate General Maciej Szpunar clarifies the concept of 'use' of the trade mark by an online intermediary, which, in his view, should be applied from the perspective of a user of the platform in question. He points out in that regard that it is clear from the settled case-law of the Court that **the act of use by an**

¹ Regulation (EU) No 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)

internet intermediary presupposes, 'at the very least, that that third party uses the sign **in its own commercial communication**'.²

The Advocate General considers that that condition is met where the addressee of that communication makes a specific link between the intermediary and the sign in question. Such a condition must be assessed from the point of view of the user of the platform in question, in order to enable an assessment of whether the sign in question appears to that user to be integrated into that commercial communication.

In his view, the perception of a reasonably well-informed and reasonably observant user of an online sales platform should be taken into account when determining whether a sign is used in the commercial communication of the operator of that platform.

Furthermore, as regards the impact of Amazon's business practices on the recognition of 'use' of the trade mark within the meaning of EU law, the Advocate General recalls that the only situation envisaged is that in which the operator of an online sales platform is **directly liable** on account of its use of a sign identical to a trade mark. In addition, while noting that the commercial offerings of third parties and of Amazon are presented uniformly and that each includes the logo of Amazon, the Advocate General recalls that it is **always specified, in the advertisements, whether the goods are sold by third-party sellers or sold directly by Amazon**.

Accordingly, the mere fact that Amazon's advertisements and those from third-party sellers appear next to each other does not entail that a reasonably well-informed and reasonably observant internet user might perceive the signs displayed on the advertisements of third-party sellers **as an integral part of Amazon's commercial communication**. The same applies to the **additional services of assistance, stocking and shipping of goods bearing a sign identical to a trade mark**, in respect of which Amazon has also actively contributed to the preparation and publication of the offers for sale.

The Advocate General is of the opinion that, in those circumstances, the operator of an online platform such as Amazon **does not use a sign**.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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² Judgments of 23 March 2010, *Google France and Google*, [C-236/08 to C-238/08](#), paragraph 56 (see also Press Release [No 32/10](#)); of 12 July 2011, *L'Oréal and Others*, [C-324/09](#), paragraph 102 (see also Press Release [No 69/11](#)); of 2 April 2020, *Coty Germany*, [C-567/18](#), paragraph 39 (see also Press Release [No 39/20](#)).