Preventing Infringements on E-Commerce Marketplaces
Proposal of a risk-based approach towards intermediary liability

REACT Annual Assembly, Amsterdam, 5 April 2018
Carsten Ullrich, LLM, Faculty of Law, Economics and Finance
About the University of Luxembourg

- founded in 2003
- 6,000 students of which 640 PhDs / 250 teaching staff
- 113 different student nationalities
- Ranked number 179 in the Times Higher Education (THE) World University Ranking 2017-2018
- Ranked number 11 in the Times Higher Education (THE) Young University Rankings 2017
- Core research activities
  - Materials science
  - Computer science & ICT security
  - European and international law
  - Finance and Financial Innovation
- Faculty of Law, Economics and Finance, Research Unit in Law
  - Communications and Media Law Team, Prof. Mark Cole
  - Specialised areas: Media Law, Data Protection, IP Law, E-Commerce, Enforcement

- multilingual, international, research-oriented
- close to the European institutions and to Luxembourg’s financial centre
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About myself

Product Compliance and Fraud Detection Manager for Amazon (Europe) - 8 years
• manage notice-and-takedown operations; product safety and recalls
• oversee supply chain compliance > food safety, dangerous goods, environmental
• Memorandum of Understanding on the Sale of Counterfeit Goods on the Internet

Regulatory Policy Advisor, British and Canadian Embassies, Berlin - 7 years
• Economic, financial and trade policy analysis
• Manage and lobby on ICT policy (telecoms, internet, IT)

Positions in Strategic Consulting and Market Research

PhD Researcher, University in Luxembourg, since 2016
• explore new regulatory solutions for preventing illegal activity on online platforms
• Teaching activities: EU Economic Law; Supply Chain Compliance; Internet Litigation

LLM - Innovation, Technology and the Law (Edinburgh)
M.A. - Political Science and Economics (UCL)
B.A. - Humanities (Economic Geography), (West London)
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Are there alternatives to the current system?

E-Commerce, Online Marketplaces and Intellectual Property

A risk-based approach... focusing on duty of care

Intermediary Liability - Current EU Regulatory Framework

Problems and Key Court Cases
Intermediary Liability
- Current EU Regulatory Framework
Current EU regulatory framework for information service providers aka intermediaries/platforms

**Horizontal:** ECD

- third party / intermediary content liability conditions
- protects **passive** intermediaries with **no control** over information hosted and **no actual knowledge** of illegal activity/information
- need to remove illegal content **expeditiously** when acquiring knowledge (Notice-and-Takedown, NTD)
- cannot be asked to monitor internet traffic and data on a general basis

**Sectoral**

- refer to ECD when third party liability is concerned
- ECD retains priority
- are supplementary to liability provisions in ECD
Problems and Key Court Cases
Google France v Louis Vuitton, C-236/08 to C-238/08 [2010] (Trademark on search engine)
- guidance on passive / active intermediary definition

Scarlet Extended C-70/10 [2011] & Sabam v Netlog, C-360/10 [2012] (Copyright on social network / access provider)
- obligation to run filtering systems monitoring all customer data for preventing IP infringements in contrast with E-Commerce and IP Rights Enforcement Directives

L’Oréal v EBay C-324/09 [2011] (Trademark on E-Commerce platform)
- more guidance on passive / active intermediary definition
- online marketplace maybe ordered to prevent further infringements of the same kind
- responsibility of intermediary to act as diligent economic operator
- but: no obligation to actively monitor of all the data of customers

Mac Fadden C-484/14 [2016] (Copyright on access provider)
- requirement to monitor all user traffic on WiFi network for preventing illegal use is unlawful
- password protection as adequate means to deter illegal use and prevent total anonymity

Delfi AS v Estonia, no 65469/09 (ECtHR, 2016) (Hate Speech on New Portal)
- information hosts can be expected to proactively assess risk related to illegal activity
1. "passive" intermediaries with no "control" over the information hosted?
   > today’s context: big data, ad revenue, information gatekeepers, multi-sided markets - are there still any passive hosts?
   > do we need to tie liability to "updated" conditions

2. no obligation to monitor for infringing content on a general basis
   > infringement prevention in specific, similar cases possible/obligatory?
   > in line with new fraud detection and content recognition technologies?

