

AIM MEMORANDUM

**CONSUMER BRANDS
FOR A TRUSTED
DIGITAL MARKET PLACE**

**> PRINCIPLES AND POLICY
RECOMMENDATIONS**

April 2015

AIM 
EUROPEAN
BRANDS
ASSOCIATION



I. Executive Summary

The European Parliament considers that “a deeper and more complete single market in the digital field could raise the long-run level of EU 28 GDP by at least 4.0 per cent - or around 520 billion euro at current prices”¹.

The European Commission has put the completion of the Digital Single Market (DSM) at the centre of its strategy to restore growth and jobs in Europe. The college of Commissioners agreed on three main areas of action:

- > Better access for consumers and businesses to digital goods and services;
- > Shaping the environment for digital networks and services to flourish;
- > Creating a European Digital Economy and Society with long-term growth potential.

This Memorandum sets out how consumer brands can help reach some of these objectives.

Brands are in a unique position to use the latest technologies and bring alive online the quality associated with branded consumer goods. They enable the essential trust that is required for the digital economy to thrive, simply because consumers feel more confident trading online when they recognize what they buy.

¹ *Mapping the Cost of Non-Europe, 2014 -19, European Parliamentary Research Service, March 2014*

Through offering innovative products, services and communication in the digital environment, brands are already a major digital stakeholder and content provider². This role played by the branded goods industry for innovation is essential not only for individual consumers but also for the broader economy: research shows³ that one euro invested in R&D in the brands industry creates twice as much added value as in the non-branded sector.



The e-commerce value chain is complex. In addition to brand manufacturers, other actors such as online service providers, resellers/retailers, payment providers, distributors and social media play important roles. Moreover, the rules governing the digital market place are not yet mature and need to be improved.

In this framework, the emergence of barriers can only be avoided if all members of the digital supply chain act responsibly and fairly; i.e. they take all reasonable and adequate measures to respect the wellbeing of others as they do offline.

The scale of the challenge facing the digital supply chain today becomes clear when one considers the widespread marketing of fake products and other misuse of trade marks taking place online. These practices undermine innovation, investment and job creation in Europe. This is in addition to many regulatory barriers to e-commerce identified by the European Commission in its 2012 Communication⁴.

In this Memorandum, AIM, the European Brands Association, calls on all actors, private and public, to assume their roles and responsibilities in creating a trustworthy and sustainable digital environment for the long term benefit of both consumers and businesses. We have adopted our own *principles for consumer brands* when doing business digitally (p. 8-10). This is our contribution to good practices for the digital market place. The principles cover topics such as business responsibility, safety, privacy and consumer access to redress as well as opportunities to use the digital world as a trustworthy marketplace.

² According to the website [Social Bakers](#), 25 brands, belonging to AIM's corporate members, cumulate more than 550.000.000 fans on Facebook (total amount of "likes"). In addition, videos posted on YouTube by 15 brands, belonging to AIM's corporate members, cumulate more than 2.200.000.000 views.

³ A virtuous cycle: Innovation, consumer, value, and communication – IMD and PIMS Associates (2000)

⁴ Communication « A coherent framework to build trust in the Digital single market for e-commerce and online services » of 11 January 2012

These principles are in line with or complementary to the new set of 'Consumer Engagement Principles' agreed by the Consumer Goods Forum in February 2015⁵. The principles of the CGF also aim to help build trust with consumers and shape the way manufacturers and retailers use consumer information that is collected digitally.

Finally, we make policy recommendations (p. 11-22) for some of the main areas of actions identified by the European Commission:

BETTER ACCESS FOR CONSUMERS AND BUSINESSES TO DIGITAL GOODS AND SERVICES

Our recommendations:

- > Adopt the measures identified in the Commission's e-commerce Communication in 2012;
- > Provide reliable consumer information online, by improving and managing product data online;
- > Pursue the development of a single source of concise and accurate product data, which consumers can trust, based on the GS1 Source standard;
- > Ensure that the information provided by comparison tools online is clear, transparent and impartial.

SHAPING THE ENVIRONMENT FOR DIGITAL NETWORKS AND SERVICES TO FLOURISH

Our recommendations:

- > Apply equivalent rules and regulatory principles online & offline taking into account the specificities of the online environment;
- > Provide guidance for a uniform approach of the principle of "duty of care" for intermediaries;
- > Enhance consumer protection against unfair commercial practices online, at EU level;
- > Clarify the scope of the "safe harbour" provided to online service providers, including the definition of "active" and "passive" role in the commercial transactions of third parties;
- > Clarify the scope of injunctions to include prevention of subsequent infringements;
- > Introduce EU wide harmonisation of compulsory notice-and-action procedures;
- > Recognize the need for brand owners to use targeted advertising online, while obtaining the adequate consent of Internet users and consumers;
- > Clarify and adapt the regulatory framework on e-privacy and data protection.

