

Online Intermediaries and Trademark Owners: The Legal Position and Obligations of Online Intermediaries to Trademark Owners Prior and post-Louboutin v Amazon

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Abstract: This article argues that the legal standing of the online intermediary towards trademark holders has undergone a significant shift. Generally, only secondary liability was assumed, as the online intermediary was not held to be able to bear its own “primary” liability for conduct not directly attributable to itself, such as offering counterfeit products. However, in the Louboutin v. Amazon case, the CJEU provided a new standard for interpreting “commercial communication”, which is required for an “active role” in the infringing use. According to the CJEU, this should include the perspective of the informed

and reasonably observant internet user. This reasoning is remarkable, as this perspective has not previously been considered when assessing whether there is active behaviour. The combination of the Louboutin v. Amazon judgement and the advent of the DSA with its associated new obligations mean that not only has the responsibility of online platforms increased, but they may also be held directly liable for infringing goods offered on their platform.

Keywords: Trademarks; Online Intermediaries; Trademark Use, Digital Service Act

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A. Introduction

1 Information sharing predominantly occurs on online platforms, which serve as foundational technological mediums for delivering or aggregating digital services and content accessible to end-users.¹ These platforms manifest in diverse formats, including but not limited to app stores, social media platforms, and search engines. Such platforms

have become so integral to contemporary society that envisioning our current era without them is challenging. Concurrently, the economic landscape has transitioned to the digital domain. Beyond companies’ proprietary websites where products can be directly showcased and purchased, a myriad of online sales platforms, often termed ‘online marketplaces’, have emerged. These marketplaces function as neutral digital environments, seamlessly connecting sellers and buyers. Typically, the entity managing an online marketplace facilitates transactions between these parties², providing

1 O. Batura, N. van Gorp & P. Larouche, ‘Online Platforms and the EU Digital Single Market’ (2015) <https://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_e-economics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf> accessed 23 July 2023.

2 EUIPO, ‘Case-law Collection on the Liability and Obligations of Intermediary Service Provider’ (2019) <<https://euipo.europa.eu/ohimportal/nl/-/news/ipr-enforcement->

sellers with an efficient means to present their products to a vast audience. Consequently, the rising popularity of online marketplaces among European Union (EU) businesses is evident, with one million EU businesses vending products through these platforms. Moreover, over 50% of small and medium-sized enterprises (SMEs) utilising these online marketplaces engage in cross-border sales.³ The European Commission appropriately recognises online marketplaces as pivotal catalysts for innovation within the digital marketplace.⁴

- 2 Online marketplaces allow third parties to offer their goods for sale. These parties are the “business users” of the online platform; private individuals acting in a commercial or professional capacity or any legal person who, through online platforms, offers goods to consumers for purposes relating to their trade, business, craft or profession.⁵ These companies have built their business and products independently of the online intermediary and use the online marketplace to make their goods available to the ever-increasing public. Business users can be established companies, but they can also be start-ups that aim for quick and easy brand awareness through these platforms. An online marketplace only has value when buyers use it. These buyers, often *consumers*, search the internet for a particular product. An online marketplace makes it clear to the buyer what is on offer for that product. It may also be that the buyer is not looking for a specific product but only visits the online marketplace to ‘look around’. Either way, the online marketplace is the ideal place for both business users and consumers to do business with each other remotely, which in the previous century was only conceivable on location.
- 3 Despite the countless different types of goods that end up on online marketplaces, the vast majority of them have one thing in common: they are each linked to a brand. This allows consumers to determine the product’s origin by linking the brand to the product. The recognition of this brand is often

case-law-collection-on-the-liability-and-obligations-of-intermediary-service-providers-in-the-european-union> accessed 23 July 2023.

- 3 European Commission, ‘Online Platforms’ <<https://digital-strategy.ec.europa.eu/de/policies/online-platforms>> accessed 23 July 2023.
- 4 European Commission, ‘Online Platforms’ <<https://digital-strategy.ec.europa.eu/de/policies/online-platforms>> accessed 23 July 2023.
- 5 Article 2(1) Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

the result of significant investments by the business behind the product. To ensure transparency in the market, protect the consumer and accommodate the product provider, trademarks can be legally protected through trademark law, which is part of the intellectual property domain.⁶ In that case, the provider can be regarded as the *trademark holder* with an exclusive right to the trademark to prohibit unauthorised third parties from using their trademark in trade concerning goods and services.⁷

- 4 The threshold for being able to act as a business user of an online marketplace is relatively low and is specially designed to be accessible to all types of companies or individuals acting in a commercial or professional capacity. As a result, the online competition is fierce. The advantages that an online marketplace offers, combined with the low threshold for anticipating in the online digital market, attract third parties who want to ride on the success of a strong brand. A common type of free riding is the use of counterfeit products. Counterfeit products cloud the sought-after transparent (digital) market, mislead consumers, undermine trademark holders, and are undesirable.⁸ The digital nature of an online marketplace entails the difficulty for consumers to determine whether a product is counterfeit. Especially when the online platform is given high brand recognition, consumers are generally more likely to assume the legitimacy of the goods offered. The speed at which online platforms inspire this trust among consumers and business users is remarkable.⁹ However, the trademark holder is not left empty-

- 6 A. Kur & M.R.F. Senftleben, *European Trade Mark Law: A Commentary* (Oxford University Press 2017) 6-10. This enumeration lists several functions of trademark law. Nowadays, trademark law has taken on a broader meaning; for example, trademarks are often used as means of communications.

- 7 Article 10 EUTMD; Article 9 EUTMR.

- 8 Studies conducted by the EUIPO, and the OECD have calculated that counterfeit and pirated goods worth EUR 119 billion were imported into the EU in 2019, representing 5.8 percent of EU imports. One in three Europeans think it is acceptable to buy fake products if the original product’s price is too high. This number is even at 50% among young people. See: EUIPO, *European Citizens and Intellectual Property: Perception, Awareness, and Behaviour* (2023), p. 9; EUIPO-Europol, *Intellectual Property Crime Threat Assessment 2022*, p. 2. The number of counterfeit products traded worldwide accounts for approximately 2.5 percent of global trade. See: OESO/EUIPO, *Global Trade in Fakes: A Worrying Threat*, Illicit Trade, OECD Publishing, Parijs, 2021, p. 9.

- 9 L.G. Verburg, ‘Online platformen en platformarbeid: een eerste verkenning’ (2019) O&R 116, 6.1.1.

handed. In many cases, these counterfeit products fall under the scope of trademark protection. The conditions for trademark infringement are listed in Article 2.20 Benelux Convention on Intellectual Property (“BCIP”)¹⁰ for Benelux trademarks and in Article 9 EU Trademark Regulation (“EUTMR”)¹¹ for EU trademarks. If an unlawful use by a third party is established, that party will be liable towards the trademark holder.

- 5 Both the BCIP and the EUTMR are influenced by the EU Trademark Directive (“EUTMD”)¹² and are, therefore, subject to interpretation by the Court of Justice of the EU (“CJEU”). The critical condition of trademark infringement is the concept of “use”. The interpretation of this concept has long been subject to debate.¹³ The CJEU has had to consider more than once whether there is use within the meaning of Article 2.20 BCIP and Article 9 EUTMR. The answer to this question is all the more complex in cases involving an intermediary, which is the case of an online marketplace. Holding the online platform liable rather than the providers of the infringing goods may be more favourable, as, in many instances, they are more reachable, influential, and financially empowered. However, it has appeared to be questionable whether these online intermediaries could fall within the scope of the concept of use.
- 6 A landmark ruling in this context is the *Louboutin v. Amazon* case.¹⁴ The CJEU answered positively to whether an online intermediary can be held directly liable for counterfeit products a third party offers.

10 Benelux Convention on Intellectual Property (Trademarks and Designs) 2005.

11 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark.

12 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks.

13 A-G Szpunar noted that “the case-law of the Court has never provided a more thorough definition of that condition and that that question has also not been considered in more detail in legal literature, with the result that it is not clear what is covered by the concept of ‘use of a sign in an intermediary’s own commercial communication’. The exclusively negative use of that condition, which has served to demonstrate only that a sign has not been used even in the case which led to its discovery, largely accentuates that lack of precision.” See: C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:C:2022:422, Opinion of A-G Szpunar, para. 53.

14 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016.

