Session 3:
EU IPR Protection and Enforcement in the Digital Single Market

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E-commerce in the EU
E-commerce in the EU

E-commerce Today

Retail e-commerce sales worldwide from 2014 to 2021 (in billion U.S. dollars)
E-commerce in the EU

E-commerce Today

E-commerce sales as percentage of total retail sales in selected countries in 2017

- China: 23.1%
- UK: 10.1%
- South Korea: 10%
- Denmark: 12.6%
- United States: 9%
- Germany: 7.9%
- Japan: 7.4%
- Italy: 3.2%
- Brazil: 2.7%
- India: 2.2%
- Mexico: 1.7%
E-commerce in the EU

Internet users who bought or ordered goods or services for private use in the previous 12 months by age group, EU-28, 2008-2018

Source: Eurostat (online data code: isoc_ec_buy)
Online purchases, EU28, 2018 (% of individuals who bought or ordered goods or services over the internet for private use in the previous 12 months)

- E-learning material
- Medicines
- Computer hardware
- Telecommunication services
- Food or groceries
- Electronic equipment
- Video games software, other software and upgrades
- Films, music
- Books, magazines, newspapers
- Tickets for events
- Household goods (e.g. furniture, toys)
- Travel, holiday accommodation
- Clothes, sports goods

55-74 years
25-54 years
16-24 years
Total

Source: Eurostat (online data code: isoc_ec_i/bay)
Intellectual Property Protection and Infringement Evolving in the Digital World
Intellectual Property Protection and Infringement Evolving in the Digital World

Copyright – Communication to the Public – Making Available to the Public

An evolving concept

- 2006, the WIPO Internet Treaties
- 2001, the InfoSoc Directive
- 2014, CJEU C-466/12, Svensson
  (followed by many more key rulings)

Future

- Exceptions and limitations
- Technology neutrality constantly challenged

WIPO Copyright Treaty 1996, Article 8:
“..the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”
Intellectual Property Protection and Infringement Evolving in the Digital World

Trade marks in Digital Media

- Trade mark functions evolving
- CJEU rulings (Google adwords, 2010, C-236/08; L’Oréal v eBay, 2011, C-324/09; Blomqvist, 2014, C-98/13)
- EUTMR 2015 (Freedom of expression recital 21; No graphical representation requirement; Illegal deceptive comparative advertising formally becoming infringement)

Future

- Virtual, augmented and mixed realities
- Other new technologies (e.g. AI, blockchain, quantum computing and 3D printing)
Building Blocks for Intellectual Property Infringing E-Commerce
BUSINESS MODEL
Primary Market
- Business to Business (B2B)
- Business to Consumer (B2C)
Secondary Market
- Business to Consumer (B2C)
- Consumer to Consumer (C2C)

IT PLATFORM
Online Platform
- Open Internet
- Darknet
Functionality
- E-shop
- Marketplace
- Retail Emporia
Governance
- Centralized
- Decentralized

SUPPORTING IT TECHNIQUES
Search Related
- Search Engine Optimization
- Metatagging
- Adwords
- HASH Tagging
- Social Media
- Mobile/Tablet Apps
Advertising
- Digital Display Advertising
- Spam Marketing
Other Techniques
- Cyber-/Typosquatting
- Domain Name Dropcatching
- Cyberattacks (e.g. Hacking, DDOS, Data Interception, Data Interference)

PHYSICAL INFRASTRUCTURE
- Production Facility
- Shipping and Air Cargo
- Brick and Mortar Shops and Storage
- Fulfillment Houses
- Drop Shipping
- Postal Services and Small Parcels Couriers

REVENUE SOURCES
- Banking Services
- Payment Processors
- Paypal, WU
- Virtual Currencies
# Building Blocks for Intellectual Property Infringing E-Commerce

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Intermediaries in the Online Environment
Intermediaries in the Online Environment

**Network Layer (Routing and Transport of Data)**
- ISPs
- Domain Name System
- Hosts
- Certificate Authorities
- VPN Services
- Network Anonymity

**Physical Layer (Equipment Storing and Transmitting Data)**
- Hardware Controllers
- Hardware Vendors
- Network Operations Centres

**Application Layer (Front-end Software Receiving and Presenting Data)**
- Platforms
- Gateways
- Marketplaces
- Transaction Networks
- Advertising
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Platforms
Gateways
Marketplaces
Transaction Networks
Advertising

Certificate Authorities
VPN Services
Network Anonymity

Network Operations Centres

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**Platforms**

**Gateways**

**Marketplaces**

**Transaction Networks**

**Advertising**
Application Layer (Front-end Software Receiving and Presenting Data)

- Platforms
  - Social Network
  - Cloud Storage
  - Media Sharing
  - Publishing Service
  - Location Service
  - Virtual/Gaming World

- Gateways
  - Information Localisation Tools (Search Engines):
    - Algorithmic
    - Optimized
  - Shortening Service