3. no (harmonized) standards for notice-and-take-down
   > unclear expectations for users and rights holders, diverging EU standards

4. Broad, inflexible horizontal framework
   > diverse platform business models & content types > sectoral differentiation?

   >> little motivation or encouragement to be transparent about infringement prevention activities
   >> no encouragement of "good Samaritan" measures
   >> protective legal framework from late 1990s applied to Web 2.0/ Web 3.0...
A risk-based approach...
leaning on duty of care

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EU Regulatory Initiatives

EU Commission: leave the current intermediary liability regime as it is for now “while implementing a sectoral, problem-driven approach to regulation”


<table>
<thead>
<tr>
<th>EU Initiative</th>
<th>Area</th>
<th>Year</th>
<th>Regime</th>
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</thead>
<tbody>
<tr>
<td>Memorandum of Understanding on the Sale of Counterfeit Goods over the Internet</td>
<td>Trademarks</td>
<td>2011, 2016</td>
<td>Self-regulation</td>
</tr>
<tr>
<td>Code Of Conduct On Countering Illegal Hate Speech Online</td>
<td>Hate Speech</td>
<td>2016</td>
<td>Self-regulation</td>
</tr>
<tr>
<td>Draft Copyright Directive Draft amendment</td>
<td>Copyright</td>
<td>2016</td>
<td>Self-regulation</td>
</tr>
<tr>
<td>Audiovisual Media Services Directive Draft amendment</td>
<td>Hate Speech, Violence</td>
<td>2016</td>
<td>Co-regulation (maybe)</td>
</tr>
<tr>
<td>Draft Regulation on Enforcement and Compliance for Goods (Goods Package)</td>
<td>Product law</td>
<td>2018</td>
<td>Co-regulation</td>
</tr>
<tr>
<td>Commission recommendation on Tackling Illegal content</td>
<td>All</td>
<td>2018</td>
<td>Self-regulation</td>
</tr>
</tbody>
</table>

• Self regulatory approaches which promote co-operation between platforms (and rightsowners)
• Little regulatory oversight
• Lack of traction, transparency, consistency... and willingness?
Proposal

- Introduce risk regulation to intermediary liability
- Companies legally mandated to assess risks and deploy appropriate risks management measures
- Enforced self-regulation / co regulation > duty of care, compliance, technical standards
- Already used in: Data Protection (GDPR), Anti-Money Laundering (AML), Environmental law, Chemicals (REACH), Occupational Health & Safety, Food safety (HACCP)...
- Used in areas that are:
  Technically complex / Fast-changing / cross traditional regulatory silos / costly to implement and enforce

+ Compliance is done by those who know the business  - Compliance is done by those who know the business (too well)
+ Flexibility - as risk environment changes  - Strain on company financial and resource
+ Save public resources  - Can cause democratic accountability/transparency challenges
+ Internationally compatible (standards)  - Can cause market entrance / competition barriers
Are there alternatives to the current system?

A risk-based approach...
looking on duty of care

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Why the Anti Money-Laundering framework as a model for online infringement prevention?

Common characteristics of both areas

1. High volume, electronic transaction environment

2. Complex and innovative business areas with constantly evolving fraud patterns

3. Global / cross-jurisdictional transactions

4. Overlap between AML scope and e-commerce (payments)
The Model

**AML Compliance Framework**
- Customer due diligence - Know – Your – Customer (KYC)
- Identification checks, beneficiary owner, business purpose verification
- Risk-based Transaction and Status monitoring (according to customer and business due diligence)
- Suspicious Transaction Reporting

**Online Intermediaries: Risk-based Infringement Prevention**
- Know – Your – Customer (KYC)
- Platform Activity/Content Risk Assessment
- Risk-based Transaction Monitoring
- Focus on High Risk activities
- Takedown (automated, notice-based, counter notice): Statutory Reporting on Takedowns and Enforcement
KYC / Due Diligence