This outcome is novel, as legal scholars and the CJEU assumed that online platforms’ actions were not directly related to the infringing use of a trademark and cannot be held directly liable based on Article 2.20 BCIP and Article 9 EUTMR.¹⁵ Potentially, this ruling has far-reaching implications for interpreting the concept of use and, therefore, the liability and obligations of online intermediaries. Despite the trademark nature of this judgement, its implications extend beyond the intellectual property domain. With the advent of the Digital Service Act¹⁶ (“DSA”), online intermediaries are involved in liability issues and various obligations. How this new set of rules should be interpreted is ambiguous, considering the *Louboutin v. Amazon* case. The pre-existing provisions of the E-Commerce Directive¹⁷ (“ECD”) may also take on an altered significance. The multitude of relevant judgements, the landmark *Louboutin v. Amazon* case and the advent of new European legislation make it unclear what online intermediaries’ current (and future) position towards trademark holders constitutes. This article aims to provide clarity for both intermediaries and trademark owners. The main question at the centre of this article is:

How do the provisions of EU trademark law and the European Union’s new Digital Services Act delineate the legal obligations of online marketplaces vis-à-vis trademark rights holders?

- 7 The article focuses primarily on online intermediaries that facilitate online marketplaces as a service. Still, the sources and case law are mainly relevant to online intermediary platforms. To obtain an understanding of various case laws, the liability and obligations of intermediaries and the interpretation of the judgement of the *Louboutin v. Amazon* case, Section 1 first outlines the legal framework of trademark infringement. This section thus forms the basis for the subsequent sections where the legal trademark position of online intermediaries is further discussed. Next, Section 2 focuses on case law, using previous rulings to establish the former legal position of the online intermediary. A case law analysis of the *Louboutin v. Amazon* case follows this. Referring to

15 For example: E. Rosati, ‘The *Louboutin/Amazon* cases (C-148/21 and C-184/21) and Primary Liability Under EU Trade Mark Law’ (2022) EIPR 435-440, C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267 and C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474.

16 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

17 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronics commerce, in the Internal Market.

this analysis and the established prior position, the reasoning complications are addressed. Section 3 is devoted to European legislation, specifically the ECD and the DSA, focusing on interpreting the provisions in light of the *Louboutin v. Amazon* case. This allows the current legal standing of the online intermediary to be established. Finally, Section 4 focuses on the future and discusses what developments can be expected regarding the legal position of online intermediaries. This section closes with a summary conclusion in which an unequivocal answer to the article's central question is formulated.

B. Trademark Infringement

- 8 Online intermediaries are taking on a significant role due to the still increasing importance of the internet. Their influence reaches as far as the intellectual property domain. This has had an impact on trademark law. To determine what the *Louboutin v. Amazon* judgement entails and its effect on intellectual property law and beyond, it is essential to form a legal framework to which it relates. Article 2.20 BCIP and Article 9 EUTMR define trademark infringement cases for EU trademarks. In both articles, a non-exhaustive list stipulates situations where a third party uses a trademark “.” This “use” can be declared infringing under certain circumstances. Thus, the unlawfulness of online intermediaries’ conduct towards trademark holders will be determined primarily by interpreting these circumstances. Many rulings preceded the judgement from the *Louboutin v. Amazon* case. The CJEU has more often given interpretation of trademark infringement. For example, the discussion of whether an online intermediary itself “uses” a trademark right or whether it is only partially responsible for this infringing “use” has been addressed numerous times by the CJEU. The outcome of this issue determines whether and to what extent the online intermediary is liable for the unlawful use of the protected trademark. In this context, legal scholars often distinguish between primary and secondary liability.¹⁸ In assessing this issue, the CJEU had to consider the fair balancing of different rights and interests of the parties involved. The interpretation of trademark infringement dictates the scope of trademark protection and the extent of the exclusive right belonging to the trademark holder. Ultimately, the outcome of these cases determines the obligations and conduct required by online intermediaries.
- 9 To arrive at an understanding of trademark infringement, this section will first explain the

relevant legal framework. The outline of the conditions and content of the trademark right will follow this. Next, the core of trademark infringement will be discussed, focusing on the use concept. Finally, in anticipation of the next section, the matter of trademark infringement by (online) intermediaries will be addressed. Therein, the distinction between primary and secondary liability will be discussed.

I. Content of the Trademark

- 10 Trademarks give products an identity and are, therefore, a means of identification par excellence.¹⁹ It must satisfy two main conditions to garner legal protection over a trademark. The sign must have a distinctive character and be clearly and precisely represented in the register.²⁰ Once the trademark is registered, then the right is acquired.²¹
- 11 Article 10(1) EUTMD states that the trademark right includes an *exclusive right* for the proprietor of the registered right. Article 10(2) EUTMD regulates under which circumstances the trademark holder can act against infringing use and to what extent their right is limited. The types of infringement are detailed in the succeeding sections a-c of Article 10(2) EUTMD. The text of this provision is fully reproduced in Article 2.20 BCIP and Article 9 EUTMR.²² The trademark holder has a total of three infringement rules at its disposal by which it can prevent or counter the unauthorised use of their trademark. They are divided under subparagraphs (a), (b) and (c) of Article 10(2) EUTMD.
- 12 Firstly, Article 10(2)(a) EUTMD concerns trademark infringement where the third party uses a sign identical to the registered trademark about goods or services that are identical to those for which the trademark is registered. This includes counterfeiting since there is the so-called use of dual identity.²³ To

19 P.G.F.A. Geerts & A.M.E. Verschuur (eds.), *Kort begrip van het intellectuele eigendomsrecht* (Deventer: Wolters Kluwer 2022) 279.

20 Article 2.1 BCIP and Article 4 EUTMR.

21 Article 2.2 BCIP and Article 6 EUTMR.

22 The BCIP has added a fourth section and which therefore falls outside the harmonization of the EUTMD, leaving the BCJ in charge of interpreting this section. This concerns cases where the sign is used other than to distinguish goods and services. This provision is mainly invoked to attack trade names used only to distinguish a company.

23 A. Kur & M.R.F. Senftleben, *European Trade Mark Law: A Commentary* (Oxford University Press 2017) 294.

18 G. Fresio, *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) ch 4.

successfully invoke this provision, both the use of the identical sign and the use of this sign about identical goods or services must be proven.²⁴ Furthermore, it must be established that the use is or may be detrimental to the functions of the trademark to guarantee to the consumer the origin of the goods or services.²⁵

- 13 Secondly, Article 10(2)(b) EUTMD defines the infringement scenario where a third party uses an identical or similar sign for identical or similar goods. That third party causes a likelihood of confusion. Likelihood of confusion exists if the relevant public confuses the products in question (direct confusion) or expects the products to originate from the same or related companies (indirect confusion).²⁶ When assessing the likelihood of confusion, a global assessment should involve the relevant circumstances of the case.²⁷
- 14 Thirdly, Article 10(2)(c) EUTMD formulates the protection of trademarks that have a reputation in Member State(s), with which the legislator mainly intended to protect their goodwill function.²⁸ Applying this infringement provision does not require a likelihood of confusion, nor does it matter to what extent the goods or services are similar. However, the signs must be identical or similar. In addition, there must be an impairment of the goodwill function or unfair advantage taken of the distinctive character or reputation of the trademark. Taking undue advantage occurs if the third party benefits from using the sign. This is also known as “free riding”.²⁹ Any damage to the trademark is

irrelevant in this respect.³⁰

- 15 The third party may evade liability if they can provide a *due cause* for using the identical or similar sign. This justification relates to balancing the interest of the trademark holder in maintaining the essential function of its trademark against the interest of a third party in using such a sign in the course of trade to designate the goods and services it markets.³¹ Finally, for a successful invocation of Article 10(2) (a-c) EUTMD, the (unlawful) use of a trademark *in the course of trade* must be ascertained. “In the course of trade” entails that the sign is used in a commercial activity that seeks an economic advantage, not in the private domain.³² Any infringement or imminent infringement of the trademark may give rise to enforcement. This may lead to a court injunction, often sanctioned by a penalty payment. If a national court grants such an injunction, the injunction applies in principle to the entire territory in which that trademark has effect.³³

II. The Concept of “Use”

- 16 The various forms of trademark infringement have in common that there must be a use for which the third party against whom infringement is sought can be held responsible.³⁴ The interpretation of “use” ultimately determines which party is responsible for an infringing situation. Article 10(3) EUTMD lists acts of use that may qualify as infringing and may, therefore, be prohibited:

a. affixing the sign to the goods or the packaging thereof;

b. offering the goods or putting them on the market, or stocking them for those purposes;

c. under the sign, or offering or supplying services thereunder; importing or exporting the goods under the sign;

d. using the sign as a trade or company name or part of

²⁴ C-690/17 *OKO-test verslag* [2019] ECLI:EU:2019:317, para. 43.

²⁵ C-17/06 *Céline* [2007] ECLI:EU:C:2007:497, para. 27; C-487/07 *L'Oréal v. Bellure* [2009] ECLI:EU:C:2009:378, para. 58.

