[NL] Provisional relief judge of the District Court: Facebook can't invoke safe harbour protection under Article 14 of the eCommerce Directive

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On 21 December 2018, the provisional relief judge of the District Court of Amsterdam ("the District Court") ruled on a dispute between PVH B.V. ("PVH") and two of its subsidiaries on one side, and Facebook Ireland Limited and Facebook Netherlands B.V. ("Facebook") on the other side. Most notably, the District Court ruled that Facebook did not fall within the scope of the safe harbour provided by Article 14 eCommerce Directive, as implemented by Article 6:196c(4) of the Dutch Civil Code (Burgerlijk Wetboek - "the DCC").

The dispute arose after numerous advertisements were shown on Facebook's platforms, Facebook and Instagram, which infringed PVH's trademarks. After being notified by PVH of those infringements, Facebook deleted the advertisements in question. Moreover, upon request of PVH, Facebook provided PVH with information regarding the advertisers concerned - namely "identifiers". Nonetheless, PVH requested additional information, such as the advertisers' addresses and payment details. Facebook did not respond to this request. PVH asked the District Court to order, inter alia, that Facebook cease all infringements without delay, provide PVH with all information regarding the advertisers, and take effective measures to prohibit the advertisers in question from using its platforms.

Most notably, the substantive assessment of the dispute concerned the question of whether the ineffectiveness of the measures taken on Facebook and Instagram established that Facebook had infringed PVH's trademarks. PVH argued that the constant reoccurrence of the litigious advertisements demonstrated the ineffectiveness of the measures taken by Facebook. In connection to this, the scope of the safe harbour (as provided by Article 14 of the eCommerce Directive and Article 6:196c(4) of the DCC) was debated. This safe harbour exempts hosting service providers from liability for information that they store for their users. Hosting service providers only fall within the scope of this safe harbour if they have taken on a passive role - that is to say, they have no knowledge of the illegality of the information in question, and, moreover, act expeditiously to remove or disable access to such information after becoming aware of its illegality.

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The Court agreed with PVH in its reasoning: Facebook had taken on an active role in publishing the infringing advertisements and did thus not fall within the scope of the safe harbour. The Court cited Facebook's advertising policies as an indication of this active role. According to those advertising policies, advertisements are subject to prior verification and possibly to rejection. Moreover, advertisements cannot, inter alia, infringe third parties' intellectual property rights. According to the Court, Facebook consequently co-determines the content of advertisements. Given its active role, Facebook must take appropriate measures to stop the systematic infringement of third parties' intellectual property rights. This obligation also encompasses measures to prevent future, sufficiently concrete, infringements on platforms. However, the Court did not hold that Facebook infringed PVH's trademarks, because its platforms are not to be used for illegal advertising; on the contrary - its advertising policies illustrate the fact that it attempts to prevent such advertising. Nonetheless, the Court held that Facebook could be held liable on the basis of tort law because it had failed to take appropriate measures. Ultimately, the Court ruled, inter alia, that Facebook should cease all infringements and provide PVH with identifying information regarding the malicious advertisers. The latter also applies to future illegal advertisements.

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