⁵ The Consumer Goods Forum ("the CGF") is a global, parity-based industry network that is driven by its members. It brings together the CEOs and senior management of some 400 manufacturers, retailers, service providers, and other stakeholders across 70 countries. [Link](#) to the "Consumer Engagement Principles".



I. Consumer brands in the digital world

Brands are in a unique position to use the latest technological advances, bringing alive online the quality associated with branded consumer goods. Through their innovative products, services and communications offered in the digital environment, brands are already a major digital stakeholder and digital content provider. Thus, they contribute to developing the single market in the digital field and boosting consumer trust when shopping online.

Since the early days of the internet, brands have consistently embraced the possibilities offered by this new technology to develop new and exciting ways of reaching and interacting with consumers.

The internet allows consumers to discover their favourite brands in a “brand new” way: brands are sold online, often through their own websites or approved third-party websites, communicating their individual heritage and style in more interactive ways and to a broader range of consumers than ever before. Nowadays, brands use social networks and offer to their consumers the opportunity to have one-to-one dialogue. Therefore, they develop closer relationships with consumers than ever before and are better aware of their wishes. This contributes to improving consumer trust when purchasing brands online.

Consumers also benefit from brand investment in digital business on another level. Indeed most online services are accessible free of charge because they are funded by advertising spend. A study shows that advertising finances a consumer surplus of some €100 billion annually⁶.

AIM shares the objective of the European institutions to further enhance those consumer benefits and the contribution of brands to the European digital economy. Therefore, we seek a secure and trusted digital market place, with high standards of business conduct and an appropriate regulatory framework.

In this spirit, AIM has developed this Memorandum for brands in the digital economy, which:

Lists principles that consumer brands support when doing business in the digital market place;

Identifies opportunities and challenges related to the current functioning of the digital single market in the main areas of action defined by the European Commission and;

Makes policy recommendations to create long term value.

Below are a range of real-life examples on how brands' relations with consumers have evolved.

EXAMPLE

To fit a new reality of its brands' presence on digital platforms and social media and make sure its message on responsible drinking is heard in new contexts, Pernod-Ricard defined **digital guidelines for Corporate Social Responsibility**. The group moderates conversations happening on social media sites, and makes sure its brand platforms display the company's '**responsible drinking**' message visibly combined with auto exclusion of people below legal drinking age.

For more information see: <http://pernod-ricard.com/80/csr>

⁶ Consumers driving the digital uptake – the economic value of online advertising-based services for consumers; IAB Europe – September 2010

EXAMPLE

LVMH-owned Benefitcosmetics.com **leverages social media to facilitate purchase decisions**. Realising that consumers do a lot of research online before buying beauty products and place great trust in what they learn from expert blogs and social media users, Benefit started engaging early on with these communities and giving their customers a forum to share their own recommendations and experiences with specific products. Benefit continues to focus on fostering dialogue about its products and was one of the first companies world-wide to integrate customer-submitted rating and reviews with its Facebook fan page.

EXAMPLE

Partnering with the UK's largest newspaper site GSK launched a new type of campaign to make its message on **preventive gum health** heard by consumers. Gum disease affects over 80% of the British population, but often people will seek out information when it's too late. By using digital media and linking its message more generally to lifestyle and beauty GSK managed to reach over 10m people and make them check their symptoms.

EXAMPLE

Building brand commitment through fan to fan interaction

In 2013, the LEGO Group launched www.ReBrick.com provide consumers all over the world with a quick overview and easy access to share their enthusiasm for LEGO brick creations. ReBrick is a free portal, set up to give everyone – fans and ordinary consumers alike an opportunity to set up links to content, on e.g. YouTube, Flickr or other websites. There is only one criterion: the subject must be the LEGO brick. Consumers are able to see, rate the quality of the creations and discuss the millions of articles, videos and images of inspiring creations and finally to share their creativity with friends and acquaintances via social network sites.

The website is intended to be a space for the fans to communicate with each other and the LEGO Group does not advertise on the site nor does it link to the online shop.

EXAMPLE

Use of social media for consumer education purposes

PepsiCo Romania, one of the biggest players in potato chips in Romania with the Lay's brand, realised that consumers had no understanding of how chips were being produced in Romania. The Lay's local team turned to social media to inform consumers that chips – and especially the Lay's brand – are made out of real potatoes, more than 80% grown in Romania, and the Lay's recipes have no artificial colours, preservatives or taste enhancers. During 2012, 12 bloggers were invited to witness the process of seeding, growing and harvesting the potatoes for Lay's chips, and then see the potatoes being turned into chips. The bloggers told the stories on their blogs, their Facebook and Twitter accounts. The project generated a lot of positive conversation in social media about the brand, created relevant and positive online content about it and addressed some myths around the product.