²⁶ C-251/95 *Sabel v. Puma* [1997] ECLI:EU:C:1997:528, paras. 22, 26; C-39/97 *Canon v. Cannon* [1998] ECLI:EU:C:1998:442, para. 29.

²⁷ C-251/95 *Sabel v. Puma* [1997] ECLI:EU:C:1997:528, para. 23; C-328/18 *Equivalenza* [2020] ECLI:EU:C:2020:156, paras. 58, 74.

²⁸ P.G.F.A. Geerts, in: *T&C Intellectuele Eigendom*, art 2.20 BVIE, note 9.. See also: C-487/07 *L'Oréal v. Bellure* [2009] ECLI:EU:C:2009:378; C-252/07 *Intel v. Intelmark* [2008] ECLI:EU:C:2008:655; C-383/12 *Environmental Manufacturing v. OHIM* [2013] ECLI:EU:C:2013:741.

²⁹ A “free rider” can be defined as a person or entity who benefits from the effort of others without making -in the eye of the beholder- an appropriate contribution to those efforts. See: M. Grynberg, “Trademark Free Riders” (2022) BTLJ 3.

³⁰ C-487/07 *L'Oréal v. Bellure* [2009] ECLI:EU:C:2009:378, paras. 41, 50.

³¹ C-85/16 and C-86/16 *Kenzo Tsujimoto v. EUIPO* [2014] ECLI:EU:C:2018:349; C-65/12 *Leidseplein Beheer v. Red Bull* [2014] ECLI:EU:C:2014:49, paras. 30, 45.

³² C-206/01 *Arsenal v. Reed* [2002] ECLI:EU:C:2002:651, para. 40.

³³ P.G.F.A. Geerts, in: *T&C Intellectuele Eigendom*, art 2.20 BVIE, note 3.

³⁴ C-179/15 *Daimler v. Egyud* [2016] ECLI:EU:C:2016:134, para. 39.

a trade or company name;

e. using the sign on business papers and in advertising;

f. using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC.

- 17 This enumeration is not exhaustive, as evidenced by the wording “in particular, “ confirmed in case law.³⁵ One will have to assess, based on the circumstances of the case, whether there is such use and whether this is considered unlawful. In cases where it becomes unclear if a third party is using an infringing sign, the use question comes into play even more. This essentially boils down, as will be discussed further below, to whether this third party has used the trademark. Such is the case with online intermediaries facilitating and administering a marketplace online.
- 18 Should infringing goods be offered on this marketplace by someone other than this intermediary, the question arises whether the supplier of these goods and the intermediary can be held liable by the trademark holder. This discussion is still very much alive in both case law and literature. According to the CJEU, there need to be two conditions satisfied to qualify if use is unauthorised by a third party. The person or entity must exhibit active behaviour (or conduct) and thus exercise direct or indirect control over the act that constitutes the use. In addition, the use must take place on its initiative and in its name, or other words, for its *commercial communication*.³⁶ This requirement is fulfilled if the customarily informed and reasonably observant recipient of such communication establishes a link between the said sign and the goods marketed or services provided by the undertaking.³⁷

III. Primary and Secondary Liability

- 19 The question of to what extent intermediaries should be held directly liable not only affects trademark law but also plays out in a broader spectrum of intellectual property. For example, the CJEU has repeatedly ruled on the discussion of whether the intermediary in question was liable based on

copyright law.³⁸ In addition, (online) intermediaries receive special attention in the DSA and the ECD. Thus, there are different degrees of liability depending on the online intermediary's role in (for example) disseminating the infringing content. In this context, the distinction between primary and secondary liability is made.³⁹ Primary liability focuses on whether the online intermediary infringes (for example) someone else's trademark. The online intermediary is liable for users' infringements in secondary liability.

C. The Louboutin v. Amazon case

- 20 The *Louboutin v. Amazon* judgement⁴⁰ distinguishes between trademark law's past, present and future as applicable to online intermediaries and their obligations to trademark holders. This section will discuss case law that preceded *Louboutin v. Amazon* to establish the legal obligations of online intermediaries towards trademark holders. After a comprehensive case analysis of the facts and judicial reasoning used in *Louboutin v. Amazon*, the substance and implications of this judgment become clear.

I. Previous Position of Intermediaries

- 21 In some cases, it may need to be evident who the trademark infringer is. In the case of online intermediaries, it can be challenging to determine whether the online intermediary is using the protected trademark if, in principle, it is only acting as an intermediary. The fact that an intermediary takes care of the technical provision necessary for using a sign by a third party and is reimbursed for it does not automatically mean that that intermediary also uses the sign itself.⁴¹ In such cases, it is challenging to identify the boundary when the intermediary acts more than just as a passive party. Therefore, there has been a lot of case law on this issue, especially on interpret-

35 E.g. C-179/15 *Daimler v. Egid* [2016] ECLI:EU:C:2016:134, para. 40.

36 C-324/09 *L'Oréal v. eBay* [2011] ECLI:EU:C:2011:474, para. 102; C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267, paras. 37-39, 47; C-193/19 *Mitsubishi* [2020] ECLI:EU:C:2020:594, paras. 38-39.

37 C-17/06 *Céline* [2007] ECLI:EU:C:2007:497, para. 23.

38 C-360/10 *Sabam v. Netlog* [2012] ECLI:EU:C:2012:85; C-682/18 and C-683/18 *YouTube and Cyando* [2021] ECLI:EU:C:2021:503..

39 G. Frosio (red.), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) 8; A. Kur & M.R.F. Senftleben, *European Trade Mark Law: A Commentary* (Oxford University Press 2017) 275-277, 290.

40 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016.

41 C-622/16 *Google v. Google France* [2010] ECLI:EU:C:2010:474, para. 57.

ing the various terms in the context of the online intermediary.

- 22 The bar for “use” regarding trademark infringement was quite low. Article 10(3) EUTMD contains a non-exhaustive enumeration that intended a broad meaning of acts of use. Several judgements indicate that the CJEU intended to extend this broad interpretation into practice. *BMW v. Deenik*⁴², *Arsenal v. Reed*, and *Adam Opel v. Autec* are examples of the CJEU consistently labelling the act of a third party as used within the meaning of Article 10(3) EUTMD. However, the CJEU seems to have taken a different route regarding online intermediaries.

Google v. Louis Vuitton

- 23 In *Google v. Louis Vuitton*,⁴³ the CJEU had to consider whether Google was liable for trademark infringement if it allowed advertisers to select signs identical to trademarks as keywords, then store those signs and display its customers’ ads based on them. For a fee, the ads were then placed above standard search results. Advertisers selected trademarks such as “Louis Vuitton” and “LV” as keywords and linked them to sponsored ads for imitation products of the brand. The CJEU ruled that a search engine does not use a trademark when it helps advertisers select trademarks as keywords, store those signs for them, and display advertisements based on them. This is because Google does not use the trademark in its communication context but merely provides the technical facilities necessary to use the trade mark.⁴⁴ This is no different if Google is paid for the search engine advertising service.⁴⁵ In contrast, the advertiser uses the trademark if it chooses trademarks as keywords and links advertisements of its products to them.⁴⁶

L’Oréal v. eBay

- 24 Another vital predecessor to the *Louboutin v. Amazon*

case is the *L’Oréal v. eBay* judgement.⁴⁷ L’Oréal thought that eBay did not show sufficient commitment to stop the sale of counterfeit products. The CJEU ruled that an online marketplace did not use the trademark if it allowed third parties to display infringing products on its website.⁴⁸ It does if an online marketplace advertises its website and its infringing sales offers. eBay advertised L’Oréal brands as keywords via Google in return for payment, so ad links to sales offers for L’Oréal products appeared on eBay. Under subparagraph (a), there is infringement about the sales offers if the advertisement makes it impossible or difficult for the usually informed and reasonably observant internet user to know whether the goods offered come from the trademark owner or a third party.⁴⁹ About advertising for its platform, there is no infringement of subparagraph (a). Still, a reliance on sub-paragraph (c) is possible as the sign was not used for identical or similar goods or services.⁵⁰ Service providers like eBay may additionally not rely on the exemption from liability for service providers under Article 14 of the E-commerce Directive if they play an active role and have knowledge or control over stored information. This is the case if they promote sales offers or help optimise the presentation of ads.⁵¹ Even if the service provider has no active role, it cannot rely on the exemption ‘if it was aware of facts or circumstances based on which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously by Article 14(1)(b) of Directive 2000/31.’⁵²

Daimler v. Együd

- 25 In the *Daimler v. Együd* case, the CJEU had to rule on whether a garage owner was liable after the termination of its customer service agreement with Mercedes-Benz for internet advertisements posted under its name in which it was still presented as an ‘authorised Mercedes-Benz garage owner’.⁵³ The garage owner tried several times to end any use of the brand that could give the public the impression that a contractual link still existed. Despite several

42 C-63/97 *BMW v. Deenik* [1999] ECLI:EU:C:1999:82, para. 39.

43 C-236-238/08 *Google v. Louis Vuitton* [2010] ECLI:EU:C:2010:159.

44 C-236-238/08 *Google v. Louis Vuitton* [2010] ECLI:EU:C:2010:159, paras. 55-56. In the analogue world, the CJEU ruled that merely filling cans with a trademark depicted on them could not lead to trademark infringement, as the intermediary only provides the technical facilities to enable the use of the trademark by a third party. See: C-119/10 *Winters v. Redbull* [2011] ECLI:EU:C:2011:937, paras. 28-30.

