

**TIFFANY (NJ) INC. AND TIFFANY AND COMPANY, Plaintiffs,
VERSUS EBAY, INC., Defendant.**

No. 04 Civ. 4607 (RJS)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIS-
TRICT OF NEW YORK**

2008 U.S. Dist. LEXIS 53359; 2008-1 Trade Cas. (CCH) P76,219

**July 14, 2008, Decided
July 14, 2008, Filed**

JUDGES: RICHARD J. SULLIVAN, United States District Judge.

OPINION BY: RICHARD J. SULLIVAN

OPINION

OPINION AFTER BENCH TRIAL

RICHARD J. SULLIVAN, District Judge:

Tiffany, the famous jeweler with the coveted blue boxes, brings this action against eBay, the prominent online marketplace, for the sale of counterfeit Tiffany silver jewelry on its website. . . .

II. FINDINGS OF FACT

. . .

Over its 170-year history, Tiffany has achieved great renown as a purveyor of high-quality and luxury goods under the TIFFANY Marks (defined below), including jewelry, watches, and home items such as china, crystal, and clocks. (*Id.*; Kowalski Decl. PP 4, 7.) The TIFFANY Marks are indisputably [*10] famous, and are a valuable asset owned by Tiffany. (Naggiar Decl. P 4.) The protection of the quality and integrity of the brand and the trademarks is critical to Tiffany's success as a retailer of luxury goods. (Kowalski Decl. P 4.)

. . .

In order to maintain its reputation for high-quality jewelry, Tiffany quality control personnel inspect Tiffany merchandise before it is released for distribution. (Callan Decl. PP 5, 8, 10.) Before a silver jewelry item can be released to Tiffany's channels of trade, the item must satisfy Tiffany's exacting standards for, *inter alia*, composition, quality, shape, and polish of the metal, as well as the quality [*12] and integrity of the TIFFANY Marks appearing on the item. (*Id.* at PP 8, 12.) To determine if an item is authentic Tiffany silver jewelry, Tiffany quality inspectors must be able to physically inspect each item. ⁷ (Tr. 32: 5-6; 64:18-23.) Tiffany closely protects its qual-

ity standards and does not make them available to the public or to other jewelry manufacturers. (Tr. 35:5-36:4.)

. . . Thus, while rights holders such as Tiffany may have obvious economic incentives to curtail the sale of both counterfeit and authentic [*16] goods on the Internet -- after all, every sale of Tiffany jewelry on eBay potentially represents a lost sales opportunity via Tiffany's own authorized distribution channels -- the law provides protection only from the former, not the latter. Clearly, eBay and other online market websites may properly promote and facilitate the growth of legitimate secondary markets in brand-name goods. . . .

1. eBay's Listings, Buyers, and Sellers

eBay is a well-known online marketplace, located at www.ebay.com, that allows eBay sellers to sell goods directly to eBay buyers. (PTO at 7.) The listings are created and posted by third-party users, who register with eBay and agree to abide by a User Agreement. (*Id.*) While users often go by descriptive user names instead of their real names, users are required to supply identifying information to eBay when registering. (Briggs Decl. P 13.) Sellers can also use multiple user names. (Tr. 671:18-672:2.)

2. eBay's Business Model and Support to Sellers

eBay's business model is based on two components: first, the creation of listings, and second, the successful completion of sales between the seller and the buyer. For each posted listing, sellers pay an initial insertion fee, ranging from \$ 0.20 to \$ 4.80 depending on the starting price. If the item is successfully sold, sellers pay a final value fee based upon the final price for the item. Final value fees range from 5.25% to 10% of the final price of the item. (Briggs Decl. P 20; Pl.'s Ex. 1151.) In addition, sellers who opt for various additional features to differentiate their listings, such as a border or bold-faced type, are charged additional fees. (Briggs Decl. P 20.) . . .

3. eBay's Control Over Sales Made On Its Website

eBay is an electronic marketplace, not a retailer. Thus, eBay itself never takes physical possession of the goods sold through its website; instead, it facilitates a transaction between two independent parties. (Chesnut Decl. P 41; Briggs Decl. PP 10-11.) Nevertheless, eBay exercises some limited control over those who trade on its website by requiring all users to register with eBay and sign eBay's User Agreement. (Briggs Decl. P 13; Def.'s Ex. 77.) The User Agreement requires users to refrain from violating any laws, third party rights, including intellectual property rights, and eBay policies. If a user violates the terms or conditions of the User Agreement, eBay may take disciplinary action against the seller, including removing the seller's listings, issuing [*24] a warning, and/or suspending the user. (Briggs Decl. P 14.)

