

Thank you!

University of Luxembourg
Multilingual. Personalised. Connected.

2nd Brand Protection Congress, Frankfurt, 4 - 5 December 2018
Carsten Ullrich, LL.M. Faculty of Law, Economics and Finance

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



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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*

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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



EU legal framework for intermediaries/platforms

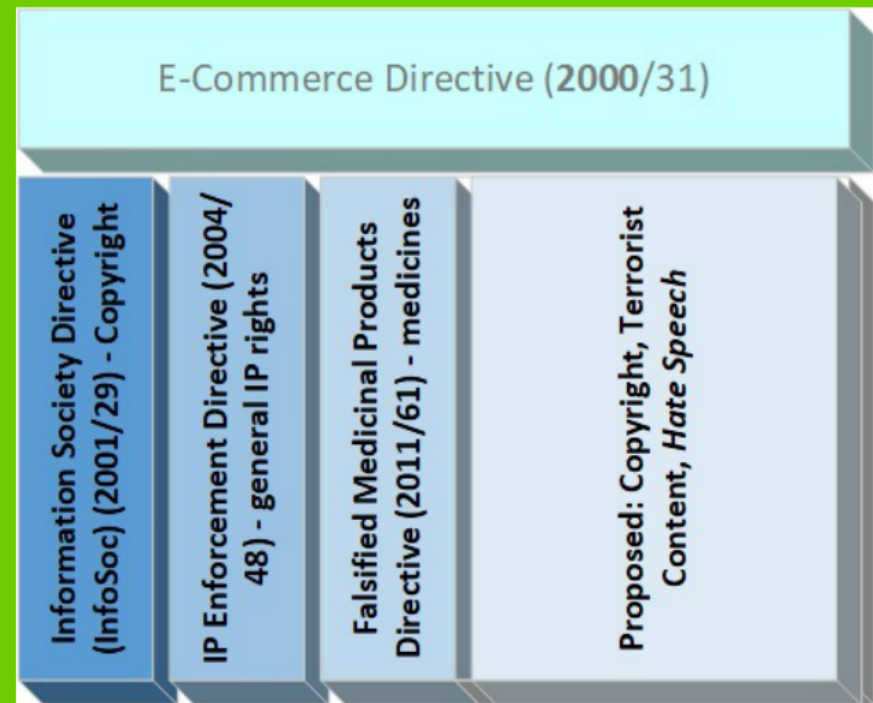
Horizontal: E-Commerce Directive (2000/31)

- 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



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

Proliferation of intermediaries

Ad Revenue

Gatekeepers

Global Players

Big Data

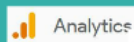
Marketplaces: most popular websites

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...



Analytics

facebook Analytics

Amazon seller analytics

Listing Analytics

New integrated intermediaries: payments, fulfilment services, analytics, transportation...

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

Ad Revenue **Proliferation of intermediaries**
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facebook Analytics

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Listing Analytics

New integrated intermediaries: payments, fulfilment services, analytics, transportation...





| 13 | 2 | 3 |
|---------------------------------------|--|----------|
| Positive | Neutral | Negative |
| <p>by g***e During past month</p> | Not working | |
| <p>by j***1 During past month</p> | Everything is bad about this item,, it stick's to your skin, it doesn't cut. | |
| <p>by n***j During past month</p> | Counterfeit JUNK! | |

[See all](#)

Delivery: Varies for items shipped from an international location

Payments:

Returns: 30 day returns. Buyer pays for return shipping | [See details](#)

s 8000 9000 SensoTouch 3D

30.7% Positive Feedback

Save this Seller

Contact seller

Visit store

See other items

available site data?



Iphone 6/6s/4.7 Coque Louis Nice Vuitton Logo Pattern (Lv)

Partager    



★★★★☆ 1 commentaire client

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](#)

Nos prix incluent l'éco-participation sur tous les produits concernés. Vous voulez recycler votre appareil électrique ou électronique gratuitement ? [En savoir plus ici.](#)

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



[Commentaires sur la publicité](#)

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

 **Ajouter au panier**

 **Acheter cet article**

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



Autres vendeurs sur Amazon

2 neufs à partir de **EUR 4,01**

Vous l'avez déjà ?

 **AUKEY**
Les indispensables en voiture
AUKEY Chargeur de Voiture, ULTRA COMPACT 2 Ports USB 4.8A Allume-Ci...
★★★★☆ 1.880
EUR

advertising revenue ?

New Arrival Legoings 2 In 1 Transformation Series Robot Vehicle Sport car DIY Building Blocks Kit Toys Kids Best Gifts

★★★★★ 4.9 (259 votes) 968 orders

Price: €22,80 - 33,32 / piece
 Discount Price: **€ 11,63 - 17,00** / piece **-49%** 7 days left
[Get our app to see exclusive prices](#)

Color:

Shipping: **€ 2,79 to Luxembourg via China Post Registered Air Mail**
 Estimated Delivery Time: 18-30 days

Quantity: piece (5595 pieces available)

Total Price: Depends on the product properties you select

[Buy Now](#) [Add to Cart](#)

[Add to Wish List \(4096 Adds\)](#)

New User Coupon: **US \$4.00** [GET IT NOW](#)

Return Policy: [Returns accepted if product not as described, buyer pays return shipping fee; or keep the product & agree refund with seller. View details](#)

Seller Guarantees: [On-time Delivery](#)
60 days

Payment:

Buyer Protection
 Full Refund if you don't receive your order
 Full or Partial Refund, if the item is not as described

[Learn More](#)



Q Mouse over to zoom in

Sold By
LET'S GO FUN Store
 China

98.9% Positive feedback
 Detailed seller ratings

[Visit Store](#) [Follow](#)

Contact Seller

[Contact Now](#)

This Seller's Categories

- Model Building
- KIDS LEGO
- Blocks
- Others

[View More](#)

Top Selling Products From This Seller



€ 11,63
 ★★★★★ (259)
 944 orders



[Report Item](#)

Shipping

Calculate your shipping cost by country/region and quantity.