- Marketplaces
  - Online Marketplaces
  - Retail Emporia
  - Ticketing Portals
  - App Stores
  - Social Commerce

- Transaction Networks
  - Payment/Credit Card Networks
  - Virtual Currency Prov.
  - Online Payment Provider
  - Transaction Processor
  - Micropayment Provider

- Advertising
  - Advertising Agency
  - Advertising Exchange
  - Demand/Supply Side Platform
  - Trading Desk
  - Ad Server
  - Data Supplier
Application Layer (Front-end Software Receiving and Presenting Data)

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Shortening Service
Liability and Safe Harbour for Intermediaries
Types of Civil Liability

**Primary Liability:**
Monetary liability for a defendant that is a primary wrongdoer that has engaged in an unjustified tortious activity by means of own acts or omissions by which legal or equitable duties has been breached

**Secondary Liability:**
Monetary liability for a defendant that has causally contributed to a prima facie wrongdoing by a third party

**Injunctive Liability:**
Liability for a defendant to comply with a non-monetary obligation even if no wrongdoing has been committed
Liability and Safe Harbour for Intermediaries

Safe Harbour (E-commerce Directive, 2000/31/EC)

- **Internet Access Provider**: Almost complete safe harbour, Article 12
- **Caching Provider**: Extensive safe harbour (but irrelevant today), Article 13
- **Hosting Provider**: Safe harbour unless bad faith (and the basis for Notice-and-Takedown regimes), Article 14
- **Prohibition** of general monitoring obligations (whether legislative or case law based), Article 15
Enforcement Measures Online

Civil measures
- EU minimum harmonisation based on TRIPS

Administrative enforcement
- National systems

Customs enforcement
- Interception of postal packages (CJEU, Blomqvist, C-98/13; small parcels procedure)

Criminal enforcement
- High diversity between EU MS (e.g. sanctions, investigative tools available, money laundering)

Civil measures, e.g.
- Disclosure of customer information
- Asset seizure (including domain name transfer) and asset freezing
- Blocking of customers access to specific Internet services
- De-indexing (and de-prioritization) of search results
- Removal of infringing content and marketing
DSM Directive (2019/790) Article 17 – A Paradigm Change or Not?

- Follows the piecemeal EU legislative approach to copyright
- Part of several legislative initiatives in parallel

Important highlights

- Text and data mining exceptions
- New related right: News publishers right
- And….. Article 17
Online Content-Sharing Service Provider (OCSSP)
- Store and give access to large amounts of User Uploaded Content (UUC), which is organized and promoted for profit-making purposes
- Not e.g. non-profit encyclopedias, scientific repositories or open source developers, online marketplaces or cloud storage

Digital Single Market Directive
Article 17

(1) Direct responsibility for communication to the public of the UUC, InfoSoc Dir

(2) Have secured license for OCSSP and users activities?

(2a) Best effort to secure license

(2b) Best effort to ensure unavailability

(2c) Acts expeditiously on notice to remove

(2d) Best effort to prevent future uploads

(3) Ineligible for ‘Safe-harbour’, E-commerce Dir Article 14(1)

(4) Obligated to

(4a) Effective complaint and redress

(4b) Inform users about allowed use

(4c) After request provide right holders adequate information on functioning of agreed practices

NOT LIABILITY

LIABILITY
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NOT LIABILITY

YES

(2a) Best effort to secure license  
(2b) Best effort to ensure unavailability  
(2c) Acts expeditiously on notice to remove  
(2d) Best effort to prevent future uploads

NO

LIABILITY

YES

(4a) Effective complaint and redress

NO

(4b) Inform users about allowed use

(4c) After request provide right holders adequate information on functioning of agreed practices
Paradigm Chance?

• First ever exception to safe harbour provisions in e-commerce directive: More to come? Specific rules for each type of online wrongdoing? A step in the direction of absolving safe harbour provision all together?

• Most detailed and complicated copyright provision ever: Will IP law provisions become increasingly detailed and difficult to comprehend and interpret due to online challenges?
Future of the DSM Directive Article 17

- Complexity
- Transposition
- Territoriality
- Scepticism amongst intermediaries
- Case law development
The Road Ahead – Opportunities and Challenges
IP in the Future

- E-commerce will continue to grow fast but national differences will remain.
- The IT infrastructure behind e-commerce is immensely complicated and ever evolving.
- The building blocks of IP infringing e-commerce include equally important: (1) Business model, (2) IT platform, (3) Supporting IT techniques, (4) Physical infrastructure and (5) Revenue sources.
- Safe harbour provisions for internet intermediaries have been essential for a well functioning e-commerce eco-system but the right balance between safe harbour and liability remains hard to find.
- Balancing IP protection and enforcement with fundamental right to data protection and privacy; freedom of expression and access to information; right to conduct a business; due process of law.
- Emerging technologies will impact and challenge IP: Rise of virtual, augmented and mixed reality, blockchain, artificial intelligence, quantum computing, 3D printing, etc.