45 C-236-238/08 *Google v. Louis Vuitton* [2010] ECLI:EU:C:2010:159, para. 57.

46 C-236-238/08 *Google v. Louis Vuitton* [2010] ECLI:EU:C:2010:159, para. 51.

47 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474.

48 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474, para. 105.

49 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474, paras. 92-94, 97.

50 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474, paras. 89-90.

51 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474, para. 116.

52 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474, para. 124.

53 C-179/15 *Daimler v. Együd* [2016] ECLI:EU:C:2016:134.

attempts to remove the internet ads, they continued to pop up beyond their control. According to the CJEU, a trader uses a trademark only if it involves active behaviour and direct or indirect control over the third party's actions.⁵⁴ This is not the case if the trader has expressly asked for the advertisement removed and it is still placed on the internet by third parties without its will.⁵⁵ However, a trader must be able to stop trademark use and comply with the prohibition.⁵⁶

Coty v. Amazon

- 26 Coty held various registered trademarks for its luxury cosmetic products. Coty products fell victim to counterfeit products offered for sale on Amazon's online marketplace. Coty argued that Amazon had infringed upon its trademarks by allowing third-party sellers to list these counterfeit or unauthorised products on its online platform. The central question was whether a party who stores goods for a third party that infringes a trademark right without being aware of that infringement falls within the scope of Article 10(3)(b) EUTMD. The Advocate General ("A-G") answers this in the negative. In doing so, he points to the wording "for those purposes", which refers to the requirement that this third party must itself have the intention to offer or market the goods.⁵⁷ The CJEU agrees with this reasoning, referring to the fact that the BJC found that Amazon lacked any intention to offer these goods. For use in its economic activity, the operator of an online marketplace must be active in the presentation, advertising, or optimisation of products offered for sale by third-party sellers.⁵⁸

II. Louboutin v. Amazon

1. Context of the Case

- 27 Christian Louboutin ("Louboutin") worked on

prototype heels in his Parisian workshop in 1992.⁵⁹ His assistant was wearing a bright shade of red nail polish, which gave Louboutin the following idea: he picked up the nail polish and started to paint the previously black sole in this bright red colour with the small nail polish brush. This turned out to be a golden move: these red soles of the high heels have become a huge success. Today, Louboutin is an established high-end fashion designer brand for luxury footwear and handbags. The red-soled, high-heeled shoes have been registered as a trademark, including Pantone 18-1663TP for the iconic red colour. This concerns both a registered Benelux and an EU trademark.⁶⁰ Besides the iconic look of the shoes, the Louboutin brand attracts attention due to the exclusivity of the shoes. Due to the high prices (the heels are offered between €695 and €2195)⁶¹, the brand attracts a specific target group. In the case at hand, Louboutin sought to sue internet giant Amazon.

- 28 Amazon, founded in 1994 by Jeff Bezos, has grown from an online bookseller to the world's largest online retailer.⁶² Among many other platforms, Amazon operates the Amazon Marketplace, which enables third-party retailers to showcase and sell their products alongside Amazon items. The shipping of the products may be handled either by those third parties or by Amazon, which then stocks the goods in its distribution centres and ships them to purchasers from its warehouses. In addition, Amazon uses a uniform method for presenting the sales offers published on its website, simultaneously displaying its sales offers and those of third-party sellers. Its logo as a reputable distributor appears on all such sales offers.⁶³ Jeff Bezos claimed from the very beginning that Amazon was not merely a retailer of consumer products but argued that Amazon was a technology company whose business was simplifying online transactions for consumers. As shown in the previous section, Amazon has often been involved in infringement cases. Allowing third parties to offer their products on Amazon's online

54 C-179/15 *Daimler v. Egiyüd* [2016] ECLI:EU:C:2016:134, paras. 39-40.

55 C-179/15 *Daimler v. Egiyüd* [2016] ECLI:EU:C:2016:134, para. 39.

56 C-179/15 *Daimler v. Egiyüd* [2016] ECLI:EU:C:2016:134, para. 41.

57 C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267, Opinion of AG Campos Sánchez-Bordona, para. 67.

58 C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267, para. 37.

59 Christian Louboutin, 'La vie en red (sole)' <https://eu.christianlouboutin.com/nl_en/red-sole> accessed 23 July 2023.

60 Benelux registration 874489 of 6 January 2010 (Louboutin); EUTM registration 008845539 of 10 May 2016 (Louboutin).

61 Christian Louboutin, 'Pumps' <https://eu.christianlouboutin.com/nl_en/ladies/shoes/pumps/> accessed 23 July 2023.

62 M. Hall, 'Amazon.com' *Britannica* (2023) <<https://www.britannica.com/topic/Amazoncom>> accessed 23 July 2023.

63 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 35.

platform (the online marketplace) has created the risk of illegal content, such as counterfeit products, entering the digital market. As in several previously discussed cases, the central issue is the extent to which Amazon, as an online marketplace operator, is directly liable for counterfeit products.

- 29 The case concerns a merger of two cases, as Louboutin sought to sue different subsidiaries of Amazon. The cases have been pending before the District Court of Luxembourg (C148/21) and the Brussels Companies Court (C-184/21). Both courts have raised preliminary questions regarding interpreting Article 9(2)(a) EUTMR, particularly ambiguity concerning the concept of use and Amazon's role as an online intermediary.⁶⁴ The courts question whether the operating method of the Amazon online sales websites may lead to use by the operator of those platforms owing to the inclusion of third-party sellers' advertisements by displaying that sign in its commercial communications. In addition, the courts question whether the public's perception is essential for interpreting an "active role". Lastly, they question whether an operator like Amazon should be regarded as using a sign identical to a protected trademark if it undertakes to ship the goods bearing that sign.

2. Judicial Reasoning

- 30 On 22 December 2022, the CJEU answered the questions raised by the District Court of Luxembourg and the Brussels Companies Court. With its preliminary ruling, the CJEU effectively provides an interpretation of Article 9(2)(a) EUTMR. The critical question at the heart of the case can be formulated as follows. Can the operator of an online sales website that integrates an online marketplace, in addition to its own sales offers, be deemed to be itself using a sign identical to an EU trademark of another for the same goods as those for which that trademark is registered when third-party sellers in that marketplace offer such goods for sale bearing that sign without the consent of the proprietor of that trademark?⁶⁵
- 31 In answering this question, the CJEU first notes that the EUTMR needs to define the use concept and then refers to various case laws to interpret this concept. The ordinary meaning of use (as was also evident from Section 2.2.) requires active behaviour and direct or indirect control over the act in which

the use consists.⁶⁶ As regards the display of signs identical or similar to a trademark in sales offers on online marketplaces, the CJEU refers to the *L'Oréal v. eBay* and *Coty v. Amazon* cases: such signs are used exclusively by the customer-sellers of the operator of that marketplace and, therefore not by the operator itself.⁶⁷ The CJEU adds that the mere fact that providing the technical facilities necessary for the use of a sign and being reimbursed for doing so does not mean that the party providing this service itself is using the sign, even if it is acting in its financial interest.⁶⁸ This is also the case when the online marketplace operator offers storage services to infringing third-party sellers, provided that the online intermediary was unaware of the infringement and did not intend to market these products.⁶⁹

- 32 So far, the CJEU appears to be mainly aligning itself with the *L'Oréal v. eBay* and *Coty v. Amazon* cases by formulating the same standards. This unanimity seems to end when, from §33, the CJEU seeks to highlight the differences in the facts and circumstances of these cases and the present case. After that, the CJEU defines the concept of "commercial communication". This includes any communication to third parties promoting its activity, goods, or services. This presupposes that, from the point of view of third parties, the sign in question is displayed as an integral part of that communication and, thus, as part of that company's activity.⁷⁰
- 33 According to the CJEU, a service provider does not use the sign if the service provided cannot, by its nature, be compared to a service to promote the marketing of goods bearing that sign and does not imply a link between that service and that sign.⁷¹ To establish such a link, the CJEU presents a new standard. To determine whether an online sales website operator

64 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, paras. 17, 21.

