

08-3947-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

TIFFANY(NJ) INC. and TIFFANY AND COMPANY,

Plaintiffs-Appellants,

--- against ---

eBAY INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Both the district court and eBay grossly overstate the relief sought by Tiffany while woefully understating eBay's obligations under the law. Tiffany has not sought to interfere with the sale of genuine merchandise, whether new or used. The record shows that of 284,000 listings reported by Tiffany to eBay over a four year period, there were only three instances in which the listings turned out to contain genuine merchandise. In those instances, Tiffany promptly withdrew its objections to the sale of the listed goods.

eBay incorrectly suggests that Tiffany's motivation is something other than to protect its most valuable asset, the Tiffany name. Both eBay and the district court erroneously state that eBay bears no responsibility other than simply to respond to specific complaints after eBay has received them. eBay's posture ignores the fact that the sale of counterfeit merchandise has long been illegal and that federal and state law enforcement agencies are aggressively involved in seeking to stop the flow of counterfeit goods into this country.

The record shows that eBay has created a highly profitable business model, the dirty secret of which is that it includes significant profits from the sale of counterfeit merchandise. Whereas traditional retailers are subject to strict liability if they sell counterfeit goods, El Greco Leather Products Co. v. Shoe World, Inc., 806 F.2d 392, 396 (2d Cir. 1986), cert. denied, 484 U.S. 817 (1987), the district court followed eBay's urging and watered down the lower standard for contributory infringement set by the Supreme Court in Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 450 U.S. 844, 854 (1982).

All of the seminal decisions concerning the doctrine, Inwood, Judge Wyzanski's decision in Coca-Cola v. Snow Crest Beverages, Inc., 64 F. Supp. 908 (D. Mass. 1946) aff'd, 162 F.2d 280 (1st Cir.), cert. denied, 332 U.S. 809 (1947), on which Inwood explicitly relied, and the flea-market cases applying the holding of Inwood, hold that knowledge or reason to know of widespread infringement (i.e., "generalized knowledge") is sufficient to trigger contributory liability. The only court ever to hold that contributory trademark infringement law requires specific knowledge of each particular individual instance of infringement (i.e., "specific knowledge") is the district court in this action. Without the support of pertinent legal authority, it wrote "reason to know" out of the standard.

The district court held, and eBay cannot dispute, that: (1) eBay knew that counterfeit TIFFANY jewelry was "often" sold on eBay, SPA59; (2) over a four year period, Tiffany reported over 284,000 listings as infringing and thus eBay had specific knowledge about individual sellers, including repeat offenders SPA18, SPA24-25; and (3) eBay received voluminous customer complaints regarding the purchase of what the customers believed to be counterfeit TIFFANY jewelry. SPA21. The legal consequence of those findings under Inwood is fatal for eBay.

Realizing that it is unable to defend itself under the law established by Inwood, eBay and its amici attempt to focus the Court's attention on exaggerated and irrelevant policy arguments. eBay and its amici ask the Court to free eBay

from the strictures of Inwood and to overrule that decision sub silentio.¹ They repeatedly claim that eBay, as a vast online marketplace, should not bear the burden of determining which goods are counterfeit because it would be bad for business. According to eBay and the amici, it makes sense that, despite what knowledge the operator of the marketplace may have, the policing burden should be borne only by the rights holders such as Tiffany.²

These arguments are fundamentally misplaced. As Tiffany has demonstrated, and as the district court has held, because of the knowledge that it has, eBay is capable of taking effective measures to prevent the listing of counterfeit TIFFANY goods. In fact, eBay is better situated to take effective anti-counterfeiting measures because only it can control what listings appear on its website.³ Equally important, the size and nature of eBay's electronic marketplace do not entitle eBay and businesses like eBay to special exemptions under the law. Like any other business, eBay and its amici are subject to the obligations in the Lanham Act designed to protect property rights. Violation of those rights is not excused because enforcement of the law would reduce the profits of the online

¹ Unlike eBay and the other amici, amicus curiae Electronic Frontier Foundation ("EFF") has the courage to admit that it wants this Court to hold that Inwood does not apply to electronic retailers. EFF Brief at 6 & n.3. In effect eBay asks the Court to do the same thing by urging the Court to reinterpret the requirements on Inwood based on its public policy arguments.

² As explained in Tiffany's initial brief, the notion that the victim's own policing efforts have any legal relevance to eBay's liability under Inwood for contributory infringement turns the law on its head. See Tiffany Brief at 38-43.

³ Even without possessing the physical goods, eBay, like Tiffany, is able to look at the listings and other indicia to determine they are likely counterfeits. eBay, of course, has access to more information than any rights owner such as Tiffany concerning the sellers and their misconduct. Indeed, in 2006, well after discovery had closed and with trial then ostensibly fast approaching, eBay implemented new procedures which substantially reduced the sale of counterfeit Tiffany merchandise. SPA27-28.

marketplace industry. In other words, eBay's business interests must yield to the interests of law enforcement and the protection of brand owners and consumers.