Aim
- ability to enforce against repeat infringers
- deterrence against badly intentioned users
- identify high risk activities (likelihood/impact of illegal use)

Description / Process
- Standardised requirement to identify sellers/uploaders/users
- Rank content by popularity/financial impact/context
- Variable by type of platform/content: e.g. marketplace, digital content, news portal, social media

Case Law guidance:
- Mac Padden - passport protection/ID disclosure (copyright)
- Dropbox v. eBay - prevent repeat infringements & act as diligent economic operators (trademark)
- Dell - content-based user anonymity (hate speech)

Risk-based Transaction Monitoring

Aim
- define risk management process for high risk activities
- demonstrate due diligence (duty of care)
- create standardised & transparent processes

Description / Process
- perform monitoring / content filtering for high risk activities
- document risk assessment process for regulatory audit/review
- document algorithmic decisions for regulatory audit/review
- ongoing review of platform risk profiles
- adaptable to type of platform / content

Legal considerations
- risk-based monitoring is not general monitoring
- precedent for red-flag (should have known) content/site (courts in Germany, US, China)

Enforcement & Reporting

Aim
- transparent enforcement (for all users and rights owners)
- safeguard due process, accountability, fundamental rights

Description / Process
- create harmonised conditions for automated takedown and for notice-and-takedown
- statutory reporting on agreed KPIs e.g. number of takedowns, enforcement against repeat infringers, user/account suspensions, counter claims, review times...
- adaptable to type of platform / content

Legal considerations
- not all statutory reporting may need to be public
- statutory reporting/notification applied in other risk regulation sectors (AML, environment...)
KYC / Due Diligence

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- L’Oreal v EBay - prevent repeat infringements & act as diligent economic operators (trademark)
- Delfi - context-based user anonymity (hate speech)
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**KYC / Due Diligence**

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- Standardised requirement to identify sellers/uploaders/users
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**Case Law guidance:**
- Max Faddes - passport protection / ID disclosure (copyright)
- C/Reed v eBay - prevent repeat infringements & act on different economic operators (trademark)
- Defi - content-based user anonymity (Trade speech)

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**Risk-based Transaction Monitoring**

**Aim**
- define risk management process for high risk activities
- demonstrate due diligence (diary of call)
- create standardised & transparent processes

**Description / Process**
- perform monitoring / content filtering for high risk activities
- document risk assessment process for regulatory audit/review
- document algorithmic decisions for regulatory audit/review
- ongoing review of platform risk profiles
- adaptable to type of platform / content

**Legal considerations**
- risk-based monitoring is not general monitoring - arguably
- precedence for red flag & should have known context/use (exports in Germany, US, China)

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**Enforcement & Reporting**

**Aim**
- transparent enforcement (for all users and rights owners)
- safeguard due process, accountability, fundamental rights

**Description / Process**
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- adaptable to type of platform / content

**Legal considerations**
- not all statutory reporting may need to be public
- statutory reporting/notification applied in other risk regulation sectors (RUM, environment...)
Risks

- Standard setting takes time
  > once in place flexible and adaptable to change

- Democratic accountability of highly technical / industry led process
  > regulatory review and audit, statutory reporting

- Competition: entry barrier for new players
  > create "sandbox" exceptions
Summary

- Enhanced responsibilities reflect the importance and power of platforms / online intermediaries
- Risk - based approach codifies platforms' duty of care / due diligence into standards
- Compliance with standards provides safe harbour
- Create level playing and transparency in infringement prevention
- Support through industry standards
  Examples: ISO 27000 (IT Security), ISO 9000 (Quality Management), FATF Standards
- Future of E-Commerce Directive?
  > review active/passive host distinction
  > review general monitoring prohibition
  > mandate sector specific duty of care standards

- REACT and BASCAP activities create data and knowledge which could inform risk assessment process
- Creation of "Should have known" or "red flag" knowledge for duty of care standards
Thank you!

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Questions please!