65 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 23.

66 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 27.

67 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 30, with referring to C-324/09 *L'Oréal v. eBay* [2011] ECLI:EU:C:2011:474, paras. 102, 103 and C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267, para. 40.

68 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 31.

69 C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267, paras. 45, 53.

70 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 39.

71 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 40.

with an integrated online marketplace uses an infringing sign, it is necessary to determine whether a customarily informed and reasonably attentive website user would establish a link between the operator's services and the sign-in question.⁷² This formulated standard is highly noteworthy, as this is the first time that the consumer-user of the online marketplace has been considered a relevant factor in determining the liability of the online marketplace operator.⁷³ It would seem that the CJEU felt it necessary to justify itself. The CJEU mentions that when assessing a similar situation (namely in *L'Oréal v. eBay*), it did not include the user's perception of the online marketplace but did not seek to exclude this perception.⁷⁴ This differs from the *A v. B* case in which the CJEU still held that the assessment of whether there is trademark use can only be based on objective data.⁷⁵

- 34 The CJEU then elaborates on the newly formulated assessment. It constitutes an overall assessment of the circumstances of the present case, with reference to how the advertisements, individually and as a whole, are presented on the website in question and the nature and scope of the services provided by the website operator.⁷⁶ The CJEU concludes the judgement by addressing these two factors. Regarding presenting those published advertisements, it could make a difference if the operator used a uniform method, simultaneously displaying its advertisements and those third-party sellers and indicating its logo as a reputable distributor with the offers.⁷⁷ Moreover, terms such as

"bestseller", "most sought after", or "most popular" can reinforce the impression that the promoted products are offered on behalf of the operator of the online marketplace.⁷⁸ In addition, the nature and scope of the services offered to third-party sellers by the online marketplace operator are essential in the assessment. For example, the operator's handling of users' queries about the goods in storage, shipping, and return policy may be an indication to the user to determine the origin of those goods.⁷⁹

- 35 The summary answer to the central question is thus as follows: Article 9(2)(a) EUTMR must be interpreted as meaning that the operator of an online marketplace which integrates an online marketplace in addition to its own sales offers may be deemed to be itself using an infringing sign when third-party sellers on that marketplace offer goods containing such signs without the consent of the trademark holder if a customarily informed and reasonably attentive user of that website establishes a link between the services of that operator and the sign in question.⁸⁰

III. The Importance of the Judgement

- 36 The outcome of the *Louboutin v. Amazon* case is noteworthy, given that there was a legitimate expectation of a negative answer to the questions raised by the national courts. This is because even the A-G in this case, believed that Amazon does not use the sign and, therefore, cannot be (directly) liable.⁸¹ This is considered remarkable within the EU, as the European Commission's website highlights the particularity of this event: ⁸²*"Although not binding, the Advocate General's opinions are usually in line with the rulings of the CJEU. But this time, it was not the case!"*

ECLI:EU:2022:1016, para. 51.

72 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 43.

73 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 44: '... that the Court's existing case-law has not taken the perception of users into consideration.'. See also: R. de Beer & J. Visser, 'Terugblik Merkenrecht 2022-2023, BIE 2023/4, p. 197: '...more generally, one can speak of a principled reversal in the ECJ's approach: third-party communication on the platform becomes, through the user's perception, the platform's commercial communication.(transl.)'

74 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 45.

75 C-772/18 *A v. B* [2020] ECLI:EU:C:2020:341, para. 22. See also: E. Rosati, 'The Louboutin/Amazon cases (C-148/21 and C-184/21) and primary liability under EU trade mark law', *European Intellectual Property Review* (2022) 44(7), 435-440.

76 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 49.

77 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022]

78 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 52.

79 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 53.

80 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 54.

81 Court of Justice of the European Union, 'Advocate General's Opinion C-148/21 and C-184/21' <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/cp220096en.pdf>> accessed 23 July 2023.

82 European Commission, 'Louboutin – Amazon case (C-148/21 and C-184/21)' <https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/louboutin-amazon-case-c-14821-and-c-18421-2023-01-31_en> accessed 23 July 2023.

37 One can draw the following conclusion from the judicial reasoning of *Louboutin v. Amazon*. As a result of this judgment, holding an online intermediary that takes the form of an operator of an online marketplace directly liable has become conceivable. With the introduction of a new criterion to determine “own commercial communication” — essential for “use” as defined by Article 9 EUTMR and consequently for trademark infringement — it becomes evident that, under specific conditions, an online intermediary can be deemed as a user of the infringing sign, regardless of the infringing product’s third-party origin. The CJEU stated that it is ultimately for the referring courts to assess whether Amazon, in its capacity as operator of an online marketplace, uses a sign identical to the trademark at issue about goods which are identical to those for which that trademark is registered within the meaning of Article 9(2)(a) EUTMR.⁸³ The CJEU promptly clarified that it would furnish the courts with interpretative insights pertinent to EU law, aiding their assessments. Considering the anticipated interpretation of the directive by national courts, it’s plausible that the ultimate resolution of these cases will resonate with the CJEU’s stance. The nature of this being a preliminary ruling suggests that its rhetoric has broad applicability, potentially influencing subsequent national court decisions.

38 Section D will elucidate that online platforms, particularly online marketplaces, are anticipated to exercise substantial due diligence. While a trademark holder has the prerogative to enforce specific measures against trademark infringement, previous cases suggest that the CJEU does not typically infer primary liability from online intermediaries. Consequently, in addition to seeking injunctive relief, a trademark holder can pursue financial damages from the online marketplace using their legitimate trademark rights.⁸⁴ This judgement implies a potential realignment in party liability. Given the incredible allure of trademark holders targeting prominent enterprises like Amazon rather than potentially obscure, minor entities that market the infringing products, this ruling could incentivise trademark holders to pursue litigation more aggressively. Consequently, this decision paves the way for previously inaccessible legal avenues.

39 Traditionally, trademarks primarily functioned as

indicators of the origin of goods or services, assuring consumers of authenticity and enabling them to differentiate between products from diverse sources. While this concept remains foundational in European law, modern trademark law also emphasises protection against dilution and unauthorised exploitation as a critical function.⁸⁵ The CJEU has given increasing significance to the goodwill function of the trademark.⁸⁶ Trademark law seeks to strike a balance among its primary stakeholders: consumers, trademark holders, and third parties. In light of the *Louboutin v. Amazon* verdict and the introduction of the DSA, there appears to be a discernible shift towards enhanced consumer protection. This is evidenced by the reinforced safeguards against consumers erroneously associating infringing branded products with esteemed platforms, which could lead to confusion and damage the brand’s reputation. Simultaneously, trademark holders benefit from expanded protection for their marks. Nonetheless, it warrants consideration whether this recalibrated equilibrium unduly impinges upon competition.⁸⁷ Much will depend on the interpretation of the new standard and to what extent the average consumer is aware of the platform’s business model in question.⁸⁸

85 P.G.F.A. Geerts & A.M.E. Verschuur (eds.), *Kort begrip van het intellectuele eigendomsrecht* (Deventer: Wolters Kluwer 2022) 278..

86 C-337/95 *Dior v. Evora* [1997] ECLI:EU:C:1997:517; C-487/07 *L’Oréal v. Bellure* [2009] ECLI:EU:C:2009:378; C-323/09 *Interflora v. Marks & Spencer* [2011] ECLI:EU:C:2011:604; C-193/19 *Mitsubishi* [2020] ECLI:EU:C:2020:594.

87 And thereby indirectly harm the interests of consumers who benefit from access to sufficient alternative products. In addition, too high a monitoring obligation could lead to a disproportionate burden on intermediaries which is not justified in the light of the nature of the services provided by such intermediaries, their expertise and the remuneration usual in the industry for the services. See G. van der Wal, S. Said, ‘De voortdurende vraag naar de rol van de tussenpersoon in het merkenrecht’, IER 2021/3, para. 6.3.

88 For example, A-G Szpunar ruled that the mere fact that Amazon’s logo is attached to all advertisements does not indicate that the consumer is going to see offers from third-party sellers as Amazon’s own communication (C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:C:2022:422, Opinion of A-G Szpunar, paras. 85–86). Instead of the consumer who has little interest in knowing with whom the sale is concluded, because for them only the product and its price are decisive, it is also possible, for example, to adopt as a benchmark precisely the consumer for whom this is decisive to establish. See also: C-148/21 and C-184/21 *Louboutin v. Amazon* ECLI:EU:C:2022:422, Opinion of A-G Szpunar, para. 72. The latter consumer is less likely to assume a link, as this consumer will be more attentive to this point. The modern internet user may know that

83 C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 38.

84 M. Stief, ‘Louboutin v. Amazon: direct liability of online platforms for third-party trademark infringement’ (2023) <<https://www.managingip.com/article/2bc9h77qtiqh5qil65ts/expert-analysis/local-insights/louboutin-v-amazon-direct-liability-of-online-platforms-for-third-party-trademark-infringement>> accessed 23 July 2023.