ARGUMENT

POINT I

EBAY ATTEMPTS TO REPUDIATE CERTAIN OF THE DISTRICT COURT'S FINDINGS TO EVADE THEIR LEGAL IMPLICATIONS

eBay claims that Tiffany has not adhered to the district court's factual findings. See eBay's Brief at 32 (citing United States v. Londano, 76 F.3d 33, 35 (2d Cir. 1996)). Tiffany, in fact, embraces many of those findings, as they provide an unequivocal basis for holding eBay liable when the law is correctly applied to those facts.

eBay is well aware of the legal consequence of the district court's factual findings and seeks to avoid several critical findings without attempting to satisfy the clearly erroneous standard:

- eBay claims that the district court found that "evaluating the authenticity of a Tiffany item requires physical inspection of that item by Tiffany personnel." eBay's Brief at 9. The district court actually found that, "in some circumstances, it is possible to determine if an item is counterfeit without physically inspecting the item." SPA5 (emphasis in the original). It cannot be disputed that eBay was found to have been aware of the indicia of counterfeit merchandise, including counterfeit TIFFANY jewelry. SPA27-28; EX1969-1988.

And as eBay boasts, since it implemented new anti-counterfeiting measures in late 2006, the number of counterfeit TIFFANY items listed on its site has been reduced. eBay's Brief at 29. Thus, eBay cannot dispute the district court's finding that it is not always necessary to physically examine an item proposed to be listed.

- eBay contends that it "stopped advertising Tiffany merchandise on its site and stopped purchasing sponsored links [on Google and Yahoo!] using the 'Tiffany' keyword". eBay's Brief at 12. Yet, the district court found that eBay continued to highlight TIFFANY jewelry on various eBay pages that tracked "top searches," "high demand" and "most watched items." SPA13-14. The district court further found that eBay continued to reimburse "affiliate advertisers" who purchased sponsored links advertising TIFFANY items. SPA14. The district court therefore found that "eBay did not fully discontinue the practice of advertising Tiffany goods on eBay through sponsored links." SPA 14.

- eBay claims that its own expert's testimony that 30% or more of the TIFFANY jewelry listed on the eBay website could be counterfeit was merely "speculation." eBay's Brief at 27 n.8. Actually, the district court stated: "even eBay's expert, Dr. Eugene Ericksen, conceded that a substantial amount of the 'Tiffany' jewelry listed on eBay's website — 30% or more — could safely be deemed to be counterfeit."⁴ SPA21 (emphasis added).

⁴ Dr. Erickson also stated in response to a question from the district court, that it was possible that the actual percentage of counterfeit goods was higher than 70%. A2393. He also acknowledged that he suggested to eBay that he would have designed a study to test the amount of counterfeit goods, but that "nobody asked [him] to do that." Id.

POINT II

CONTRARY TO EBAY'S MISREADING OF INWOOD, "GENERALIZED KNOWLEDGE" OF PERVASIVE INFRINGEMENT IS SUFFICIENT TO ESTABLISH LIABILITY FOR CONTRIBUTORY INFRINGEMENT

In Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982), the Supreme Court held that a defendant is liable for contributory infringement if it knew or had reason to know that a party to whom it was supplying its product or service was engaging in trademark infringement. See Tiffany's Brief at 27. eBay urges a dramatically narrower interpretation of Inwood. eBay's interpretation ignores the majority's decision by essentially extinguishing the "reason to know" prong. It was this prong that the majority adopted when it embraced Judge Wyzanski's decision in Coca-Cola v. Snow Crest Beverages Inc., 64 F. Supp. 980 (D. Mass. 1946), aff'd, 162 F.2d 280 (1st Cir.), cert. denied, 332 U.S. 809 (1947).

A. "Generalized Knowledge" of Pervasive Infringement Satisfies Inwood's Standard for Contributory Trademark Liability

eBay argues that Inwood requires "specific knowledge" of individual infringing activities before liability for contributory infringement may attach. See eBay's Brief at 30-31. This proposition is baseless. The slim reed that eBay advances for this interpretation is based on a tortured grammatical construction of the word "one" in the phrase "continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement." See eBay Brief at 33-34 (citing Inwood, 456 U.S. at 854). In its opening brief, Tiffany addressed the logical meaning for the word "one" in this context. See Tiffany

Brief at 34. Notably, eBay's argument is pure bootstrapping, as it is premised on the district court's erroneous interpretation of Inwood rather than any textual analysis of Inwood itself. See id. at 34.

eBay fails to confront the Supreme Court's and the lower courts' analysis of the facts in Inwood, which concerned the aid given to an undifferentiated group of pharmacists that were infringing the mark at issue. Each court analyzed the factual record to determine whether there was sufficient evidence of knowledge of a pervasive problem and not whether there was sufficient evidence of knowledge regarding each individual pharmacist. More precisely,

- The district court found that the incidents of substitution had “occurred too infrequently to justify the inference that the [defendant's] catalogs and use of imitative colors [for pill capsules] had ‘implicitly invited’ druggists to mislabel.” Inwood, 456 U.S. at 853 (citation omitted; emphasis added).
- When this Court affirmed the trial court's denial of a temporary injunction, Justice Friendly noted the infrequency of illegal substitution. Justice Friendly stated that, while “evidence of improper substitution was limited to 15 prescriptions [,] [d]iscovery and trial might show that the practice was much more widespread” Ives Laboratories, Inc. v. Darby Drug Co., 601 F.2d 631, 644 (2d Cir. 1979) (footnote omitted; emphasis added).
- This Court reversed the district court's dismissal of the contributory trademark infringement claim because it had not given sufficient weight to

the “pattern of illegal substitution and mislabeling”⁵ Ives Laboratories, Inc. v. Darby Drug Co., 638 F.2d 538, 543 (2d Cir. 1981) (citation omitted; emphasis added).⁶

Further, eBay ignores the knowledge or reason to know standard adopted in the majority’s opinion, and attempts to substitute Justice White’s concurrence for the majority’s decision. See eBay Brief at 34-37. In fact, but for a reversal on procedural grounds, Justice White’s opinion would have been a dissent. He criticized the majority for “endors[ing] the legal standard purportedly employed by the Court of Appeals,” and wrote a separate opinion because he believed that the Court of Appeals “watered down to an impermissible extent the standard” Inwood, 456 U.S. at 859 (White, J., concurring). In response, the majority expressly dismissed Justice White’s assertion that it was adopting a “reasonable anticipation” standard, id. at 854 n.13, and held that the knowledge or reason to know standard set forth by Judge Wyzanski in Snow Crest is the correct standard. Id. at 854.

