

The Court of Appeal rules on targeting in the context of global online marketplaces (*Lifestyle Equities & Anr v Amazon & Ors* [2022] EWCA Civ 552)

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On 4 May 2022, the Court of Appeal of England and Wales handed down its judgment in *Lifestyle Equities & Anr v Amazon & Ors* [2022] EWCA Civ 552. The Court of Appeal found that listings on Amazon's United States website targeted consumers in the United Kingdom and therefore that Amazon is liable for infringement of Lifestyle Equities' UK trade marks.

Background Facts

Lifestyle Equities CV and Lifestyle Licensing BV (together "**Lifestyle**") are the owner and exclusive licensee of various UK and EU trade marks for 'BEVERLY HILLS POLO CLUB' (the "**BHPC marks**").

Lifestyle brought proceedings against Amazon for infringing its trade marks by advertising, offering for sale and selling to UK and EU consumers goods bearing the BHPC marks. The infringing goods were listed on Amazon's United States website www.amazon.com ("**Amazon.com**") but were available for purchase by consumers in the UK and EU.

The first instance decision

The key issue to be decided by the judge at first instance was whether the listings of US BHPC branded goods on Amazon.com, which could be accessed and purchased by UK and EU consumers, amounted to use of the BHPC marks in the UK and EU. In particular, the question was whether the listings targeted UK/EU consumers, whether directly or indirectly.

Mr Justice Michael Green dismissed the claim, finding that Amazon had not infringed the BHPC marks in the UK and EU by virtue of the US listings. The judge held that neither Amazon.com nor the BHPC listings on Amazon.com were targeted at UK/EU consumers. His reasoning was that such consumers are fully aware that they are purchasing goods on the Amazon.com website which is directed primarily at US consumers and not them. Further, the judge considered that UK/EU consumers will clearly have appreciated the disadvantages of ordering goods from the US-targeted Amazon.com website for delivery in the UK - but decided that they wanted to do this anyway. He considered it therefore to be largely irrelevant that Amazon facilitated the processing and shipping of the goods to the UK.

The Appeal

The Court of Appeal overturned the High Court's decision and found that Amazon had used the BHPC marks in the UK and EU and thus infringed Lifestyle's trade marks. Lord Justice Arnold gave the leading judgment, Vos MR and Snowden LJ agreeing. They held that the listings, which constitute advertisements and/or offers for sale, were clearly targeted at the UK. Arnold LJ relied on the fact that the Amazon.com website recognises that the purchaser is located in (e.g.) the UK, that the shipping and billing addresses are in the UK, that the currency of payment could be £GBP, that the consumer was told that certain goods "ship to United Kingdom" or similar, and that Amazon makes all the necessary arrangements for the goods to be imported into the UK for delivery to consumers in the UK.

The Court of Appeal therefore found that the first instance decision was wrong on a number of grounds, which led him to reach the wrong finding on targeting. First, he focused on the targeting of the Website as a whole and failed to analyse the targeting of each of the types of acts complained of. Second, the judge was mistaken in accepting that simply because the Amazon.com website was directed at US consumers, the relevant listings were not targeted at UK/EU consumers. It did not follow that the Amazon.com website was restricted to US

consumers. Thirdly, the judge had wrongly implied a requirement for subjective intent on the part of Amazon to use the sign in the relevant territory.

Fourthly, there was no evidential basis for the judge's finding that Amazon's involvement in the processing and shipping of orders to UK/EU consumers was explicable as Amazon simply making the process "as painless and easy as possible" after the consumer had already made a decision to buy on the Amazon.com website. Fifthly, the judge placed undue significance on the higher shipping costs and import duties which UK/EU consumers would be required to pay on the Amazon.com website than if they ordered from www.amazon.co.uk or www.amazon.de in finding that these consumers were not targeted. Consumers would not necessarily be aware of these differences, and even if they were, the differences may have been offset by product price differentials.

Arnold LJ further held that even if Amazon's advertisements and offers for sale did not constitute use of the BHPC marks in the UK/EU, Amazon's sales of US branded goods to UK and EU consumers nevertheless constituted use of the marks within the relevant territory and thus infringed Lifestyle's trade marks. In making this finding he disagreed with the judge's interpretation of Case C-98/13 *Blomqvist v Rolex*.

Implications

The principles applied by the Court of Appeal will make it easier for businesses to prevent infringement of their trade marks in the UK by global sales listings. This may push Amazon and its competitors to become more restrictive in their approach to global listings and to shift to a more territorial business model, or to consider taking warranties or indemnities regarding relevant IP rights in all the territories into which goods may be sold.

From the perspective of the companies listing products on Amazon and similar marketplaces, even relatively small businesses ought to give consideration to worldwide trade-mark clearance searches if they plan on making use of global order-fulfilment services, so as to be able to properly assess the level of risk they are taking.

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