D. Obligations Imposed by Regulations

40 Now that it has emerged in the previous Section that the CJEU places greater responsibility on online intermediaries, what obligations this entails for them remains. The answer to this question can only be found by involving the ECD and the DSA. Indeed, the analysis of several CJEU rulings shows that the CJEU wanted to stress the importance of the responsibility of the online platforms, even if it did not establish the liability of that online platform.⁸⁹ Given the nature of the ECD and the recent advent of the DSA, combined with the developments of the discussed case law, it is necessary to include these regulations in the research to determine a comprehensive final answer to the article's central question. This Section, therefore, elaborates on the obligations these regulations entail and whether these regulations should be interpreted differently in the context of the previous Sections. First, a brief introduction to both regulations will follow. Then,

the ads displayed on a platform can come not only from the platform itself but also from third parties with which the platform has nothing to do. For instance, Amazon can be seen as a highly renowned distributor but it is also renowned for its marketplace activity. Consumers therefore probably know that the website both makes sales offers for goods sold directly by Amazon and has sales offers posted by third-party sellers (See: C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:C:2022:422, Opinion of A-G Szpunar, para. 86). The CJEU ruled also in the *Google France and Google* case that where the provider of a search engine advertising service which stores, on behalf of a number of customers, signs corresponding to trademarks as keywords and displays advertisements on the basis thereof, is merely carrying out its usual activity and therefore, in the eyes of an informed internet user familiar with the use of that service, does not appear to be using the signs in question for its own commercial communication (C-236/08-C-238/08, *Google France and Google* [2010] EU:C:2010:159, para. 55; C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:C:2022:422, Opinion of A-G Szpunar, para.70). For instance, in the *Tempur/Medicomfort* case, the Court of Appeal of The Hague ruled that the normally informed and observant internet user was aware that when they typed in a brand name as a keyword on the search page of a search engine provider, not only search results linked to the brand owner would appear, but also third-party advertisements (Court of Appeal of The Hague, 22 November 2011, 200.083.709-01, ECLI:NL:GHSGR:2011:BU6275 (*Tempur/Medicomfort*), para. 17. See also: G. van der Wal, S. Said, 'De voortdurende vraag naar de rol van de tussenpersoon in het merkenrecht' (2021) IER 3, 5.2.

89 For example, in C-324/09 *L'Oréal v. eBay* [2011] ECLI:EU:C:2011:474 and C-567/18 *Coty v. Amazon* [2020] ECLI:EU:C:2020:267.

several provisions will be discussed, in which the most critical exemptions and obligations for online intermediaries will come to light. The Section concludes with an overview of the implications of *Louboutin v. Amazon* for the discussed provisions.

I. Background and Relevance of ECD and DSA

41 The ECD established a legal framework governing digital services. Its primary objective was to harmonise regulations across EU Member States and provide a basis for free movement of online services. The ECD presented an initial definition for online providers acting as intermediaries: the "Information Society Service Providers" ('ISSPs'). As previously noted, the ECD could not provide a clear and specific definition of an online intermediary to classify intermediaries such as the operator of an online marketplace. With an effective date in 2000, the ECD was drafted at a time when online platforms with the size and influence of today did not exist. The fast-growing and fast-developing digital environment requires modernisation. Given the emerging challenges, the EU recently presented a new regulation: the DSA. With a publication date of October 2022 and the entry into force of 16 November 2022, the DSA has rapidly sailed through the European legislative process. The need for an updated regulation for (among others) online intermediaries was highly desirable. The DSA aims to provide better protection to users and fundamental rights online, establish a robust transparency and accountability framework for online platforms and provide a single, uniform framework across the EU.⁹⁰ Therefore, the main aim of the DSA is to modernise the regulatory framework for digital services. In doing so, the DSA notably follows on from the ECD, which has similar content but was considered somewhat outdated.

42 The DSA relates to the ECD in two ways.⁹¹ For one, the DSA is required to safeguard the provisions of the ECD and seeks to preserve the ECD's intermediary liability framework. This is reflected, for example, in Articles 4, 5 and 6 DSA, which essentially correspond to Articles 12, 13 and 14 ECD. Incidentally, Article 6(3) DSA contains a new consumer protection law

90 European Commission, 'Questions and Answers: Digital Service Act' (2023) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 23 July 2023.

91 F. Wilman, 'Between preservation and clarification: The evolution of the DSA's liability rules in light of the CJEU's case law'(2022) <<https://verfassungsblog.de/dsa-preservation-clarification/>> accessed 23 July 2023.

regulation. This provision covers the liability of online platforms that allow consumers to conclude distance contracts with traders (in other words, online marketplaces). On the other hand, the DSA aims to clarify issues from the ECD, as has become apparent, for example, in establishing the definition of “online intermediary”.

- 43 An essential difference between the ECD and the DSA can be found in their nature. The ECD is a so-called directive and thus must be implemented in national law. Therefore, directly relying on these provisions is impossible; the relevant national law must be invoked.⁹² In contrast, the DSA is a regulation that can be directly invoked. After it enters into force, all European Union citizens can invoke the provisions of the DSA.⁹³
- 44 In previously discussed case law, the CJEU connected the interpretation of trademark infringement and the definitions and scope of different European legislation.⁹⁴ This makes the provisions from the ECD and the DSA, among others, relevant to the legal standing of online intermediaries towards trademark holders. In this regard, other regulations regarding intermediaries’ liabilities and obligations may also be relevant. For example, the DSM Copyright Directive⁹⁵ (‘DSM’) looks at the *lex specialis* liability of “online content-sharing services”. However, the DSM does not clearly define this term. Authors assume that many hosting services and online platforms do not fall under this definition.⁹⁶ Therefore, given the nature of an online marketplace and the type of infringement subject to this article, the DSM will be further disregarded.

92 A.S. Hartkamp, *C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Deventer: Wolters Kluwer 2023) 152.

93 A.S. Hartkamp, *C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Deventer: Wolters Kluwer 2023) 152.

94 For example, in C-148/21 and C-184/21 *Louboutin v. Amazon* [2022] ECLI:EU:2022:1016, para. 37.

95 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

96 R. Chavannes, A. Strijbos & D. Verhulst, ‘Kroniek technologie en recht’ (2023) *NJB* 1084 2.2.b.

II. Key Provisions

- 45 The ECD has established several pivotal obligations tailored to online service providers, often called ISSPs. The ECD outlines a limited liability framework for intermediaries, carving out provisions that exempt ISSPs and hosting platforms from liability for illicit content, provided they were unaware of its existence. Furthermore, the ECD introduced the “Notice and Takedown Procedure,” mandating intermediaries promptly remove or restrict access to illegal content upon receiving a notification.⁹⁷ In addition to introducing precise definitions for “online platforms” and “online intermediary services”, the DSA offers significant advancements. While the ECD hesitates to allocate responsibilities to ISSPs, the DSA emphasises enhanced accountability for online platforms. A defining feature of the DSA is its principle: the more intimately a service provider engages with user content, the more pronounced its obligations become.⁹⁸ The DSA introduces the notion of “Very Large Online Platforms” (VLOPs) and imposes extensive obligations and regulations upon them. Additionally, the DSA sets forth new requirements for other online platforms, encompassing transparency stipulations, risk assessments, and protective measures against illicit content.

1. An Online Intermediary

- 46 By operating the platform for the online marketplace, the operator offers what is termed an “information society service” (ISSP) under EU Directive 2015/1535.⁹⁹ This service typically involves transactions conducted remotely, electronically, and upon specific requests from service recipients. The ECD has traditionally encapsulated this concept using the abbreviation “ISSP”.

97 However, Wolters and Gellert are critical of the N&A process in the DSA. They point out that content providers lack effective and accessible options to challenge decisions that are negative for them. A clear justification is lacking in many cases when their content is removed from the platform. See: P.T.J. Wolters & R.M. Gellert, ‘Het “notice and action-mechanisme” van de DSA: een adequaat evenwicht tussen de betrokken belangen?’ (2022) *Computerrecht* 218, 4.3, 5.2.

98 R. Chavannes, A. Strijbos & D. Verhulst, ‘Kroniek technologie en recht’ (2023) *NJB* 1084 2.3.

99 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure or the provision of information in the field of technical regulations and of rules on Information Society services (codification).