⁵ The Supreme Court did not reverse Ives because the “pattern” of third-party counterfeiting was insufficient to trigger liability, but did so because the district court’s factual findings were not clearly erroneous and this Court was not entitled to review them de novo. Inwood, 456 U.S. at 855-56.

⁶ The Second Circuit remanded the case to the district court in 1979. On remand, the district court found for defendants. Ives Laboratories, Inc. v. Darby Drug Co., 488 F. Supp. 394 (E.D.N.Y. 1980). Plaintiffs appealed that decision to the Second Circuit. Ives Laboratories, Inc. v. Darby Drug Co., 638 F.2d 538, 543 (2d Cir. 1981). It was this latter Second Circuit decision that was appealed to the Supreme Court in Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982).

B. Inwood's Adoption of Snow Crest Undermines eBay's Misreading of Inwood

Both the Inwood majority and this Court explicitly relied on and adopted Judge Wyzanski's decision in Snow Crest, 64 F. Supp. at 989-90. Their reliance on Snow Crest makes plain that the district court below and eBay misunderstood the law of contributory infringement.

In Ives, Judge Friendly stated that the "proper criteria" for establishing a contributory trademark infringement claim are set forth in Snow Crest. Ives, 601 F.2d at 636. In Inwood, the majority endorsed Justice Friendly's articulation of the standard. Inwood, 456 U.S. at 854 n. 13. The Inwood majority also adopted Judge Wyzanski's statement of the standard for contributory infringement.⁷ Id. at 854.

As discussed in Tiffany's initial brief, Snow Crest holds that "generalized knowledge" of infringement is sufficient for liability to attach. See Tiffany's Brief at 30-31. eBay, however, wrongly contends that Snow Crest adopted a "specific knowledge" standard and rejected a "generalized knowledge" standard. See eBay's Brief at 42. In support of its contention, eBay misleadingly quotes from one part of Snow Crest that:

had the plaintiff provided "notice that *particular named bars* which defendant was continuing to supply were serving defendant's product when plaintiff's product was specifically ordered," that would have been sufficient" [to trigger contributory trademark infringement liability].

⁷ Other courts have affirmatively cited and relied on Snow Crest. See, e.g., National Federation of the Blind, Inc. v. Loompanics Enterprises, Inc., 936 F. Supp. 1232, 1245 (D. Md. 1996); Power Test Petroleum Distributors, Inc. v. Manhattan & Queens Fuel Corp., 556 F. Supp. 392, 395 (E.D.N.Y. 1982) (Snow Crest is "the seminal case on contributory infringement.").

Id. (emphasis by eBay; citation omitted). But eBay omits to quote from or refer to the alternative liability scenario that Judge Wyzanski set forth in the very paragraph from which eBay quotes. Judge Wyzanski held that a defendant would be liable if it instead had:

credible information that would have led a normal bottler in defendant's position to believe that so many bar customers specifically ordered "rum (or whiskey) and Coca-Cola" that in view of the volume of defendant's sales many bars must necessarily be passing off defendant's product as Coca-Cola.

Snow Crest, 64 F. Supp. at 989-90.⁸ It is this alternative ground for liability that the district court erroneously failed to apply.

Both the district court and eBay confuse generalized "allegations" of infringement with "knowledge" of infringement. eBay tries to characterize Snow Crest as a "specific knowledge" case by also quoting Judge Wyzanski's holding that the plaintiff's statement

"in a conversation of general scope [with the defendant, a competitor] that unnamed bars in unnamed quantities were serving defendant's product when plaintiff's was called for," was insufficient to obligate the defendant to "investigate passing off or to take steps to safeguard against such passing off or to eliminate or curtail sale of its products."

eBay's Brief at 42 (citations omitted). In its initial brief, Tiffany explicitly addressed the distinction between allegations and knowledge, and explained that

⁸ eBay's failure to discuss the two alternatives and to reconcile them to its contention is telling, as both alternatives were discussed in Tiffany's initial brief. See Tiffany's Brief at 31.

Judge Wyzanski merely held that vague and unsubstantiated allegations arising from a single conversation with plaintiff's lawyer were not sufficient to notify the defendant of the existence of third-party infringement. See Tiffany's Brief at 31 n.11: eBay has failed to challenge this analysis of Snow Crest.

eBay's analysis of Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996), is likewise deficient. See eBay's Brief at 53-54. That decision, as did Inwood and Snow-Crest, held that "generalized knowledge" of pervasive infringement in a marketplace may trigger contributory liability. See Tiffany's Brief at 32-33. eBay erroneously contends that the allegations of the defendants' "knowledge" concerned solely a "discrete" group of vendors. See eBay's Brief at 53. In fact, the complaint in Fonovisa alleged that the swap-meet operators were aware of widespread, pervasive infringement. Fonovisa, 76 F.3d at 261. eBay concedes that the Fonovisa swap-meet operators' were on notice of and in a position to take action against widespread infringement. See eBay's Brief at 54. That concession is fatal. The facts underlying the district court's finding that eBay had "generalized knowledge" are far more extensive than the allegations that the Ninth Circuit held satisfied the knowledge requirement in Fonovisa. Compare Tiffany's Brief at 18-21 (detailing eBay's knowledge of the pervasive infringement of the TIFFANY Marks) with id. at 32 (detailing the facts that established knowledge in Fonovisa).

