The rise of e-commerce platforms, big data & Global shipping
Time for new legal responsibilities to help fight counterfeits & piracy!?
The rise of e-commerce platforms, big data & Global shipping
Time for new legal responsibilities to help fight counterfeits & piracy?(!)
Introduction

Legal Background

Problems with intermediary liability

The way forward
About the University of Luxembourg

- founded in 2003
- 6,000 students of which 640 PhDs / 250 teaching staff
- 113 different student nationalities
- **Ranked number 12** in the Times Higher Education (THE) **Young University Rankings** 2018
- Core research activities
  - Materials science
  - Computer science & ICT security
  - European and international law
  - Finance and Financial Innovation
- **multilingual, international, research-oriented**
- close to the European institutions and to Luxembourg’s financial centre
PhD Researcher, University of Luxembourg, since Dec. 2016

Product Compliance & Fraud Detection Manager, Amazon, Lux/London

Regulatory Policy Analyst, British and Canadian Embassies, Berlin

Strategic Consultant, Market Research, Euromonitor, London

Teaching:
  • *EU Economic Law*
  • *Supply Chain Compliance*
  • *Internet Litigation*
The rise of e-commerce platforms, big data & Global shipping
Time for new legal responsibilities to help fight counterfeits & piracy?(!)
A risk-based approach... leaning on duty of care

E-Commerce, Online Marketplaces and Intellectual Property

Are there alternatives to the current system?

Problems

Intermediary Liability - Current EU Regulatory Framework
Intermediary Liability
- Current EU
Regulatory Framework
EU legal framework for intermediaries/platforms

**Horizontal:** E-Commerce Directive (2000/31)
- protects *passive* intermediaries (*no actual knowledge* or *control* of illegal activity/information)
- remove illegal content *expeditiously* when notified (Notice-and-Takedown)
- *cannot be obliged to monitor* internet traffic and data on a general basis

**Drafted twenty years ago**

**Sectoral**
- do not go beyond ECD
- supplementary to ECD
- encourage industry codes of conduct
A risk-based approach...
leaning on duty of care

Are there alternatives to the current system?

E-Commerce, Online Marketplaces and Intellectual Property

Intermediary Liability - Current EU Regulatory Framework

Problems
Problems
1. "passive" intermediaries with "no control" over the information hosted?

**Proliferation of intermediaries**

**Ad Revenue**

**Gatekeepers**

**Global Players**

---

**Marketplaces: most popular websites**
- Google(1) Youtube (2) Facebook (3) Reddit (5)
- Taobao (9) Amazon (11) Ebay (41)

**E-commerce marketplaces = 56% of global e-commerce**

**Leading in big data analytics, artificial intelligence...**
- Amazon seller analytics
- Facebook Analytics
- Listing Analytics

**New integrated intermediaries: payments, fulfilment services, analytics, transportation...**
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**New integrated intermediaries: payments, fulfilment services, analytics, transportation...**
Iphone 6/6s/4.7 Coque Louis Nice Vuitton Logo Pattern (Lv)

Prix : EUR 4,01
Tous les prix incluent la TVA.
2 neufs à partir de EUR 4,01
Couleur : Color 05

Signaler des informations incorrectes sur les produits


MPOW
TWS écouteurs bluetooth sport 24h autonomie
Mpow Orellettes Bluetooth 5.0 Ecouteurs ...
EUR 40

Cliquez pour ouvrir le point de vue élargi

EUR 4,01
Faites-vous livrer entre le 27 nov. et le 14 déc. en choisissant la Livraison Rapide lors du passage de commande. En savoir plus.

En stock.
Expédié et vendu par

EUR 4,01 + EUR 0,72 Livraison
Quantité : 1

La commande 1-Click n'est pas disponible pour cet article.

Achetez votre liste

Autres vendeurs sur Amazon

2 neufs à partir de EUR 4,01

Vous l'avez déjà ? Vendez sur Amazon

AUKEY
Les Indispensables en voiture
AUKEY Chargeur de Voiture, ULTRA COMPACT 2 Ports USB 4.8A Allumé-cli...
EUR 1,880
### Shipping

Calculate your shipping cost by country/region and quantity.

<table>
<thead>
<tr>
<th>Quantity:</th>
<th>1</th>
<th>Ship to:</th>
<th>Germany</th>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Shipping Company</th>
<th>Shipping Cost</th>
<th>Estimated Delivery Time</th>
<th>Tracking Information</th>
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</thead>
<tbody>
<tr>
<td>Seller's Shipping Method</td>
<td>€0,00</td>
<td>Free Shipping</td>
<td>26-54 days</td>
</tr>
<tr>
<td>China Post Registered Air Mail</td>
<td>€4,78</td>
<td>€2,79</td>
<td>You save: €2,00 (about 42%)</td>
</tr>
<tr>
<td>ePacket</td>
<td>€5,54</td>
<td>€3,89</td>
<td>You save: €1,66 (about 30%)</td>
</tr>
<tr>
<td>Standard Shipping</td>
<td>€6,39</td>
<td>€4,48</td>
<td>You save: €1,92 (about 30%)</td>
</tr>
<tr>
<td>Premium Shipping</td>
<td>€18,99</td>
<td>€6,60</td>
<td>You save: €12,40 (about 65%)</td>
</tr>
<tr>
<td>DHL</td>
<td>€66,25</td>
<td>€10,37</td>
<td>You save: €55,89 (about 84%)</td>
</tr>
</tbody>
</table>

**Product Details**

**Feedback:** (259)  | **Shipping & Payment** | **Seller Guarantees**

**Packaging Details**

- **Unit Type:** piece
- **Package Size:** 15cm x 10cm x 5cm (5.91in x 3.94in x 1.97in)

**Payment**

We support the following payment methods.
Packaging Details

Unit Type: piece
Package Size: 15cm x 10cm x 5cm (5.91in x 3.94in x 1.97in)

Payment

We support the following payment methods.