EXAMPLE

Brands contributing to a better oral health via digitally sharing and spreading knowledge amongst health professionals.

Procter & Gamble frequently work with leading scientific researchers, providing insights valuable to dental professionals. This is why it launched Dentalcare.com, an online resource for dental professionals. They can stay up to date with the latest research, news and events as well as Oral-B product innovations. It provides access to Oral-B's continuous professional development courses and interactive educational webinars. There are practical tips on working in a dental practice and access to a database with over 600 scientific articles. In addition, there are patient educational resources, including videos and leaflets for sharing with their patients.

The site has now served the needs of Dental Professionals for over 15 years around the world. Each month, around 50,000 dental professionals use the website. It demonstrates how Oral-B helps dental professionals motivate patients to take control of their oral health.



II. Brands' role in enabling a trusted digital environment - AIM principles

AIM believes that engaging in the digital market place is an opportunity for the branded goods industry to strengthen relations with consumers and offer them more innovative products and services. Our principles are in line with or complementary to the new set of 'Consumer Engagement Principles' agreed by the Consumer Goods Forum in February 2015. The principles of the CGF also aim to build trust with consumers and shape the way manufacturers and retailers use consumer information that is collected digitally⁷.

AIM supports the following principles for consumer brands in the digital economy.

1. CONSUMER BENEFITS

- > Brands are committed to delivering new consumer benefits through the use of digital technology.
- > Consumer benefits include value, quality, innovation, choice, convenience, transparency and social responsibility⁸.

⁷ The Consumer Goods Forum ("the CGF") is a global, parity-based industry network that is driven by its members. It brings together the CEOs and senior management of some 400 manufacturers, retailers, service providers, and other stakeholders across 70 countries. Link to the "Consumer Engagement Principles" ⁸ Principles 1, 2, 3 of the CGF on simple communications, value exchange and transparency correspond to this principle

2. HUMAN RIGHTS AND PRIVACY

- > Brands respect and value all human rights in the digital environment, such as the right of access to information and freedom of expression. Consequently, brands have in-house rules in place for their own social media channels to protect users against the promotion of racism, violence, pornography and hatred.
- > Brands are also committed to respect the privacy of consumers and protect their personal data⁹.

3. TRUST

- > Brands are committed to the pursuit of innovation in the digital market place that meets the evolving needs and expectations of consumers.
- > Brands will help counter activities such as identity theft or deceptive web sites, and support trust-enhancing rules and practices on fraud prevention and transparency in the origin of products and services¹⁰.

4. INNOVATION

- > Brands are also committed to the pursuit of innovation in the digital market place that meets the evolving needs and expectations of consumers;
- > Brands support and help create a digital environment that is responsive to the speed of change in the digital world.

5. FAIR COMPETITION

- > Brands seek to create an environment of fair and vigorous competition guaranteeing maximum value to consumers in the digital as well as the physical world;
- > Brands will behave fairly and strive to free the digital world from unfair or illicit practices.

6. GOVERNANCE

- > The digital world requires global, multi-stakeholder engagement and coordination to solve issues related to consumer trust and protection;
- > Brands are open to dialogue with all relevant stakeholders, including developing and signing up to co- and self-regulatory initiatives where appropriate.

7. SINGLE MARKET

- > Brands are strong supporters of the European Single Market, without barriers to legitimate cross-border e-commerce. A well-functioning Digital Single Market will benefit both consumers and the competitiveness of European businesses and economies.

⁹ The principles 4, 5 and 6 of the CGF correspond to this principle.

¹⁰ Principle 7 of the CGF corresponds to this principle.

8. SAFETY

- > Brands are committed, also in their digital business, to provide products and services that are safe for their intended use.

9. RESPONSIBILITY

- > Brands recognize their responsibility to take into account wider societal interests and to include in their sustainability policies and activities all relevant aspects of doing business digitally.

10. REDRESS

- > Brands support consumer access to online dispute resolution (ODR) mechanisms where relevant.



III. Consumer brands for a trusted digital market place – policy recommendations

At a debate organised by the European Internet Foundation, in January 2014, Andrus Ansip stated: *"As Vice-President in charge of the Digital Single Market, it is my responsibility to make sure that we create a (...) more trustworthy environment for our citizens and businesses.*

Safety and security in the online world are paramount.

Trust is a 'must' – on all levels:

- > Whether we are fighting against cybercrime or extremist websites;*
- > Working to prevent the misuse of consumers' personal data;*
- > Or strengthening the rights of online shoppers across the European Union".*

Brand manufacturers have embraced the digital revolution. They support the will to shape the new business environment in a way that boosts consumer trust. Therefore, they strive to preserve the distinctive features of their brands, which should remain beacons of trust for consumers when shopping online as well as offline.