C. eBay Wrongly Equates “Generalized Knowledge” with “Reasonable Anticipation”

“Generalized knowledge” and “reasonable anticipation” are fundamentally distinct concepts; thus eBay is mistaken when it equates the two and asserts that liability cannot be based on the former. See eBay’s Brief at 5. eBay’s attempt to equate these two concepts has no basis, and is no more than a sleight of hand designed to override Inwood’s “reason to know” prong. eBay is liable under the “reason to know” prong because of the district’s court’s findings established that eBay had “generalized knowledge” of the pervasive listing of counterfeit TIFFANY goods on its website.⁹

eBay wrongly assumes without support, that the concept of “generalized knowledge” is “interchangeable” with the “reasonable anticipation” standard. See eBay Brief at 34.

“Reasonable anticipation” is equivalent to “foreseeability.” Both are projections as to future occurrences. See, e.g., United States v. Carreon, 11 F.3d 1225, 1235 n.49 (5th Cir. 1994) (adopting Black’s Law Dictionary definition of “foreseeability” as “the ability to see or know in advance; e.g., the reasonable anticipation that harm or injury will likely result from certain acts or omissions.”). The “reasonable anticipation” standard thus requires an actor to infer that a fact will likely occur at some point in the future. But the question here is not whether

⁹ Tiffany has not argued that the Court should employ a “reasonable anticipation” standard on this appeal. The discussion of “reasonable anticipation” occurred only in the amicus curiae brief submitted by the International AntiCounterfeiting Coalition (the “IACC”). And even there, the IACC was simply providing historical perspective; it did not advocate that this Court adopt a “reasonable anticipation” standard. See the IACC’s Brief at 26.

there is a likelihood of infringement in the future. The question is whether there are facts from which one can conclude that infringement has occurred.

In contrast to “anticipation”, “knowledge” is gained from facts that already exist or have existed; there is no need to anticipate or foresee that an event may occur because it is already occurring or has occurred. Similarly, “reason to know” is also premised on facts that already exist. As the Restatement (Second) of Torts § 12 (1965) explains, the phrase “reason to know” is “used with respect to existent facts.”¹⁰ “Reason to know” means that an actor:

has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.

Id. at comment a (emphasis added).¹¹ And the type of “generalized knowledge” that eBay had, see SPA45, 59, constitutes “reason to know”.

Since neither the district court nor Tiffany rely on the “reasonable anticipation” standard, eBay’s exposition regarding the invalidity of that standard is besides the point. See eBay’s Brief at 34-37, 40-41. eBay’s argument about the

¹⁰ The Restatement (Second) of Torts § 12(1) was cited by the Seventh Circuit in Hard Rock Café Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143, 1149 (7th Cir. 1992), to explain the meaning of Inwood’s “reason to know” standard.

¹¹ The definition of “reason to know” further demonstrates that the district court’s “specific knowledge” standard is untenable. If contributory liability is not triggered until a defendant is provided specific notice about specific instances of infringement, then there is no conceivable scenario for liability to be premised on “reason to know.” If a defendant has a specific notice of specific instances of infringement, it does not have “reason to know” of infringement — it has “actual” knowledge.

“reasonable anticipation” standard is therefore a red herring and should be disregarded.

D. eBay’s “Specific Knowledge” Decisions Do Not Hold that “Generalized Knowledge” Is Insufficient to Establish Liability for Contributory Infringement

eBay string cites seven decisions that purportedly substantiate eBay’s interpretation of Inwood. See eBay’s Brief at 37-39. Even assuming that eBay’s characterization of these decisions is correct, which in large part it is not, these decisions do not hold that “generalized knowledge” of widespread infringement fails to satisfy Inwood’s knowledge requirement.

Each of those decisions merely states that the plaintiff established liability because of the evidence of specific knowledge. E.g., Habeeba’s Dance of the Arts, Ltd. v. Knoblauch, 430 F. Supp. 2d 709, 714 (S.D. Ohio 2006). Even though none of those decisions discusses whether “generalized knowledge” would establish liability, eBay concludes that these decisions implicitly hold that “generalized knowledge” is insufficient to trigger liability. eBay’s conclusion is flawed. The inverse of a statement is not the logical equivalent of the statement. If a court holds that a defendant with specific knowledge of individual instances of infringement may be contributory liable, it does not follow that a defendant with “generalized knowledge” of widespread infringement may not be contributory liable.

As just noted, none of the decisions cited by eBay involved “generalized knowledge”. In fact, some of them do not even concern contributory trademark

infringement claims. See AT&T Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1433 n.14 (3d Cir. 1994), cert. denied, 514 U.S. 1103 (1995); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 439 n.19 (1984) (the court observed merely that Inwood does not provide the standard for a vicarious copyright claim).

eBay also includes Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 966 (C.D. Cal. 1997), aff'd, 194 F.3d 980 (9th Cir. 1999), in its string cite. In its initial brief, Tiffany explained why Lockheed is inapplicable. See Tiffany's Brief at 35-36. eBay, however, ignores and fails to rebut Tiffany's analysis. eBay's reliance on Perfect 10, Inc. v. Visa International Service Association, 494 F.3d 788, 807 (9th Cir. 2007), cert. denied, 128 S. Ct. 2821 (2008) is likewise misplaced. The Court dismissed the contributory trademark infringement claim because the defendant did not exert "direct control and monitoring" over the infringing product; the court did not even reach the issue of the defendant's knowledge. Id. (citation omitted)

Finally, eBay's parenthetical description of Monsanto Co. v. Campuzano, 206 F. Supp. 2d 1271 (S.D. Fla. 2002), is misleading. eBay claims that the Monsanto court "refus[ed] to impose liability based on defendant's general awareness of related infringing activity by other third parties." See eBay Brief at 38. If the Monsanto court actually made that holding, it would be relevant to this appeal. But, the Monsanto court did not so hold because that case did not involve knowledge of widespread, rampant infringement by third parties. Rather, it involved knowledge of the actions of only one third-party infringer. 206 F. Supp.