47 Since operators of online marketplaces perform an essential link in trading or offering goods to the public, it was suspected that these operators act as intermediaries.¹⁰⁰ However, there was little consensus among legal scholars, courts, and legislators on defining an “online intermediary” and under what circumstances they would fall within the scope of ISSPs.¹⁰¹ With the recently enacted DSA, more clarity can be provided. The DSA formulates an initial definition for “intermediary services”. This includes, among others, a hosting service “consisting of the storage of information provided by, and at the request of, a recipient of the service”.¹⁰² The fact that an online marketplace can be considered a “hosting service” and, therefore, an “intermediary service” is rendered by Article 3(i) DSA, which contains a comprehensive definition of the term “online platform”. According to this provision, online platforms are a form of hosting services and are considered intermediary services.

48 This analysis is supported by the Digital Market Act¹⁰³ (“DMA”), which, referring to Regulation (EU) 2019/1150¹⁰⁴, addresses the specific definition of “online intermediation services”.¹⁰⁵ The online marketplace operates as an information society service, allowing business users to present goods to consumers and foster direct transactions. This service is rendered to the business user through established contractual agreements with the provider. Consequently, the online marketplace is designated a “provider of online intermediation services,” satisfying all stipulated criteria.¹⁰⁶ Whereas formerly, it was merely an assumption, it can now be said with certainty that the operator of an online marketplace can be defined as an *online intermediary*.

100 G. van der Wal, ‘De voortdurende vraag naar de rol van de tussenpersoon in het merkenrecht’ (2021) IER 3,2.1.

101 Frosio (red.), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) 6.

102 Article 3(g)(iii) DSA.

103 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

104 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

105 Article 2(5) DMA.

106 Article 2(2) Regulation 2019/1150.

2. Safe Harbour

49 Article 6 DSA states:

“Where an ISSP is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider does not have actual knowledge of illegal activity or illegal content (...) or upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.”

50 This provision thereby describes the so-called *safe harbour*. An online intermediary can “escape” liability under certain circumstances if it meets the conditions of this liability exemption. The DSA’s liability exemptions apply to intermediary liability, regardless of the nature of the liability.¹⁰⁷ This renders the DSA relevant for trademark law. Failure to meet the conditions of the liability exemptions does not automatically mean that the online intermediary is liable.¹⁰⁸ The provisions of the DSA should not be reasoned a-contrario in that context. The liability question must, therefore, be answered by reference to applicable rules of EU or national law.¹⁰⁹

51 The safe harbours for hosting providers (such as online platforms) have been moved from the ECD to the DSA. As a result, the direct effect of the DSA entails that the national implementations of Articles 14-16 ECD have become obsolete (for the Netherlands, this is Article 6:196c Dutch Civil Code) and can now be invoked directly under the DSA. Given that the text of Article 6 DSA is almost like Article 14 ECD, it can be assumed that the interpretation of Article 14 ECD applies *mutatis mutandis* to Article 6 DSA. Online platforms facilitating buying and selling between two parties (such as online marketplaces) can invoke the safe harbour provision of Article 6 DSA.¹¹⁰

52 The applicability of Article 6 DSA is assessed according to the degree of the “active role” the provider of the online platforms had. The “active role” criterion is an open standard interpreted several times by the CJEU. An online marketplace can successfully invoke the safe harbour provision if that operator does not play an active role that enables

107 Recital 17 DSA.

108 Recital 17 DSA.

109 C-622/16 *Google v. Google France* [2010] ECLI:EU:C:2010:474, para. 107.

110 N.A. de Werd & T.C. Bokhoeve, ‘Wat is de rol en verantwoordelijkheid van online platforms in de digitale strijd tegen namaakproducten?’ (2022) *Computerrecht* 2.1.

it to have knowledge of or control over the stored data.¹¹¹ To do so, however, the online intermediary must quickly delete that data or make access to it impossible as soon as it becomes aware of the unlawful nature of that data.¹¹² This interpretation is codified in Recital 18 DSA:

“The exemptions from liability established in this Regulation should not apply where, instead of confining itself to providing the services neutrally by a merely technical and automatic processing of the information provided by the recipient of the service, the provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over, that information. ... “

53 The European legislator’s decision to use the term “neutrally” rather than “passively” in its wording merits attention. This choice indicates a more cautious approach when evaluating the “active role” criterion, particularly for hosting services like online marketplaces. Recital 21 DSA further underscores this caution, emphasising only conduit and caching and stipulating that for service providers to claim exemptions, they must not be involved with user content. Notably, online hosting services face a somewhat lenient standard; they can interact with such content and potentially claim the safe harbour provision. The crux of determining the service provider’s “active role” and eligibility for liability exemptions lies in the online marketplace’s activity. Thus, complete passivity is optional to qualify for the Article 6 DSA safe harbour.

54 Taking voluntary action on one’s initiative to deal with illegal content or to comply with EU or national law is not a ground to be excluded from the Article 6 DSA safe harbour exemption. This “Good Samaritan” clause from Article 7 DSA builds on the potential reluctance of service providers to take an active role and aims to remove a disincentive for such voluntary action.¹¹³ According to Article 7 DSA, this reluctance

is unwarranted, provided an online intermediary acts in good faith and with due care.¹¹⁴ Nevertheless, it cannot be ruled out that online platforms remove more content from their websites to avoid liability. This would contradict one of the DSA’s goals, i.e., to safeguard more protection of fundamental rights online, including freedom of expression.¹¹⁵

3. Due Diligence

55 The DSA formulates several *due diligence* obligations the online intermediary must comply with. These obligations mainly focus on the process and design of the service offered rather than the content itself.¹¹⁶ Taking measures to comply with the due diligence obligation is separate from the liability question and, therefore, does not affect the assessment of the active role of the online intermediary.¹¹⁷ However, these different obligations provide a clear picture of what is expected of the online intermediary. The degree of responsibility depends on the extent and social impact of the service. In general, four “layers”

evolution of the DSA’s liability rules in light of the CJEU’s case law’ *Verfassungsblog* (2022) <<https://verfassungsblog.de/dsa-preservation-clarification/>> accessed 23 July 2023. While a platform that actively tracks down information and removes infringing information loses its neutral position, it does not automatically mean that a benevolent platform is directly liable or more quickly liable than a platform that keeps its distance. Indeed, there is still a need to investigate whether there has been unlawful conduct. Nevertheless, an involved host may be more likely to have knowledge or be deemed to know the infringing information, so it may still be liable more quickly than a passive host. See: M.Y. Schaub, *Onlineplattformen - Monografieën Privaatrecht nr. 19* (Wolters Kluwer 2020), nr. 71.

114 In any case, the diligent economic operator is not acting in good faith if it operates a business model based on promoting infringements by users of the platform. See J. Nordemann, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, Study prepared for the European Parliament, 2018. Available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA%282017%29614207, pp. 11.

115 A. Kuczerawy, ‘The Good Samaritan that wasn’t: voluntary monitoring under the (draft) Digital Services Act’ (2021) <The Good Samaritan that wasn’t: voluntary monitoring under the (draft) Digital Services Act – *Verfassungsblog*>, accessed 5 September 2023.

116 M. Husovec & I. Roche Laguna, ‘Digital Service Act: A Short Primer’, in *Principles of the Digital Service Act* (Oxford University Press: Forthcoming 2023) 4.

111 C-324/09 *L’Oréal v. eBay* [2011] ECLI:EU:C:2011:474.

112 C-236-238/08 *Google v. Louis Vuitton* [2010] ECLI:EU:C:2010:159. For instance, the Dutch Supreme Court argued that operating a spam filter and providing a search function did not result in the platform NSE having knowledge of or control over the messages stored on that platform. The Supreme Court also held that the platform took the technical measures that could be expected of a diligent economic operator in its situation to credibly and effectively counter copyright infringements on its platform. The fact that the NTD procedure could possibly be improved, and additional measures were conceivable did not detract from this (Dutch Supreme Court, 17 January 2023, 17/01135, ECLI:NL:HR:2023:94 (*Brein v. NSE*), para. 3.6.3.