In addition to exercising some control over users, eBay also restricts the types of items which can be listed on its website. For example, eBay maintains a list of prohibited items, *e.g.*, drugs, firearms, and alcohol, for which it routinely screens in order to prevent such items from being offered for sale on eBay. (Pl.'s Ex. 4.)

4. eBay's Anti-Fraud Efforts

a. Trust and Safety Department

eBay has made substantial investments in anti-counterfeiting initiatives. (Tr. 686:14-15, 687:5-8.) eBay has invested as much as \$ 20 million each year on tools to promote trust and safety on its website. (*Id.* at 687:21-25.) One quarter of eBay's workforce of roughly 16,000 employees is devoted to trust and safety. (*Id.* at 691:18-692:7.) Of these 4,000 individuals, approximately 2,000 serve as eBay Customer Service Representatives "(CSRs)". (Chesnut Decl. P 20.) More than 200 of these individuals focus exclusively on combating infringement, at a significant cost to eBay. (Tr. at 597:24-580:8, 687:9-14.) eBay also employs 70 persons who work exclusively with law enforcement. (*Id.* at 599:1-2, 746:21-747:19; Chesnut Decl. PP 56-57.) In several instances, [*25] information that eBay has provided to law enforcement agencies has led to the arrest of counterfeiters. (Chesnut Decl. PP 56-57.)

b. Fraud Engine

Between December 2000 and May 2002, eBay manually searched for keywords in listings in an effort to identify blatant instances of potentially [*26] infringing or otherwise problematic activity. (*Id.* at P 34.) In May 2002, eBay began using technology to perform that function. (*Id.*) These technological tools are known as the eBay fraud engine. (*Id.*) The fraud engine uses rules and complex models that automatically search for activity that violates eBay policies. (*Id.*) eBay spends over \$ 5 million per year in maintaining and enhancing its fraud engine, which is principally dedicated to ferreting out illegal listings, including counterfeit listings. (Tr. 687:15-18.)

The fraud engine currently uses more than 13,000 different search rules, and was designed in part to capture listings that contain indicia of counterfeiting apparent on the face of the listings without requiring expertise in rights owners' brands or products. (Chesnut Decl. P 35.) The fraud engine thus was developed to monitor the website and flag or remove listings that, among other things, explicitly offered counterfeit items, contained blatant disclaimers of genuineness, or included statements that the seller could not guarantee the authenticity of the items. For example, at all times relevant to this litigation, eBay monitored its website for and removed listings that [*27] expressly offered "knock-off," "counterfeit," "replica," or "pirated" merchandise, and listings in which the seller stated he "cannot guarantee the authenticity" of the items being offered. (*Id.*; Tr. 581:11-584:22; Def.'s Exs. 125, 135.) For obvious reasons, the fraud engine could not determine whether a listed item was actually counterfeit. (Chesnut Decl. P 35.) However, the fraud engine also contained numerous other data elements designed to evaluate listings based on, for example, the seller's Internet protocol address, any issues associated with the seller's account on eBay, and the feedback the seller has received from other eBay users. (*Id.* at P 36.) Between 2003 and the close of discovery in 2006, eBay modified and updated its fraud engine at least weekly. (*Id.*)

At all times relevant to this case, eBay's fraud engine flagged thousands of listings on a daily basis that contained obvious indicia of infringing or otherwise fraudulent activity. (*Id.* at P 38.) Listings flagged by the fraud engine were sent to eBay's CSRs for review and possible further action. (*Id.*) In reviewing the flagged listings, CSRs examined multiple factors according to eBay guidelines in order to make a decision [*28] as to whether a violation of eBay policies had occurred, including the language and sophistication of the listing, the seller's history and feedback

rating from past buyers, the seller's business model, and the seller's eBay registration information. (*Id.*)