2d 1271. The court granted summary judgment in favor of the defendants because there was only circumstantial evidence that the defendants knew or “should have known” that their customer was involved in a repackaging scheme that was alleged to constitute trademark infringement. *Id.* at 1274-75. Once again, as it did in its discussion of Snow Crest, eBay has confused “generalized allegations” of infringement with “generalized knowledge.” See this Reply Brief at 10-11, *supra*.

POINT III

EBAY CONFUSES WILLFUL BLINDNESS WITH INWOOD’S KNOWLEDGE REQUIREMENT AND MISSTATES THE DISTRICT COURT’S FINDINGS

The district court’s substantial findings regarding eBay’s knowledge of the pervasive listing of counterfeit TIFFANY goods on its website satisfied the knowledge requirement under Inwood. In an attempt to obscure that conclusion, eBay argues that the district court’s findings do not establish that eBay was willfully blind to the listing of counterfeit goods. See eBay’s Brief at 49-55. That argument, however, is a red herring and an improper attempt to switch the standard that Tiffany must satisfy in order for eBay to be held liable. Thus, eBay’s analysis of willful blindness, which is an alternative basis for finding liability, should be disregarded.

eBay’s analysis of the evidence that it discusses in the context of willful blindness is erroneous and misplaced. eBay challenges three of the findings on which Tiffany relies, claiming that they do not prove “willful blindness”.

Specifically, eBay challenges Tiffany's analysis of: (1) the results of Tiffany's Buying Programs; (2) the number of repeat infringers; and (3) the support that eBay provides to its sellers. See eBay's Brief at 51-53. eBay's analysis as to each of those issues is wrong.

As to Tiffany's two Buying Programs, approximately 75% of the TIFFANY silver jewelry purchased was counterfeit. SPA20. With regard to the statistical projectibility of this data, the district court found that the results of the Buying Programs "provide limited evidence as to the total percentage of counterfeit [TIFFANY] goods available on eBay at any given time." SPA21 (emphasis added). However, there is no dispute that the purchases made in the two Buying Programs were selected randomly and no dispute as to the quantity of counterfeit items purchased. In fact, eBay never challenged the analysis of the authenticity of any of those goods. Moreover, as the district court found, eBay's own expert concluded that at any time, "30% or more" of the TIFFANY jewelry listed could "safely be deemed to be counterfeit." SPA21 (citation omitted). Under Inwood, since eBay was provided with the results of the Buying Programs both before and after Tiffany commenced this action, SPA20, eBay knew, or at least had reason to know, of the widespread listing of counterfeit goods. See Tiffany's Brief at 37.

As to the number of repeat offenders, eBay contends that its decision not to suspend reported infringers does not amount to willful blindness. See eBay's Brief at 52. The critical fact, however, is that eBay knew that there were repeat offenders. It is undisputed that, based on the limited information that it had, Tiffany was able to identify 178 sellers that it reported to eBay on multiple

occasions. See Tiffany's Brief at 24. This repetitive problem also establishes that eBay knew, or, had reason to know, of the widespread problem.

As to the support provided to sellers, eBay claims that the "tools" offered to its sellers have no connection to willful blindness. See eBay's Brief at 52-53. Tiffany does not make that assertion. The district court found that eBay provided substantial assistance and support to its sellers. SPA8-9, 12-14. These findings do not concern the issue of "willful blindness," but establish that eBay is subject to Inwood because it supplied a service. SPA44.

eBay contends that the district court was correct in its observation that, "[w]ere Tiffany to prevail in its argument that eBay was willfully blind, the 'reason to know' standard of the Inwood test would be inflated into an affirmative duty to take precautions against potential counterfeiters, even when eBay had no specific knowledge of the individual counterfeiters," and that the law does not "impose any duty to seek out and prevent violations." See eBay's Brief at 55 (quoting SPA53 (citation omitted)). The district court's observation, however, is a further reflection of its confusion concerning the "reason to know" standard and "reasonable anticipation." As discussed above, eBay and the district court wrongly conflate the two. See this Reply Brief at 12-14, *supra*.

That confusion is reflected in the district court's discussion of the Seventh Circuit's decision in Hard Rock Café Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143 (7th Cir. 1992). See SPA53; eBay's Brief at 55. The district court correctly observed that Hard Rock held that the law "does not impose any duty to

seek out and prevent violations.” SPA53 (quoting Hard Rock, 955 F.2d at 1149).¹² The Seventh Circuit, however, made this holding in conjunction with holding that the “reason to know” standard means that the “standard for contributory liability requires [a defendant] to understand what a reasonably prudent person would understand. . . .” 955 F.2d at 1149 (citation omitted). As shown above, such an “understanding”, or “reason to know”, is based on “existent facts.” See this Reply Brief 12-13, supra. Thus, a party cannot turn a blind eye to facts that would tell a reasonable person that it is assisting the sale of counterfeit goods. It is for that reason that the Seventh Circuit held that the district court had erred in dismissing the claim for contributory infringement after a bench trial. See Tiffany’s Brief at 33 n.13.