- VISA
- MasterCard
- American Express
- Qiwi Wallet
- WebMoney
- GiroPay
- Sofort
- Przelewy24
- Western Union
- Bank Transfer
- mercadopago
- Doku
1. "passive" intermediaries with "no control" over the information hosted?

Proliferation of intermediaries

Ad Revenue

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Global Players

Big Data

2. no obligation to monitor for infringing content on a general basis
   - specific vs general infringement prevention?
   - new detection and content recognition technologies

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

>> purely reactive obligations on platforms
>> no encouragement of "good Samaritan" measures
>> protective legal framework from 1990s
A risk-based approach... focusing on duty of care

Are there alternatives to the current system?

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Problems

Intermediary Liability - Current EU Regulatory Framework
Are there alternatives to the current system?
## EU Regulatory Initiatives

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Area</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communication on Tackling online disinformation</td>
<td>Fake News</td>
<td>2018</td>
</tr>
<tr>
<td>Proposal for a regulation on preventing the dissemination of terrorist</td>
<td>Terrorist speech</td>
<td>2018</td>
</tr>
<tr>
<td>content online</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Product Safety Pledge - Voluntary commitment of online marketplaces</td>
<td>Non-food consumer products</td>
<td>2018</td>
</tr>
<tr>
<td>Recommendation on measures to effectively tackle illegal content online</td>
<td>All</td>
<td>2018</td>
</tr>
<tr>
<td>Notice on the market surveillance of products sold online</td>
<td>Non-food consumer products</td>
<td>2017</td>
</tr>
<tr>
<td>Communication on Tackling Illegal Content Online</td>
<td>All</td>
<td>2017</td>
</tr>
<tr>
<td>Code Of Conduct On Countering Illegal Hate Speech Online</td>
<td>Hate Speech</td>
<td>2016</td>
</tr>
<tr>
<td>MoU on the sale of Counterfeit Goods over the Internet</td>
<td>Trademarks</td>
<td>2011, 2016</td>
</tr>
</tbody>
</table>

- Sectoral, without affecting e-commerce Directive
- Self regulatory, promoting co-operation between platforms and other stakeholders
- Lack of traction, transparency, consistency... and willingness?
Alternatives?

• What that can be reasonably expected of platforms to fight illegal activity/content as gatekeepers, crucial intermediaries, global players, big data owners...

• Moral and economic justifications for more proactivity

• What about defining **standards of duty of care** for platforms?

• Platforms legally obliged to assess risks of infringement on their platform

• Manage high risk activities, incl prevention (risk management) data protection, health & safety, product regulation

• (Technical) standards for duty of care / illegal activity prevention

• Adapt the E-Commerce Directive?
A risk-based approach... leaning on duty of care

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The Model

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

Risk-based infringement prevention: vertically adaptable (examples)

| UGC - Copyright | E-Commerce - Trademarks | Social Media – Hate speech/Violence | News Portal – Hate Speech/Violence | ... | ... |
### Risk-based infringement prevention: vertically adaptable (examples)

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</tr>
</thead>
<tbody>
<tr>
<td>Password ID/Email Risk assess by commercially popular content</td>
<td>Commercial Seller ID verification Private seller Email Risk assess by seller provenance, product group, transaction volume</td>
<td>Password / Email Context based risk assessment</td>
<td>Anonymous/Hidden User Name Context-based/news category risk assessment</td>
</tr>
<tr>
<td>Content monitoring for high-risk/commercially successful content Content/transaction monitoring by high risk product category/seller risk profile (AML) / transaction volume</td>
<td>Keyword filtering for comments in contexts most at risk/high ad revenue</td>
<td>Keyword filtering for comments in news contexts most at risk</td>
<td></td>
</tr>
<tr>
<td>Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims, SLAs, Follow-the money actions Algorithmic audits</td>
<td>Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims/Re-instalms, SLAs Regular algorithmic audits</td>
<td>Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims/Re-instalms, SLAs Regular algorithmic audits</td>
<td>Journalistic standards reporting</td>
</tr>
</tbody>
</table>

**UGC = User Generated Content**  
**SLA = Service Level Agreement**
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/uploads/users
- Rank context by popularity/financial impact/context
- Variable by type of platform/content: e.g. marketplace, digital content, news portal, social media

Case Law guidance:
- Mac Faddan - passport protection - ID disclosure (copyright)
- EVraid v. EBay - present repeats infringements & act as diligent economic operators (breach of C)
- Tolfi - content based user anonymity (data sprees)

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... arguably
- precedence for red flag (should have known) content/use (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...
current project with React

development of duty of care requirements for e-commerce platforms
Thank you!


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