Upon reviewing a potentially infringing, fraudulent, or problematic listing, the CSR would: (1) remove the listing from eBay; (2) send a warning to the seller; (3) place restrictions on the seller's account, such as a selling restriction, temporary suspension, or indefinite suspension; and/or (4) refer the matter to law enforcement. (*Id.* at P 39.) eBay removed thousands of listings per month based on CSR reviews of listings captured by the fraud engine. (Chesnut Decl. PP 38-39; Def.'s Ex. 13.) At all times relevant to this litigation, CSRs' decisions were guided by standards and guidelines put in place by eBay lawyers and staff members, and the action taken was based upon the seriousness of the violation. (*Id.*) Nevertheless, eBay's ultimate ability to make determinations as to infringement was limited by virtue of the fact that eBay never saw or inspected the merchandise in the listings. While some items -- such as guns -- were completely [*29] prohibited and thus required no judgment to remove, listings that offered potentially infringing and/or counterfeit items required a more in-depth review. (Tr. 582:23-584:17.)

c. The VeRO Program

In addition to the fraud engine, eBay has, for nearly a decade, maintained a set of procedures, known as the Verified Rights Owner ("VeRO") Program, to address listings offering potentially infringing items posted on the eBay website. (Chesnut Decl. P 15.) At all times relevant to this litigation, the VeRO Program was a "notice-and-takedown" system, whereby rights owners could report to eBay any listing offering potentially infringing items, so that eBay could remove such reported listings. (*Id.* at P 16.) At the present time, more than 14,000 rights owners, including Tiffany, participate in the VeRO Program. (*Id.* at P 17.)

At all times, eBay's VeRO Program rested on the responsibility of rights owners to police their own trademarks. Under the VeRO Program, a rights owner who saw a potentially infringing item listed on eBay could report the listing directly to eBay, by submitting a Notice of Claimed Infringement form or "NOCI". (*Id.* at P 18; *see* Def.'s Exs. 29, 84.) A NOCI attested that the rights [*30] owner possessed a "good-faith belief" that the item infringed on a copyright or a trademark. (Chesnut Decl. P 16.) NOCIs could be faxed to eBay, emailed to eBay, or reported to eBay via a software tool called the VeRO Reporting Tool. (Def.'s Ex. 94; Pl.'s Ex. 154; Chesnut Decl. P 18.) As part of the VeRO Program, eBay offered rights owners tools to assist in efficiently identifying potentially infringing listings. These included the VeRO Reporting Tool as well as an automated search tool called "My Favorite Searches." (Chesnut Decl. P 23.) These tools allowed rights owners to search automatically for particular listings every day, to save their favorite searches, and to email the search results directly to the rights owner for review on a daily basis. (*Id.*)

Upon receipt of such a notice, CSRs first verified that the NOCI contained all of the required information and had indicia of accuracy. (*Id.*) Thereafter, eBay promptly removed the challenged listing. Indeed, at all times relevant to this litigation, the Court finds that eBay's practice was to remove reported listings within 24 hours of receiving a NOCI. (Tr. 712:20-21; Chesnut Decl. P 21; Def.'s Ex. 26.) Seventy to 80 percent of [*31] reported listings were removed within 12 hours of notification during the time period at issue in this litigation. (Tr. 713:1-3.) At present,

three quarters of the listings are removed within four hours. (*Id.* at 712: 15-16.) eBay typically removed thousands of listings per week based on the submission of NOCIs by rights holders. (Chesnut Decl. P 21.) . . .

During the relevant time period, eBay generated substantial revenue from the sale of "Tiffany" silver jewelry on its website. (Poletti Dep. Tr. 59:15-62:9.) Indeed, between April 2000 and August 2005, there were 456,551 sales of Tiffany jewelry in the Jewelry & Watches category. ¹² (Pl.'s Ex. 394 at 1.) eBay's Jewelry & Watches category manager estimated that, between April 2000 and June 2004, eBay earned \$ 4.1 million in revenue from completed listings with "Tiffany" in the listing title in the Jewelry & Watches category. (Poletti Dep. Tr. 59:15-62:9.) . . .

