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C-567/18 Coty - Amazon: Storing goods on behalf of third party vendors does not infringe an EU trade mark

On 2 April 2020, the Court of Justice ruled on the interpretation of the notion of storage of goods for the purpose of offering or putting them on the market, from a trademark law perspective.

Art. 9 § 3 of the EU trade mark Regulation (no. 2017/1001) specifies the types of use of a registered mark that are forbidden for anyone but the trade mark holder. Letter b of that provision addresses, *inter alia*, "***putting** them [**the goods**] **on the market, or stocking them for those purposes under the sign**, or offering or supplying services thereunder*"

This is the core of the dispute, which gave rise to the preliminary ruling at hand, pertaining to the liability of a famous online marketplace for stocking products on behalf of third-party vendors. The parties to the proceedings are **Coty** Germany GmbH ("Coty"), a German subsidiary of Coty - licensee of the Davidoff trade mark; **Amazon** Services Europe S.à.r.l. ("Amazon Services") - which allows third party vendors to offer their products on the amazon.de site through the 'Amazon Logistics' service, with **sales contracts between vendors and buyers**; **Amazon FC Graben** GmbH ("Amazon FC") - which physically manages the storage of products offered for sale by Amazon on behalf of third parties.

The dispute concerns a Davidoff branded perfume purchased by Coty from the Amazon marketplace, where the product was sold by a third party using the "Amazon Logistics" service.

As the trademark right was not exhausted (pursuant to Art. 15 of the EU TM Reg.), since the product was not put on the market by Coty or with its consent, the latter ordered Amazon to cease offering it. Then, Coty sought an injunction against Amazon in Germany over the storage and shipment of the perfumes for the purpose of placing them on the market. The Court held this was not a case of trade mark use, hence rejected the claim. Rather, it ruled that it is a mere storage of the goods on behalf of the third party seller. After Coty appealed before the Bundesgerichtshof, the German Supreme Court filed for a preliminary ruling to the CJEU.

In the ruling at issue, the CJEU analysed the actual activity carried out by **Amazon**, noting that it **merely stored the goods, without offering them for sale or putting them on the market**. Secondly, the Court held that Amazon did not intend to offer those goods for sale or put them on the market.

Based on the teachings of its applicable case law, the Court concluded that **this cannot be considered as a case of trade mark use**. Indeed, the types of use that may be prohibited by the mark proprietor only refer to an active behavior on the part of the third party.

It is interesting to note that **Coty** also asked the Court - in the event that the answer to the question submitted by the referring court is in the negative - to rule on whether the activity of the operator of an online marketplace in circumstances such as those in the main proceedings falls within the scope of **Article 14(1) of Directive 2000/31** (**the "e-commerce Directive"**) and, if not, whether such an operator must be regarded as an 'infringer' as referred to in the first sentence of **Article 11 of Directive 2004/48** (the "Enforcement Directive"). This has been taken into account in the Advocate General's Opinion of 28 November 2019 and is a substantial part of his reasoning (you can read about it here).

To the contrary, based on the relevant case law, **the CJEU decided not to answer** to that question, since it was for the referring Court to raise it.

Therefore, the Court of Justice concluded that **a person who stores goods which infringe trade mark rights on behalf of a third party, without being aware of that infringement, must be regarded as not stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims**.