

Legal challenges for e-Commerce

Rima Guillen

Senior associate, MNKS

Luxembourg Internet Days

November 17th, 2014



Introduction



- No territorial attachment - what are the laws to be respected?
- The effect of “disintermediation” – no need for intermediaries.
- Security, reputation and clients’ confidence are the major concerns of e-commerce actors.
- E-Commerce itself is a great worldwide challenge for legislators and judges!

Agenda



- **Intellectual Property and Reputation**
- **Data protection and Privacy**
- **Online contracts and customers' confidence**



I- Intellectual property & Reputation



Managing well your IP – building your reputation (I)



Various IP assets

- Trademarks
- Domain names
- Patents
- Authors' rights, etc.

**If you don't
control your
brand online,
someone else
will!**

Measures of protection :

- Formal registration
- Confidentiality
- Coherent IP strategy

Are the logos/ slogans/domain names used adequately protected?

- Clearing/registering key trademarks
- Avoid cybersquatting
- Monitoring and enforcing your IP rights

Managing well your IP – building your reputation (II)



2 commandments:

- **Ensure that your company actually owns IP on its products/ services/websites, etc.**
 - *How?* Appropriate clauses in your agreements (with employees, third parties, services providers)

- **Ensure that you do not infringe IP rights of others – this might be costly for you!**
 - Ownership of content
 - Non violating content/links

A&M Records, Inc. v. Napster, Inc. : \$26 million

MGM Studios, Inc. v. Grokster, Ltd. : \$50 million to the music and recording industries

The status of hosting services provider



■ Legal definition:

- *a technical intermediary ...*
- *which has no control on the content*

**Criterion = mere data
storage service**

■ A limited liability regime:

- *The HSP does not have actual knowledge that the content stored on its website is illegal*
- **The HSP removes the content from the moment that it has an actual knowledge that the content is illegal**

■ No general obligation to monitor content



Status of the hosting services provider – are you in?



- **Google Adwords: the HSP status is given to Google** (*CA Paris, December, 11th 2013*)
 - *merely technical, automatic and passive activity of Google*
 - *the creation of the announcement within Google Adwords was the fact of the sole advertiser*

- **A first conviction of Facebook as a HSP** (*TGI Paris, April 13th, 2010*)
 - *Facebook was fined due to illegal content it hosted and did not take down as requested. The Bishop of Soissons had challenged the presence on the site of a picture of him, posted without his consent, on a page entitled “Running naked in a church pursuing the Bishop”.*

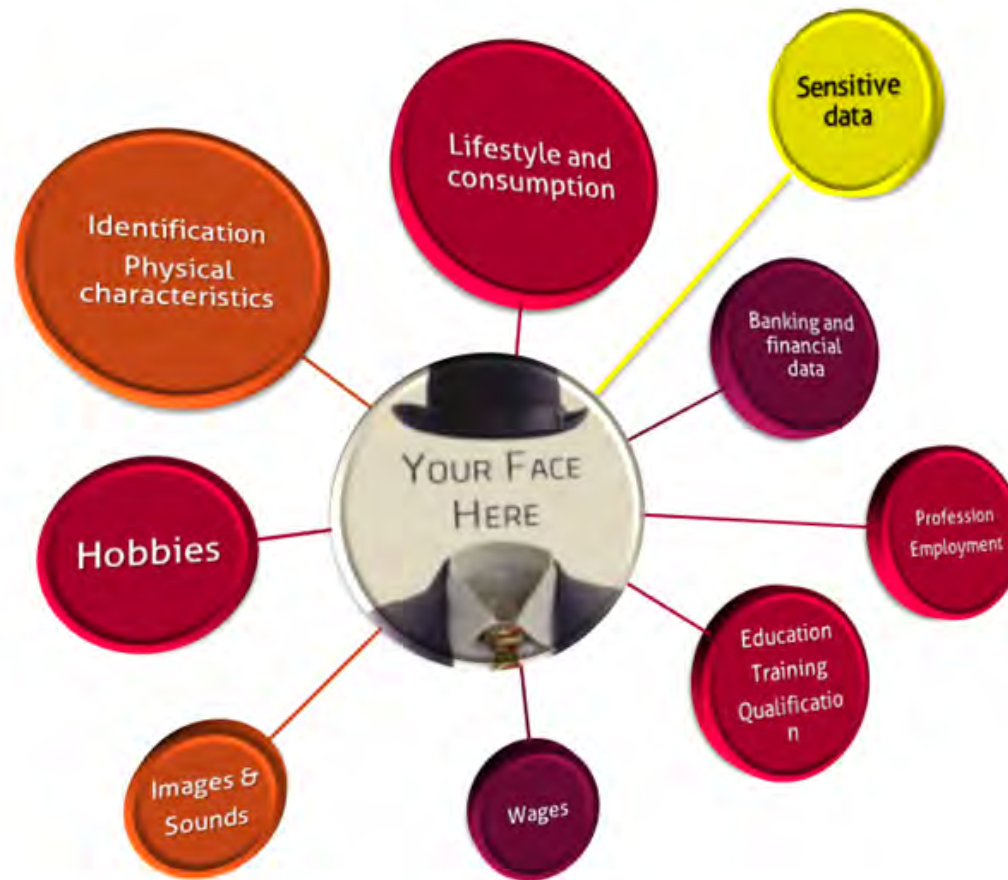
- **eBay is not a HSP** (*French C.Cass, May 3rd, 2012 – 3 rulings*)
 - *eBay is denied the status of HSP as it provides sellers with tools to help them sell their products*