From the time of eBay's June 2003 letter through May 2004, Tiffany reported 46,252 listings for which Tiffany claimed a good-faith belief that the items being sold were counterfeit. ¹⁶ (Pl.'s Ex. 1082.) In August 2003, Tiffany was the second-highest reporter of NOCIs in the VeRO Program. (Def.'s Ex. 81; Pl.'s Ex. 92.) In each year from 2003 through 2006, Tiffany reported substantially more listings than it did the year prior. (Pl.'s Ex. 1082.) Specifically, Tiffany reported 20,915 listings in 2003 (*id.*); 45,242 listings in 2004 (*id.*); 59,012 listings in 2005 (*id.*); and 134,779 listings in 2006 (*id.*; Tr. 97:20-99:18). As of September 30, 2007, shortly before trial, Tiffany had reported 24,201 listings for 2007. (Zalewska Decl. P 79.) All told, Tiffany reported 284,149 listings through the VeRO Program. (*Id.* at P 80; Tr. 195:1-195:8.) According to eBay's monthly records, of the 14,000 rights owners who participate in the VeRO Program, (Chesnut Decl. P 17), Tiffany was among the top ten reporters in 21 of the 28 months between June 2003 and September 2005. (Pl.'s Ex. 253-283.) Thus, by any measure, it is clear that Tiffany was one of the most frequent reporters [*48] in the VeRO Program.

2. Tiffany's Staffing

Notwithstanding the significance of the online counterfeiting problem, it is clear that Tiffany invested relatively modest resources to combat the problem. In fiscal year 2003, Tiffany budgeted approximately \$ 763,000 to the issue, representing less than 0.05 percent of its net sales for that year. (Def.'s Ex. 200; Tr. 94:11-14.) Tiffany's CEO, Michael Kowalski, testified that over the past five years, Tiffany has budgeted \$ 14 million to anti-counterfeiting efforts -- of which approximately \$ 3-5 million was spent in litigating the instant action. (Tr. 825:121-826:21.)

More specifically, Tiffany's time dedicated to monitoring the eBay website and preparing NOCIs was limited. Beginning in the summer of 2003, Ewa Zalewska, then a paralegal in Tiffany's legal department, devoted two days a week to reviewing the eBay website and answering emails from buyers and sellers involving removed listings. (*Id.* at 76:7-77:4.) [*49] John Pollard, then Tiffany's security manager, also devoted one day a week to monitoring and reporting on the eBay website. (*Id.* at 78:7-10.) . . .

2. eBay Suspended Sellers

When Tiffany filed a NOCI, Tiffany often requested that eBay suspend the seller. Indeed, by 2005, Tiffany's NOCIs routinely included a request that eBay suspend the seller. (Cacucciolo Decl. PP 9, 24, 25, 48.) The Court finds that eBay declined to automatically or permanently suspend a seller after the filing of a first, or even a second, NOCI. However, for the following rea-

sons, the Court finds that eBay took appropriate steps to warn and then to suspend sellers when eBay learned of potential trademark infringement under that seller's account.

eBay suspended "hundreds of thousands of sellers every year," tens of thousands of whom were suspended for having engaged in infringing conduct. (Tr. 707:8-708:23; Chesnut Decl. P 51; Def.'s Exs. 27, 100, 134.) [*64] Although eBay primarily employed a "three-strikes rule" for suspensions, a seller could be suspended on a first violation if it were determined that, for example, the seller "listed a number of infringing items," and "this appears to be the only thing they've come to eBay to do." (Tr. 700:10-22, 589:25-291:6; Chesnut Decl. PP 48-49.) In other circumstances, if a seller listed a potentially infringing item but appeared overall to be a legitimate seller, the "infringing items [were] taken down, and the seller [would] be sent a warning on the first offense and given the educational information, [and] told that . . . if they do this again, they will be suspended from eBay." (Tr. 700:23-701:10.) . . .

III. CONCLUSIONS OF LAW

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1. Elements of Contributory Infringement

Contributory trademark infringement is a judicially constructed doctrine articulated by the Supreme Court in *Inwood*. In that opinion, the Supreme Court held that:

[I]f a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit. . . .

3. Knowledge Or Reason To Know

Under the *Inwood* test, Tiffany must prove that eBay continued to supply its services "to one whom it knows or has reason to know is engaging in trademark infringement." *Inwood*, 456 U.S. at 854. The evidence produced at trial demonstrated that eBay had *generalized* notice that some portion of the Tiffany goods sold on its website might be counterfeit. First, Tiffany sent eBay demand letters in 2003 and 2004, articulating its belief that large quantities of counterfeit Tiffany merchandise were being sold through the eBay website, and that any seller of a significant lot -- e.g., of five or more pieces of purported Tiffany jewelry -- was "almost certainly" selling counterfeit merchandise. (Pl.'s Ex. 489, 490, 429.) Second, Tiffany [*122] apprised eBay of the results of its Buying Programs, particularly, of the supposed finding that 73.1% of the Tiffany items it purchased in its 2004 Buying Program were counterfeit. (Pl.'s Ex. 492.) Third, Tiffany filed thousands of NOCIs alleging a good faith belief that certain listings were counterfeit or otherwise infringing on Tiffany's marks, and eBay received numerous complaints from buyers stating that they had purchased what they believed to be fake Tiffany jewelry through the eBay website.