113 F. Wilman, ‘Between preservation and clarification: The

117 Rectical 41 DSA.

of due diligence obligations can be distinguished:¹¹⁸

- 56 *Universal obligations* apply to all providers of intermediary services that may qualify for the liability exemptions.¹¹⁹ These obligations include assigning a single point of contact for authorities and users.¹²⁰ In addition, the provider must explain the moderation of third-party content and the use of automation.¹²¹ Medium-sized or more prominent firms¹²² must also publish an annual report containing various aspects that enhance transparency in the market.¹²³
- 57 *Additional obligations* apply to all hosting services.¹²⁴ The DSA defines how the hosting provider must receive notifications of illegal content on the service provided.¹²⁵ Once the provider is notified of the illegal content, it may lose the right to its liability exemption if it does not act against this content.
- 58 *Advanced obligations* apply to medium-sized or bigger hosting service providers with an online platform.¹²⁶ This set of obligations is by far the most comprehensive. Several categories of obligations can be distinguished: Content Moderation, Fair Design of Services, Advertising, Amplification and Transparency. In the Advertising category, the online platform is required to make it clear who paid for the advertisement, the content creator must be enabled to include advertisements in uploaded content, and the advertisement must not be based on profiling using sensitive data as

input.¹²⁷ These advanced obligations also include a set of transparency obligations designed explicitly for online marketplaces.¹²⁸ For instance, a “Know-Your-Business-Customer” obligation is formulated whereby the traceability of merchants must be improved.¹²⁹ The provider of an online marketplace must undertake measures to promote such traceability by, for example, storing ID documents and payment details. If a third party has a legitimate interest in receiving this information, this data should be provided to that third party.

- 59 *Special obligations* apply to VLOPs, online platforms with an average of 45 million active monthly users.¹³⁰ VLOPs are designated as such by the European Commission in the Official EU Journal. VLOPs must identify, analyse, and assess systemic risks from their services’ design, functioning, and use.¹³¹ This risk assessment must be carried out at least once a year and at the expense of the VLOP. The assessment focuses on illegal content, actual or foreseeable adverse effects on all fundamental rights, pre-defined protected issues, and serious negative consequences to users’ physical and mental well-being. In addition, the VLOP should, among other measures, maintain a crisis response mechanism, provide access to data to supervisory authorities and vetted research, and appoint a compliance officer responsible for complying with the DSA obligations. The European Commission is the sole authority in monitoring and enforcing these specific obligations.

III. Implications for Online Intermediaries

- 60 On 23 April 2023, the European Commission designated 17 VLOPs.¹³² These include several online marketplaces like Amazon, Zalando and Alibaba AliExpress. They will have to comply with all obligations outlined by the DSA for VLOPs within four months from the date of notification of the designation. Amazon opposes this designation and asserts that they are a retailer rather than a

118 M. Husovec & I. Roche Laguna, ‘Digital Service Act: A Short Primer’, in: *Principles of the Digital Service Act* (Oxford University Press: Forthcoming 2023) 4.

119 Chapter III, Section 1 DSA.

120 Article 11 and 12 DSA.

121 Article 14 DSA.

122 Small firms are fewer than 50 employees, and turnover and or/annual balance sheet total does not exceed 10 million Euros. However, if the small firm is qualified as VLOP, it remain under the obligation. See: European Commission, ‘Internal Market, Industry, Entrepreneurship and SMEs’ <https://single-market-economy.ec.europa.eu/smes/sme-definition_en> accessed 23 July 2023.

123 Article 15 DSA.

124 Chapter III, Section 2 DSA.

125 Article 16 DSA.

126 Chapter III, Section 3 DSA.

127 Articles 26 and 28 DSA.

128 Chapter III, Section 4 DSA.

129 Article 30 DSA.

130 Chapter III, Section 5 DSA.

131 Article 34 DSA.

132 European Commission, ‘Digital Service Act: Commission designates first set of Very Large Online Platforms and Search Engines’ (2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413> accessed 23 July 2023.

communication platform and, therefore, does not fall under the targeted group of obligations.¹³³ Zalando also resists the designation, asserting that the European Commission significantly overestimated the size of its user base. Amazon further claims that the designation is “based on a discriminatory criterion and disproportionately violates the principle of equal treatment and the applicant’s fundamental rights”.¹³⁴ Whether such arguments will hold in the lawsuits filed remains to be seen.

- 61 As highlighted in Section 3, the scope of online intermediary liability has been expanded by the CJEU. The fact that the perspective of the customarily informed and reasonably observant internet user is now considered an essential factor in assessing whether a given act can be classified as a “commercial communication” could potentially have implications for interpreting some provisions of the ECD and the DSA. This may affect, for example, the interpretation of an active role, which is relevant for possible reliance on Article 6 DSA.¹³⁵ If the perspective of the internet user is taken as a measure when assessing whether an online intermediary has an active role, it could be that this would lower the threshold for assuming the active role.

E. Conclusion

- 62 Online marketplaces are digital platforms where the operators facilitate interactions between (third-party) sellers and buyers (consumers). These operators function as “intermediaries” under the DSA’s classification. As the prevalence of such platforms increases, complex legal issues arise, particularly concerning the extent of these intermediaries’ liabilities. When trademark infringements occur, rights holders decide to pursue legal action against the individual seller or the more prominent online intermediary. Often, the latter is the more appealing target due to various reasons. Yet, evolving European regulations and diverse case

law have muddled the waters. This article addressed a pressing question: How do the EU trademark law and the Digital Services Act define the responsibilities of online marketplaces toward these rights holders?

- 63 Much debate has been about the level of responsibility online intermediaries have to provide trademark owners. Generally, only secondary liability was assumed, as the online intermediary was not held to be able to bear its own “primary” liability for conduct not directly attributable to itself. The analysis of case law reveals that the CJEU has had to rule on this matter often, but each time with the outcome mentioned. The CJEU did emphasise the importance of a responsible online intermediary but did not attach direct liability to it yet. In *Louboutin v. Amazon*, the question arose from two different national courts through preliminary questions on how the concept of use should be interpreted when an online intermediary operating an online marketplace is involved. The Louboutin heels fell victim to counterfeit products on Amazon’s online marketplace. The problem was the lack of clarity on whether Amazon played an active role by placing ads for counterfeit products on its website.
- 64 In its decision, the CJEU frequently references the benchmarks and arguments from the cases of *L’Oréal v. eBay* and *Coty v. Amazon*, suggesting a possible parallel outcome. However, the CJEU introduces a shift in its ruling by articulating a new criterion for defining “commercial communication” to determine an “active role” in infringement. The CJEU posits that this definition should encompass the viewpoint of an informed and discerning internet user. Additionally, the Court outlines various factors that could influence this interpretation. Notably, this approach of integrating the perspective of the informed user is novel in evaluating active behaviour in such cases.
- 65 This perspective becomes increasingly evident that online intermediaries like Amazon may bear primary liability for products infringing on copyrights offered by third parties. The CJEU appears to be recalibrating the balance between parties, tilting it towards enhanced consumer protection. This perspective has been identified as the pivotal factor in this shift.
- 66 European legislative bodies also reflect this inclination. The Digital Services Act (DSA) introduction underscores the heightened responsibility of online intermediaries. The DSA encompasses several obligations, some novel, distinguishing it from its precursor, the E-Commerce Directive (ECD). While these two regulations coexist and are intended to be complementary, it’s pivotal to recognise the DSA’s immediate enforceability upon its enactment. Consequently, specific provisions of the ECD might become obsolete, but interpretations

133 E. Woollacott, ‘Amazon ‘Isn’t A Very Large Online Platform’, *Forbes* (2023) <<https://www.forbes.com/sites/emmawoollacott/2023/07/12/amazon-isnt-a-very-large-online-platform/?sh=2cf812761ab4>> accessed 23 July 2023.

134 E. Woollacott, ‘Amazon ‘Isn’t A Very Large Online Platform’ *Forbes* (2023) <<https://www.forbes.com/sites/emmawoollacott/2023/07/12/amazon-isnt-a-very-large-online-platform/?sh=2cf812761ab4>> accessed 23 July 2023.

135 See also E. Rosati, ‘The Role, Responsibility and Liability of Online Intermediaries under EU IP Law’, in *Routledge Handbook of Fashion Law* (Routledge: Forthcoming 2024), ch. 7, who also indicates an emerging trend towards a greater responsabilisation of online intermediaries.

by entities, including the CJEU, continue to influence the DSA's interpretation. Specifically, the definition of an "active role," critical for invoking the safe harbour provisions, could be impacted by this judgment. Furthermore, the emergence of Very Large Online Platforms (VLOPs) mandates these platforms to adhere to heightened due diligence requirements. VLOPs are now tasked with formulating and upholding policies aligning with the new legislation and prevailing case law.

- 67 The legal position of online intermediaries about trademark owners has seen a notable transformation. This change is primarily attributed to the verdict in *Louboutin v. Amazon* and the introduction of the DSA and its subsequent obligations. These developments imply an augmented responsibility for online platforms, positioning them at potential direct liability for infringing products listed on their sites. Consequently, with a valid trademark, trademark owners now possess a substantial legal advantage. Considering this, it is plausible that, in the future, trademark owners will primarily target online marketplace operators when infringements occur on their platforms. This revised legal position has evoked strong reactions from numerous online platforms. As with many evolving legal landscapes, these changes present many unresolved questions. Thus, the definitive resolution on this issue still needs to be discovered.