



Liability of internet service providers Online Marketplaces

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Online Marketplaces



MARKTPLAATS.NL

amazon



Etsy

craigslist



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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Liability of online marketplaces

- IP infringing products offered on marketplace
- NL:
 - marketplace does not infringe IP right itself
 - no joint/secondary infringement
 - marketplace may be acting unlawful

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Exclusion of liability - marketplaces

- EU – Exclusion of liability for hosting providers
 - No knowledge of illegal activity
 - Removal of content / blocking of access after notice of illegal activity (Notice and TakeDown)
 - Art. 14 (1) E-Commerce Directive
- CJEU L'Oréal / eBay
 - Liability not excluded if provider plays an **active role**, allowing it to have knowledge or control of the data stored, by optimising the presentation of the offers or promoting them (para. 123).



Measures

- Regardless of exclusion of liability, courts can impose orders requiring provider to stop or prevent an infringement
 - Art. 14 (3) E-Commerce Directive
- Measures may also be required on the basis of:
 - Art. 8(3) Copyright Directive
 - Art. 11 IP Enforcement Directive



Limits to measures

- No general monitoring / active prevention
 - Art. 15 E-Commerce Directive
- Measures must be fair, effective, proportionate, dissuasive and not too complicated or costly or create barriers to legitimate trade.
 - Art. 3 IP Enforcement Directive



What measures?

- Removal
 - after court order or after notice if illegal nature of content is evident
 - Block user/advertiser
 - Provide identifying data
 - Filter?
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- CJEU L'Oréal / eBay (end and prevent)
 - NL: Court of Appeal Leeuwarden Stokke/Marktplaats (no filtering; no obligation to register advertisers)



Developments - DSM



- Proposal for Directive on Copyright in the Digital Single Market
- Includes new obligations for intermediaries
 - Art. 13 and recital 39
 - obligation for information society service providers who store and give access to large amounts of works uploaded by their users
 - to use effective content recognition technologies
 - to prevent availability of infringing material
- Applicable to online marketplaces? Appear to be intended for value gap re online content (YouTube, etc.); not counterfeit.
- Also: Filtering? Fair balance?

Thank you!

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