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Locke Lord QuickStudy: Better User Experience or Trade Mark Infringement? The UK Supreme Court Gives Guidance on Website Targeting

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The Supreme Court of the United Kingdom has recently upheld a decision of the English Court of Appeal concerning the criteria for when a website will be considered to be targeting consumers in the United Kingdom ("**UK**"). The Supreme Court has confirmed that there is a relatively low threshold for a finding that a non-UK website targets consumers in the UK, and therefore the operator of that website could infringe a UK registered trade mark right where that website makes available goods or services to consumers in the UK under that mark without the UK trade mark holder's authorisation.

It is well established that a UK trade mark can be infringed through use on a website outside of the UK where that website targets sales in the UK, for example by actively encouraging sales in the UK through addressing advertisements to UK consumers directly to encourage them to visit the website. It is also well established that the fact that a non-UK website can be accessed from the UK, and does not block sales from the UK, does not mean that the website is targeting UK consumers *per se.* In this case, the Supreme Court was asked to consider, in effect, whether automated tools used by a website to tailor the products and pages seen by a visitor from the UK based on the visitor's IP address were sufficient to deem that a website was targeting consumers in the UK.

The case concerned a dispute between Lifestyle Equities CV ("**Lifestyle**") and the online retailer Amazon. Lifestyle owned a portfolio of trade marks registered in various territories including the UK and the European Union for BEVERLY HILLS POLO CLUB. The marks covered various goods and services relating to fashion, including clothing. Lifestyle however did not hold registrations in the US, where the corresponding marks are owned BHPC Associates LLC, an unrelated entity which produces and sells goods under the marks in the US ("**US Branded Goods**").

Amazon marketed and sold the US Branded Goods via its US website to US consumers. The specific point appealed to the Supreme Court was whether Amazon's US website targeted consumers in the UK as well, and therefore by virtue of that targeting Amazon had infringed Lifestyle's rights in the UK by using the marks in the course of trade to offer the US Branded Goods for sale to consumers in the UK.

When a UK consumer visited the landing page of the Amazon US website, the website identified the consumer's geographical location from the consumer's IP address. That prompted the words "*deliver to the United Kingdom*"

to appear, remaining throughout navigation of the website. Hovering the cursor over the *"deliver*" box would result in the message "*We're showing you items that ship to United Kingdom*" to be displayed. The consumer could also choose (but did not have to choose) to "*shop in [its] local currency*", which would then display the purchase price in the currency selected. Finally, before purchase, the consumer would be provided with a "*Review your order*" page, containing an offer to sell the goods in question to the UK consumer, along with times and prices for delivery to the UK and the option to pay in sterling instead of dollars. It is worth noting that the contract for sale was concluded in the US, with title and risk to the purchased goods passing upon delivery to Amazon's delivery carrier in the US.

The consumer experience was a fully automated process, triggered by the IP address of the consumer, and resulted in a contract concluded entirely in the US. However, the Supreme Court noted that this automation had been included by design, and the combined effect of the website "moulding" itself to a UK consumer was sufficient for a finding that the website did indeed target UK consumers, as the average consumer would consider the combination of factors as being designed to offer goods to consumers in the UK. The Supreme Court confirmed that it was also not necessary to establish the subjective intention of the trader when considering targeting; what matters is whether the trader's activities, when viewed objectively from the perspective of the average consumer, were targeted at consumers in the UK.

The Supreme Court's decision should be of particular interest to businesses which allow customers from the UK to purchase goods from outside the UK. It is increasingly common for overseas businesses to tailor their websites based on the IP address of the visitor to increase its usability, and in turn increase the prospect of making a sale. It suggests that tools designed to make a purchase from the UK easier – and a way to grow a business without building a UK-specific website – could, following this decision, leave businesses with greater exposure to claims that they are targeting UK consumers through the use of these tools. This is irrespective of the volume of sales actually made to consumers in the UK.

This is of course only one way in which an overseas business needs to be mindful of applicable law in the UK, another notable example being the applicability of the UK General Data Protection Law when dealing with UK-based consumers. In light of this decision overseas businesses may wish to reassess the risks of using automated tools to facilitate the sale of goods or services into the UK.

The full decision is available here.

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