POINT IV

EBAY’S ARGUMENT THAT A FINDING OF LIABILITY WOULD DESTROY ITS BUSINESS MODEL IS UNSUBSTANTIATED AND LEGALLY IRRELEVANT

eBay claims that, if it were obligated to take remedial measures to eliminate the pervasive infringement of the TIFFANY Marks on its web site, such an order

¹² In Hard Rock, the defendant was a landlord, and the issue was whether a landlord had a duty to “seek out” evidence of the sale of counterfeits on premises it leased. The issue here, however, is not whether eBay has a duty to “seek out” counterfeiters. There is no dispute that eBay already has, within its own database, significant evidence of sales of counterfeits by its sellers. SPA59. Thus, the issue is whether eBay can ignore the information already in its possession or whether the information already in eBay’s possession is sufficient to subject it to liability. Tiffany submits that the evidence is sufficient to subject eBay to liability because, at a minimum, it gives eBay “reason to know” that sellers, both in general and as to specific sellers in particular, are offering counterfeit TIFFANY merchandise.

would “cripple” eBay, eBay’s Brief at 48, and that it would result in a “ban on listings of countless authentic Tiffany items.” *Id.* at 5. The Court should disregard this argument for several reasons. First, it is not based on any findings by the district court, and is in fact contrary to the district court’s findings. Second, a party that engages in contributory infringement cannot avoid liability because corrective action would harm its business. Third, the fact is that eBay has been ordered to take such measures by courts in Europe and has apparently been able to comply with those directives and survive. S.A. Louis Vuitton Malletier v. eBay, Inc., Tribunal de Commerce de Paris, Premiere Chambre B. (Paris Commercial Court), Case No. 200677799 (June 30, 2008); Rolex, S.A. v. eBay GmbH, No. 1ZR35/04 (German Federal Supreme Court, April 19, 2007).

eBay contends that, if Tiffany were to prevail, the “viability of eBay and other Internet commerce sites would be imperiled,” because such sites cannot guarantee the authenticity of third-party merchandise. eBay’s Brief at 44. Once again, eBay’s fear is based partly on its erroneous conflation of “reasonable anticipation” and “reason to know.” *See id.* at 45 (“Tiffany pushes the far broader duty of anticipatory anti-counterfeiting action – despite its clear rejection by the courts – as a tool for achieving the improper objective of reducing competition with Tiffany’s own sales channels.”) Tiffany, however, has not attempted to impose a “reasonable anticipation” standard on eBay’s conduct – it seeks only to hold eBay to its obligations under Inwood. *See* this Reply Brief at 13, supra.

Moreover, eBay does not have to “guarantee the authenticity” of TIFFANY jewelry in order to prevent the listing of counterfeits. The district court’s findings

demonstrate that eBay is able to institute measures that would prevent the listing and sale of counterfeit TIFFANY jewelry on its site, without “crippling” its operation. eBay does not have to be an “expert” and does not have to be in physical possession of the merchandise in order to identify a listing as likely being for a counterfeit.

In fact, as eBay notes in its Brief, after it instituted new anti-counterfeiting measures in late 2006 (on the eve of the originally scheduled trial date), eBay did reduce the amount of counterfeit TIFFANY silver jewelry offered on eBay. See eBay’s Brief at 29. eBay’s 2006 anti-counterfeiting measures were based on what it concluded were common indicia of counterfeit listings and items. SPA27-28. First, eBay delayed the availability of TIFFANY listings to the public so that eBay’s customer service representatives could review items for additional indicia of counterfeits. SPA27. Second, eBay instituted a quantity filter to determine the number of items in one listing, id., **REDACTED - FILED UNDER SEAL**. Third, eBay began to prohibit one-day and three-day auctions of certain brand names, including, presumably, “TIFFANY.” SPA27. Fourth, eBay also restricted cross-border trading as there was a significant quantity of counterfeit merchandise coming from outside of the United States. SPA27-28.¹³

None of the measures instituted in late 2006 required eBay to be an “expert” in the TIFFANY Marks or obviously to be in possession of the items to determine

¹³ Even before the dispute with Tiffany arose, eBay knew the indicia of counterfeit merchandise. **REDACTED - FILED UNDER SEAL**

None of the measures instituted in late 2006 required eBay to be an “expert” in the TIFFANY Marks or obviously to be in possession of the items to determine that they were counterfeit. Nor has eBay ever contended that have any of these measures has “crippled” eBay.¹⁴

Moreover, eBay is the party best situated to prevent infringement. eBay is the only party that can prevent the listing of counterfeit TIFFANY jewelry. By the time that eBay allows a listing to be posted, the horse is out of the barn. Tiffany cannot police for counterfeits any sooner than they are available to the public. SPA19; A92. Given the large number of TIFFANY listings (up to 1,000 at any given time (SPA19)), the fact that listings may be sold immediately (*i.e.* in the non-auction, “Buy-it-Now,” format), SPA7 n.10, and that items may be added at any time, even with a team of employees reporting around the clock, Tiffany is unable to identify every single infringing listing. SPA19.¹⁵

eBay erroneously claims that there is no support for Tiffany’s assertion that counterfeit TIFFANY jewelry is sold before Tiffany can report it. See eBay’s

