

Editorial

Bringing eBay into line

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As the largest and best-known internet auction service provider in the global village, eBay has become an immensely popular facility for offering goods for sale before the widest audience. The advantages of eBay are that it provides a forum for the sale of niche goods where prospective purchasers are difficult to target; by cutting out the retailer (and his mark-up) it enables goods to be sold more cheaply; it is almost impossible to police effectively; and also provides a veil of anonymity for seller and buyer alike.

A medium of this nature was bound to attract the attention of counterfeiters and sellers of products that infringe intellectual property rights. Conversations with infringement lawyers who represent major brand owners suggest that many now regard eBay as the main threat to the integrity of their legitimate trade. This was recently confirmed by a recent comment made to the editor by a long-standing parallel trader to the effect that the eBay phenomenon had contributed more than any other factor to the decline in traditional grey goods trade.

eBay is not deaf to two criticisms articulated by brand owners. One is that eBay is not motivated to redress the woes of genuine brand owners, being a substantial beneficiary of the increasing volume of trade in infringing goods in that it derives its income by taking a slice of the value of each transaction concluded via its auction websites. The other is that it does not take active steps to police the placing of goods for sale through its facilities, even though if a company must at least suspect that many of its users are selling counterfeit goods.

eBay disputes the validity of these criticisms, being well aware that a reputation for acting as a fence for illicit goods will deflate consumer confidence in it and, by depressing sales, also decrease its income stream. However, to deflect these criticisms eBay has adopted its Verified Rights Owner (VeRO) policy, enabling rights owners to report product sale listings that infringe their rights. When notified by a rights owner of what the latter believes to be an infringing listing, eBay will remove it immediately from its website. By so doing, eBay believes that it can both prevent sales of known infringing products and avoid the risk of being joined as a defendant in infringement proceedings.

Quads 4 Kids v Campbell [2006] EWHC 2482 (Ch), a recent decision of the High Court for England and Wales, focused on eBay's reliance on its VeRO programme as a means of deflecting criticism of its IP policy. Campbell, a

Community design owner, filed a VeRO notice to the effect that a vendor of quad bikes was infringing his design rights. eBay took down the listing. The vendor, incensed at having his avenue of commerce blocked in what he believed to be genuine products and certain that the Community design right had not been infringed and was in any event invalid, went to court and sought an interim order that Campbell refrain from making groundless infringement threats pending a trial at which the legality of those threats would be determined.

The court had no hesitation in granting the relief. Although eBay's VeRO programme was put into place in order to deflect the risk of eBay's liability, and no one had actually threatened the vendor at all, the effect of Campbell activating the VeRO programme was to cause the vendor to have a reasonable apprehension that he would himself be targeted in infringement proceedings. The effect of this decision is to give legitimate eBay vendors the upper hand—they can turn the tables on VeRO users and render them defendants in civil proceedings in which they may be liable for substantial damages.

What, then, should brand owners do? Bearing in mind the facts that (i) they do not have the opportunity to inspect goods sold through eBay in order to ascertain their legality, (ii) genuine goods may not be apparently legitimate or illegitimate, for example where they are parallel-traded, or may be product overruns, (iii) individual quantities of products sold may be too small to make it commercially worthwhile for them to take large-scale action, they will feel that the odds are stacked against them.

The main problem faced by eBay is that there is no feasible solution that does not depend upon the cooperation of eBay itself. Threatening eBay and attacking it for its selfish focus on escaping liability rather than maintaining the purity of its listed stock in an impure world has so far borne few fruits. Getting eBay onside is preferable, but not easy. Setting up a competitor to eBay that operates in accordance with accepted norms of operation that restrict or remove the risk of sales of counterfeits is the obvious solution of final resort—but, given the profitability of internet auction sites, perhaps this last resort should be the brand owners' first port of call instead.

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