Tiffany argues that this generalized knowledge required eBay to preemptively remedy the problem at the very moment that it knew or had reason to know that the infringing conduct was generally occurring, even without specific knowledge as to individual instances of infringing listings or sellers. (Pl.'s Post-Trial Mem. at 20, 22.) By contrast, eBay asserts that such generalized knowledge is insufficient, and that the law demands more specific knowledge of individual instances of infringement and infringing sellers before imposing a burden upon eBay to remedy the problem. (Def.'s Post-Trial Mem. at 9.)

Accordingly, before the Court is the question of whether eBay's *generalized* knowledge of trademark [*123] infringement on its website was sufficient to meet the "knowledge or reason to know" prong of the *Inwood* test. For the following reasons, the Court concludes that while eBay clearly possessed general knowledge as to counterfeiting on its website, such generalized knowledge is insufficient under the *Inwood* test to impose upon eBay an affirmative duty to remedy the problem.

a. Legal Standard

The Second Circuit has not defined how much knowledge or what type of knowledge a defendant must have to satisfy the "know or reason to know" standard set forth in *Inwood*. . . .

[C]ourts have been reluctant to extend contributory trademark liability to defendants where there is some uncertainty as to the extent or the nature of the infringement. In *Inwood*, Justice White emphasized in his concurring opinion that a defendant is not "require[d] . . . to refuse to sell to dealers who merely *might* pass off its goods." *Inwood*, 456 U.S. at 861 (White, J., concurring). In *Coca-Cola Co. v. Snow Crest Beverages*, 64 F. Supp. 980 (D. Mass. 1946), *aff'd*, 162 F.2d 280 (1st Cir. 1947), [*126] an early and important contributory infringement case cited in *Inwood*, Coca-Cola asserted that Snow Crest had contributorily infringed its mark by selling "Polar Cola" to bartenders who sometimes mixed the soda into customers' "rum and Coke" drinks. *Coca-Cola*, 64 F. Supp. at 989. Coca-Cola argued that Snow Crest should have known about the infringement because attorneys for Coca-Cola had informed Snow Crest's president of the bartending practice and indicated that their investigation revealed that the practice had occurred in 82 bars. *Id.* at 987-90. The district court found that such "lawyer's argumentative talk" was inadequate to establish that a reasonable businessperson in Snow Crest's position should have known that its products were being used to infringe, particularly because "plaintiff's counsel . . . did not give the names or the numbers of any offending bars," "did not inform defendant of the details of the investigation of the 82 bars," and "did not ask defendant to take any specific step to notify or caution bars against passing off." *Id.* . . .

Lockheed Martin Corp. v. Network Solutions, Inc., is particularly instructive in this matter. 985 F. Supp. at 965. In that case, the plaintiff sought to impose contributory trademark liability on defendant Network Solutions for accepting registrations of Internet domain names that were identical or similar to Lockheed Martin Corporation's SKUNK WORKS service mark. *Id.* at 950. Lockheed acknowledged that not all uses of the SKUNK WORKS mark were infringing, but contended that because Network Solutions reviewed registration requests, they were sufficiently on notice as to potential infringement. *Id.* at 963. The court disagreed, holding that "Lockheed's argument would require the Court to impute knowledge of infringement to NSI in circumstances

where the use of the term 'skunk works' in a domain name may or may not be infringing. Such an expansion of contributory liability would give Lockheed a right in gross to control all uses of 'skunk works' in domain names." [*128] *Id. at 965*. Similarly, the court further held that even after receiving plaintiff's demand letters, Network Solutions would not have reason to know that the holders of the allegedly infringing domain names were in fact infringing. *Id. at 967*.

By contrast, those courts that have determined that defendants had "reason to know" of infringement have relied on far more specific notice from plaintiffs to defendants. For example, in *Habeeba's Dance of the Arts*, 430 F. Supp. 2d at 714, the court determined that advance written notice of a specific infringing event, providing the date, the event, and the location of the event, would be sufficient to meet the knowledge requirement for contributory trademark infringement.