¹⁴ Additionally, as discussed in the IACC’s *Amicus Curiae* brief, courts in Germany and France have held eBay liable for the infringement of third parties on its site. See the IACC’s Brief at 20 n.6. eBay has not been “crippled” by the additional anti-counterfeiting measures that those courts required eBay to institute to prevent the sale of counterfeit goods. *Id.*

¹⁵ In its *amici* brief, Amazon.com distorts the limitations under which Tiffany works and attempts to argue that eBay is likewise constrained: “even with its specialized knowledge concerning its brand, trademarks, and products, Tiffany explains that it must have employees manually review listings to accurately identify infringing products, and that the sheer number of listings of Tiffany products on eBay renders this an overwhelming task.” *Amici Curiae* Brief of Amazon.com, Inc. at 12 (citation omitted). Thus, according to eBay’s *amici*, it would be unfair to “foist” this burden upon eBay. *Id.* at 12-13. That assertion is false because eBay requires Tiffany to review each and every TIFFANY listing in this manner. eBay requires rights holders to assert a good-faith basis for claiming each item is infringing under penalty of perjury. SPA11-12; A329-30. Since eBay is not so constrained, it is able to employ automated measures.

Brief at 11 n.1. As the district court found, however, eBay received voluminous complaints from customers who had purchased what they believed to be counterfeit TIFFANY jewelry. SPA21. As the district court also found, over a four and one-half year period, Tiffany received over 3,900 emails complaining about counterfeit TIFFANY items on eBay. SPA22. Finally, during the time period in question, eBay earned revenue from selling counterfeit TIFFANY jewelry. A1446-47; EX2057-60.

In any event, assuming arguendo that requiring eBay to take remedial measures would impair eBay's business, that fact cannot relieve eBay of its legal obligations. eBay can avoid contributory liability only if it takes "effective measures to prevent infringing uses" Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1382 (9th Cir. 1984) (citation omitted; emphasis added). It is not a defense to liability for contributory infringement that the remedy would interfere with or impair the defendant's business. Thus, since eBay is liable under Inwood, it must take all appropriate remedial steps, regardless of the impact on its business model.¹⁶

Finally, as Tiffany stated in its initial brief, the district court improperly weighed Tiffany's efforts in policing its trademarks on eBay in determining whether eBay is liable for contributory infringement. Tiffany's Brief at 38. eBay

¹⁶ eBay also contends that, "[i]n the context of eBay's vast online marketplace, the policing obligation makes it incumbent upon rights owners to provide eBay with sufficiently specific notice to enable eBay to take appropriately targeted remedial action" eBay's Brief at 45. eBay provides no legal support for its assertion that the size of its marketplace is a factor for determining liability under Inwood. Indeed, the fact that the Ninth Circuit in Fonovisa never considered the size of the many swap meets that the defendants operated belies eBay's attempt to argue that it is too big and important to be subject to Inwood. See Fonovisa, 76 F.3d 259.

attempts to justify the district court's error by claiming that the district court did not actually hold that Tiffany's purportedly insufficient policing efforts were a defense, but that the district court merely considered Tiffany's policing efforts: in order: (1) to "make clear" that Tiffany's "modest investment to monitor infringing conduct and to pursue direct infringers does not entitle it to transfer those responsibilities onto a third party such as eBay . . . ;" and (2) "to establish that Tiffany to some degree has itself to blame for the incidences of counterfeiting for which it seeks to hold eBay responsible. . . ." for not devoting "sufficient resources to the VeRO program. . . ."¹⁷ See eBay's Brief at 47. That argument is tantamount to admitting that the district court treated the brand owner's policing efforts as a defense. Neither of those issues has anything to do with the standard under Inwood. Nor has any court ever held that either issue relieves a party of its responsibilities if it is found to be liable under the Inwood standard, or, in the case of brick and mortar retailers, relieved them of their absolute liability for the sale of counterfeit merchandise. Indeed, if Tiffany's policing efforts were relevant, then the primary responsibility for remedying the harm caused by that misconduct would be shifted to the victim, which is an unprincipled proposition for which eBay has cited no legal support.

¹⁷ Contrary to eBay's contention, and as reflected by its failure to cite to the district court's opinion for any support, the district court never stated that Tiffany is to blame for the fact the pervasive counterfeiting that occurs on eBay.

POINT V

EBAY WRONGLY CONTENDS, WITHOUT ANY LEGAL SUPPORT, THAT THE NOMINATIVE USE DOCTRINE SHIELDS ITS ADVERTISING OF THE SALE OF COUNTERFEIT TIFFANY GOODS

As the district court held, eBay knew of the pervasive counterfeiting of the TIFFANY Marks on its site. SPA59. Thus, as a matter of law, the nominative fair use doctrine is not a defense and cannot excuse eBay of liability for direct trademark infringement, false advertising or trademark dilution. If the district court's interpretation of the "nominative fair use" doctrine is upheld, trademark law will be significantly altered, and the purposes of the Lanham Act — protection of the rights owner and consumers — will be frustrated. See Tiffany's Brief at 45-47.

eBay contends that the district court properly applied the three-prong "nominative fair use" analysis as set forth in New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302, 308 (9th Cir. 1992).¹⁸ See eBay Brief at 57-58. With respect to the third prong of the New Kids analysis, eBay claims that the district court correctly held that eBay's use of the TIFFANY Marks was permissible because "Tiffany had failed to prove that consumers 'believed that Tiffany endorsed the sale of new jewelry through eBay, or that consumers believed

¹⁸ eBay's amicus curiae, Yahoo!, Inc. argues that, under the similar "nominative fair use" analysis as set forth in Century 21 Real Estate Corp. v. Lendingtree, Inc., 425 F.3d 211 (3d Cir. 2005), eBay's use of the TIFFANY Marks is permissible. See Yahoo's! Brief at 10-12. Because counterfeits are per se confusing, see this Reply Brief at 26, infra, the Century 21 analysis has no bearing here.

that Tiffany was a sponsor or affiliate of eBay.” See eBay Brief at 57 (quoting SPA34). This finding, however, begs the question – Tiffany did not bear that burden of proof.

