



15-SECOND ADVERTISING LAW ALERT

MIXED CASES CAN CREATE PUZZLING ADVERTISING DECISIONS

Mixed cases in which the advertising issues are perceived as less important than the trademark issues sometimes result in puzzling precedents. A recent decision provides an example.*

BACKGROUND

TIFFANY trademark owners sued eBay, the online marketplace where third parties sell goods directly to visitors of eBay's website.

Tiffany alleged that eBay facilitated the sale on its website of a great many counterfeit TIFFANY silver items. It charged eBay with infringement and dilution of its marks and false and misleading advertising of Tiffany products.

eBay advertised the availability of Tiffany items through sponsored link ads and, prior to the suit, had featured such availability on its website pages.

These ads allegedly influenced some consumers to buy counterfeit Tiffany items in violation of Lanham Act Section 43(a)(1)(B), which precludes the misrepresentation of the nature, characteristics, qualities or geographic origin of goods.

OPINION

The court gave judgment to eBay on all counts. As for the false advertising allegations, the judge first found that eBay's advertising of the availability of Tiffany items was not literally false because authentic Tiffany products were available (as were fake ones).

Next, the court found that the ads were not proven to be impliedly false because Tiffany "has not proven that eBay had specific knowledge as to the illicit nature of individual listings." eBay merely had "generalized knowledge that Tiffany products sold on eBay were often counterfeit." (This unusual conclusion appears to require showing an advertiser's knowledge or intent to mislead as an element of proof.)

Finally, the court concluded that, "to the extent that the advertising was false, the falsity was the responsibility of third party sellers, not eBay" (which knew that many offerings were fake).■

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* *Tiffany (NJ), et al. v. eBay, Inc.*, 04 Civ. 4607 (S.D.N.Y. July 14, 2008).