Significantly, Tiffany has not alleged, nor does the evidence support a conclusion, that all of the Tiffany merchandise sold through eBay is counterfeit. Rather, a substantial number of authentic Tiffany goods are sold on eBay, including both new and vintage silver jewelry, sometimes in lots of five or more. (*See, e.g.,* Def.'s Exs. 34, 270, 422.) . . .

b. Analysis

The evidence adduced at trial demonstrates eBay had *general knowledge* of infringement by sellers using its website. Such general knowledge, however, does not require eBay to take action to discontinue supplying its service to all those who *might* be engaged in counterfeiting. Having concluded that, as a matter of [*133] law, general knowledge of infringement is insufficient, the Court proceeds to consider whether the generalized assertions of infringement made by Tiffany are sufficiently specific to impute to eBay knowledge of any and all instances of infringing sales on eBay. The Court concludes that Tiffany's general allegations of counterfeiting failed to provide eBay with the knowledge required under *Inwood*. . . .

5. Continues To Supply

The Court has concluded that the generalized allegations of trademark infringement described above are insufficient to [*147] impute either knowledge or a reason to know of trademark infringement to eBay. However, the situation is distinct with respect to the individual sellers against whom Tiffany filed NOCIs. Tiffany argues that the filing of a NOCI provided eBay with actual or constructive knowledge of Tiffany's good-faith belief that an item was counterfeit or otherwise infringing.³⁸ Nevertheless, even assuming *arguendo* that the filing of a NOCI provided eBay with knowledge or reason to know of infringement by particular sellers on its website, the test under *Inwood* is not merely that eBay had knowledge, but instead whether eBay "continue[d] to supply" its product to known infringers. *Inwood*, 456 U.S. at 854. The *Inwood* test thus directs the Court to consider what action eBay took upon receiving such notice of infringement through Tiffany's NOCIs.

38 Of course, a NOCI was not a notice of actual infringement, but instead, was a notice of Tiffany's good-faith belief that a particular item or listing was infringing.

When Tiffany filed a NOCI, eBay's practice was to promptly remove the challenged listing from its website. In addition to removing the listing, eBay also warned sellers and buyers, can-

celled all [*148] fees associated with the listing, and directed buyers not to consummate the sale of the listed item. Accordingly, the Court concludes that Tiffany has failed to prove that eBay continued to supply its services in instances where it knew or had reason to know of infringement. . . .

Tiffany's own evidence supports the Court's conclusion that eBay's policy was an "appropriate step" in cutting off the supply of its services to infringers. *AT&T*, 42 F.3d at 1433 n.14. While Tiffany identified close to 200 "repeat offenders," Tiffany does not contest that once Tiffany sent in a NOCI for these users, eBay pulled the listing. Furthermore, with only a few exceptions, the users who reappeared on the eBay website appeared three or fewer times, frequently within a very short time span (*e.g.*, within one week or even one day). Accordingly, Tiffany has failed to establish by a preponderance [*152] of the evidence that eBay failed to take appropriate action against these sellers upon receiving notice of infringing activity. . . .

Second, while the Court is sympathetic to Tiffany's frustrations in this regard, the fact remains that rights holders bear the principal responsibility to police their trademarks. See *MDT Corp. v. New York Stock Exch.*, 858 F. Supp. 1028, 1034 (C.D. Cal. 1994) ("The owner of a trade name must do its own police work."); *see also Hard Rock Cafe*, 955 F.2d at 1149 (defendants are not required "to be more dutiful guardians of [trademark plaintiffs'] commercial interests). In effect, Tiffany's contributory trademark infringement argument rests on the notion that because eBay was able to screen out potentially counterfeit Tiffany listings more cheaply, quickly, and effectively than Tiffany, the burden to police the Tiffany trademark should have shifted to eBay. Certainly, the evidence adduced at trial failed to prove that eBay was a cheaper cost avoider than Tiffany with respect to policing its marks. But more importantly, even if it were true that eBay is best situated to staunch the tide of trademark infringement to which Tiffany [*155] and countless other rights owners are subjected, that is not the law. . . .

Under these circumstances, the Court concludes that Tiffany has failed to prove that eBay continued to supply its service to those whom it knew or had reason to know were engaging in infringement, and that eBay took appropriate steps to cease making its website available in those instances where Tiffany brought objectionable conduct to its attention.