“Nominative fair use is a doctrine used to determine whether a defendant’s use of a plaintiff’s marks creates a likelihood of confusion as to the source of the ‘defendant’s product or the mark-holder’s sponsorship or affiliation.’” SPA32 (quoting Merck & Co. v. Mediaplan Health Consulting, Inc., 425 F. Supp. 2d 402, 413 (S.D.N.Y. 2006)). Accord 4 J. Thomas McCarthy, McCarthy on Trademark and Unfair Competition § 23:11 (4th ed. 2008) (“[N]ominative fair use” is an alternative method for analyzing if there is the kind of likelihood of confusion that constitutes trademark infringement.”). If the defendant’s use of the plaintiff’s marks creates a likelihood of confusion, the “nominative fair use” doctrine cannot apply. See Merck, 425 F. Supp. 2d at 413.

It is unnecessary to perform a “likelihood of confusion” analysis here because counterfeits per se cause confusion. See Philip Morris USA, Inc. v. Felizardo, No. 03 Civ. 5891, 2004 WL 1375277, at *5 (S.D.N.Y. Jun. 18, 2004) (“likelihood of confusion” analysis is unnecessary “because counterfeit marks are inherently confusing”); Gucci America, Inc. v. Duty Free Apparel, Ltd., 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003) (counterfeits by their very nature cause confusion). Here, the district court found that eBay knows that the TIFFANY jewelry sold on eBay was “often” counterfeit. SPA59. eBay’s use of the TIFFANY Marks therefore per se causes confusion. Consequently, Tiffany did not

have to prove that there was any confusion regarding Tiffany's endorsement of TIFFANY jewelry on eBay or whether Tiffany was a sponsor or affiliate of eBay.¹⁹

The sale of counterfeits is illegal; it can never constitute fair use. eBay's use of the TIFFANY Marks therefore cannot be protected "nominative fair use."

eBay contends that it may rely on the doctrine because it is not required to guarantee the authenticity of every item listed on its site and that it removed infringing items that Tiffany brought to its attention. See eBay's Brief at 58. This argument is a non sequitur, as this issue has no bearing on the applicability of the doctrine. That deficiency is made evident by the lack of any legal support for this contention. In any event, eBay's knowledge of the availability and sale of counterfeit TIFFANY jewelry on its site is not limited only to those listings that Tiffany reported through VeRO. The district court found that eBay knows that counterfeit TIFFANY jewelry is "often" sold on its site (i.e., jewelry sold before a listing could be reported).²⁰ Thus, even if eBay were arguably unable to separate the listings for genuine goods from the listings for counterfeit goods, it could not rely on the doctrine in order to shield the advertising of the sale of substantial quantities of counterfeit goods.

¹⁹ eBay faults Tiffany for citing "no authority for the proposition that nominative fair use does not apply where the defendant does not know that particular uses of the plaintiff's trademarks amidst many legitimate uses are misleading." See eBay's Brief at 57-58. This argument has no substance. As explained above, "nominative fair use" does not even enter the discussion when, as here, counterfeit goods are involved, and eBay knew that counterfeit goods were being sold on its website.

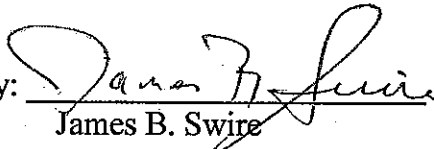
²⁰ See, e.g., SPA59 ("eBay certainly had generalized knowledge that TIFFANY products sold on eBay were often counterfeit."); SPA21 ("During the last six weeks of 2004, 125 consumers complained to eBay about purchasing 'Tiffany' items through the eBay website that they believed to be counterfeit.").

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT DISMISSING THE COMPLAINT SHOULD BE REVERSED, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO CRAFT APPROPRIATE INJUNCTIVE RELIEF FOR PLAINTIFFS-APPELLANTS AND TO AWARD THE APPROPRIATE DAMAGES AND COSTS.

Dated: New York, New York
December 12, 2008

ARNOLD & PORTER LLP

By: 

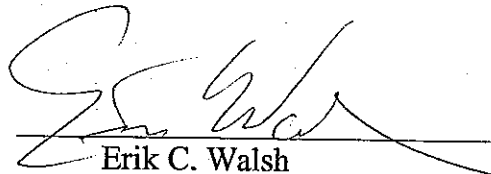
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, appellants hereby certify that the foregoing Reply Brief was prepared with Microsoft Word, and, excluding the corporate disclosure statement, table of contents, table of authorities, signature block and this certificate, contains 6,320 words according to the Word Count feature in Microsoft Word, and otherwise that it complies with the type-volume limitations imposed by that Rule and the Local Rules of this Court.

Dated: December 12, 2008



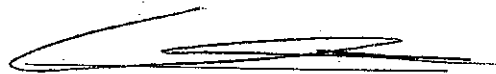
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I, Anthony D. Boccanfuso, the undersigned attorney at law duly admitted to practice in the State of New York, respectfully show that on the 12th day of December, 2008, I caused a two copies of the annexed **REPLY BRIEF FOR PLAINTIFFS-APPELLANT** to be served by hand delivery upon:

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