II- Data protection & Privacy

Personal data – the major asset of E-commerce!



Value of your data:

- Total value of European consumers data : 315 billions in 2010, 1000 billions in 2020*
- Value per consumer : EUR 170 / 240 **

* Study of the Boston Consulting Group in 2011

** Study of Orange in 2014

Your role as data controller



■ Your relations with data subjects

- Transparent / comprehensive privacy policy
- Proper information of data subjects
- Rights of data subjects respected

■ Your relations with third parties

- Confidentiality clauses
- Security measures: protection against accidental, unlawful destruction, loss / alteration & unauthorized disclosure / access

Unified and increased sanctions – in the future



Administrative formalities – do not forget CNPD!

- Prior notification
- Prior authorization

Existing sanctions under Luxembourg law

- Imprisonment of up to 8 days; and/or
- Fine of up to EUR 125.000.

Draft regulation



- Increased sanctions - a fine of up to EUR 1.000.000 or 2% of the annual worldwide turnover (the European Parliament proposed up to 5% of the annual worldwide turnover).

The increased sanctions will put more pressure on businesses to comply!

Increased awareness towards data processing



*C-131/12, Google Spain and Google
(CJEU, May 13th, 2014)*

Facts:

In 2010 a Spanish citizen lodged a complaint against Spanish newspaper and against Google Spain and Google Inc. The complaint concerned the auction notice of the repossessed home available on Spanish newspaper in question and Google search results.

Ruling:

Search engines are controllers of personal data and individuals have the right to ask search engines to remove links with personal information about them, where the information is **inaccurate, inadequate, irrelevant** or **excessive** for the purpose of the processing.



facebook

Europe vs. Facebook

Facts:

Max Schrems (Austrian law student) launches global class action suit against Facebook, alleging a series of privacy violations, including

- The absence of effective consent to many types of data use
- Tracking of Internet users on external websites (e.g. through 'Like buttons')
- Unauthorized passing on of user data to external applications

Requesting 500 euros of damages per user.

Estimated as likely to be the largest class action privacy suit ever brought!



III- Online contracts and customers' confidence

Why you need a contract and what should it contain?

Why You need a written contract with your customer?

- To provide all mandatory information concerning online transaction
- To define the applicable law / jurisdiction
- To limit / define your responsibilities / liabilities

What shall it contain?

- Description of services
- Payment system
- Delivery information and cost
- Liability
- Amendment
- Acceptance mechanism



**Terms and conditions= Contract with
consumer!**

Acceptance of your Terms & Conditions



The burden of proof that mandatory information is provided to the consumer lies on YOU!

Be sure you have an appropriate acceptance mechanism.

- Tacit acceptance by simply providing the link – is it a sufficient proof?
- A checkbox
- Opt-in with a read through possibility



Thank you!



Rima Guillen

guillen@mnks.com

+352 26 48 42 35 56