Quantity: Ship to:

| Shipping Company | Shipping Cost | Estimated Delivery Time | Tracking Information |
|---------------------------------------|---|--|----------------------|
| Seller's Shipping Method | € 0,00 Free Shipping | 26-54 days | Not available |
| China Post Registered Air Mail | € 4,78 € 2,79 You save: € 2,00 (about 42%) | 26-49 days (It may take longer during the holiday seasons.) | Not available |
| ePacket | € 5,54 € 3,89 You save: € 1,66 (about 30%) | 20-35 days | Available |
| Standard Shipping | € 6,39 € 4,48 You save: € 1,92 (about 30%) | 21-47 days | Not available |
| Premium Shipping | € 18,99 € 6,60 You save: € 12,40 (about 65%) | 7-15 days | Available |
| DHL | € 66,25 € 10,37 You save: € 55,89 (about 84%) | 8-17 days | Available |

[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)
 Package Weight: 0.3kg (0.66lb)

Payment

We support the following payment methods.



new integrated intermediaries

Full or Partial Refund, if the item is not as described

[Learn More](#)

Q Mouse over to zoom in

[Report item](#)

Shipping

Calculate your shipping cost by country/region and quantity.

Quantity: Ship to:

| Shipping Company | Shipping Cost | Estimated Delivery Time [?] | Tracking Information |
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| DHL | €66,25 € 10,37 You save: € 55,89 (about 84%) | 8-17 days | Available |
| EMC | €11,04 € 4,48 You save: € 6,56 (about 60%) | 20-27 days | Available |

[Product Details](#)

[Feedback \(259\)](#)

[Shipping & Payment](#)

[Seller Guarantees](#)

parcels.

Packaging Details

Unit Type: piece

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

new integrated intermediaries

Payment

We support the following payment methods.



| | | | |
|------------------|---|------------|---------------|
| Shipping | €0,99 €4,70 You save: € 1,92 (about 30%) | 2-17 days | Not available |
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Feedback (259)

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new integrated intermediaries

Payment

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

Proliferation of intermediaries

Ad Revenue

Gatekeepers

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

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EU Regulatory Initiatives

| Initiative | Area | Year |
|---|----------------------------|---------------|
| Communication on Tackling online disinformation | Fake News | 2018 |
| Proposal for a regulation on preventing the dissemination of terrorist content online | Terrorist speech | 2018 |
| Product Safety Pledge - Voluntary commitment of online marketplaces | Non-food consumer products | 2018 |
| Recommendation on measures to effectively tackle illegal content online | All | 2018 |
| Notice on the market surveillance of products sold online | Non-food consumer products | 2017 |
| Communication on Tackling Illegal Content Online | All | 2017 |
| Code Of Conduct On Countering Illegal Hate Speech Online | Hate Speech | 2016 |
| Proposed Directive on Copyright in the Digital Single Market | Copyright | 2016 |
| Audio-visual Media Directive Recast Proposal | Hate Speech, Violence | 2016 |
| Unfair Commercial Practices Directive (Implementation Guidance) | Consumer Law | 2016 |
| MoU on the sale of Counterfeit Goods over the Internet | Trademarks | 2011, 2016 |

- 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?

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The Model

Online Intermediaries: Risk-based Infringement Prevention

**Know – Your – Customer (KYC)
Platform Activity/Content Risk Assessment**

Risk
Identification

**Risk-based Transaction Monitoring
Focus on High Risk activities**

Risk
assessment

**Takedown (automated, notice-based, counter notice); Statutory
Reporting on Takedowns and Enforcement**

Risk rated
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)

| UGC - Copyright | E-Commerce - Trademarks | Social Media – Hate speech/Violence | News Portal – Hate Speech/Violence | | |
|---|--|---|--|------|------|
| Password ID/Email Risk assess by commercially popular content | Commercial Seller ID verification Private seller Email Risk assess by seller provenance, product group, transaction volume | Password / Email Context based risk assessment | Anonymous/Hidden User Name Context-based/news category risk assessment | | |
| Content monitoring for high-risk/commercially successful content | | Keyword filtering for comments in contexts most at risk/high ad revenue | Keyword filtering for comments in news contexts most at risk | | |
| Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims, SLAs, Follow-the money actions Alorithmic audits | Content/transaction monitoring by high risk product category/ seller risk profile (AML) / transaction volume | Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims/Re-instalments, SLAs Regular algorithmic audits | Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims/Re-instalments, SLAs Regular algorithmic audits Journa listic standards reporting | | |
| | Takedown conditions/user rights Reporting on No. Takedowns, Repeat Infringers, Seller Suspensions, SLAs, Follow-the money actions | | | | |

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/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 Fadden - passport protection/ID disclosure (copyright)
- L'Oreal v eBay - prevent repeat infringements & act as diligent economic operators (trademark)
- Delfi - context-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 ... 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



**development of duty of care
requirements for
e-commerce platforms**

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Carsten Ullrich, A risk-based approach towards infringement prevention on the internet: adopting the anti-money laundering framework to online platforms, International Journal of Law and Information Technology, Volume 26, Issue 3, 1

Carsten Ullrich, Standards for Duty of Care? Debating Intermediary Liability from a Sectoral Perspective, 8 (2017) Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC) 111

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