¹¹ [Link](#) to the speech: *A safe and secure connected digital space for Europe, by Vice-President Ansip, 20 January 2015*

In this context, brand manufacturers are faced with a number of opportunities and risks relating to the framework in which they do business. In this section, we describe opportunities and challenges related to the digital single market in the main areas of action defined by the European Commission and we make policy recommendations.

BETTER ACCESS FOR CONSUMERS AND BUSINESSES TO DIGITAL GOODS AND SERVICES

Consumer brands manufacturers comply with EU legislation and European Commission's guidelines, which regulate the European digital market place and aim to avoid barriers to cross border e-commerce. However, paradoxically, companies developing their online business cross-border in the European Union encounter many other barriers resulting from different regulatory frameworks. Rules are either not harmonised or harmonised but implemented differently in the member states.

In 2012, the European Commission published the Communication "*A coherent framework to build trust in the Digital single market for e-commerce and online services*". It identified a broad range of barriers to cross-border e-commerce in Europe. AIM agreed with the need to take EU policy initiatives to improve the situation. Therefore, we welcomed the initiatives and legislative proposals of the European Commission to harmonise e-signature in the EU, harmonise payment systems, improve cross-border parcel delivery, implement consumer rights in the online environment and create alternative dispute settlement schemes.

- > Adopting the measures identified in the Commission's e-commerce communication

Progress can only be achieved by finding difficult compromises among member states and with the European Parliament on the broad range of issues and proposals identified by the Commission. Such compromises need to be found urgently, also taking into consideration the potential administrative burdens on companies and the flexibility needed to safeguard the on-going innovation in the digital market place. Many policy makers predict that the internet economy will be a primary driver of growth but they sometimes underestimate the dampening effect of an overly complex regulatory framework.

- > Providing reliable consumer information online - by improving and managing product data online

Consumer brands manufacturers strive to ensure that all consumers have easy access to comprehensive information on products and services in the most efficient way to meet their individual needs. In 2012, the European Consumer Agenda recognized that

in today's fast changing world, consumers have to deal with complex information. In addition, consumers sometimes face an information overload, which complicates decision-making. Therefore, they search for "shortcuts" to help them compare various offers and find the best deal.

Brand manufacturers are convinced that the internet and new technologies could help solve the dichotomy information overload/knowledge deficit. The provision of non-essential, non-commercial information online could augment essential information provided on-pack, thereby reducing consumer confusion.

However, the internet and the many platforms, tools and services developed on it can also result in the generation of inaccurate or confusing information about branded products, which mislead consumers.

It is important that consumers can rely on accurate product information, such as its composition or instructions for use. Brand manufacturers are committed to guarantee the existence of a trusted source of such product data.

- > Pursuing the development of a single source of concise and accurate product data, which consumers can trust, based on the GS1 Source standard

An industry-wide initiative is currently underway. It is based on a new standard called "GS1 Source", developed by the Brussels-based international standards body GS1 ([link](#) to the new standard). This project aims to provide digital product information that consumers can trust.

Research showed that 20% of available digital product information online is wrong¹². In addition, a GS1 survey in 2012 showed that 73% of consumers consider it important that product information comes from a trusted source¹³. Brands and retailers who own high quality digital information about their products are willing to share it. So GS1 Source was designed as a trusted source of data network to support the communication of authentic product data provided by brand owners to consumers/shoppers, retailers and internet application providers using internet and mobile devices.

The main benefits expected from the initiative are the following:

- Consumers will be able to trust product data online
- Help brand owners to communicate with consumers in a digital, multichannel world by providing a single point of contact for companies

¹² Source: *Mobile savvy shopper report, the impact of poor third-party app data on shopper behaviour*, GS1 UK and Cranfield School of Management, January 2011

¹³ Consumer survey undertaken by GS1 - 7 countries, 1000 representative sample in each country - "what do consumers want?"

- to share their product information in digital format
- Help e-tailers and application providers to give consumers an optimal experience by ensuring that product data is accurate and complete
- > Ensuring that the information provided by comparison tools online is clear, transparent and impartial

In 2012, the European Consumer Agenda highlighted the wide use of comparison tools as part of the digital revolution.

Brand manufacturers engaged early with the European Commission to ensure that comparison tools do not mislead consumers or create confusion about branded products. Therefore, AIM welcomed the creation of a multi-stakeholder dialogue on the issue and supported the report presented at the Consumer Summit in March 2013¹⁴. The report makes recommendations to provide consumers with transparent and reliable information. For example, it points out that comparison tools should be transparent about their methodologies and business models. Comparison tools should also be impartial.

Since then, the European Commission has commissioned a study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes. AIM participated in several meetings of the multi-stakeholder dialogue to discuss the study and the best ways to implement its recommendations. AIM trusts that the new guidelines of the unfair commercial practices directive to be published in summer 2015 will address the concerns raised by non-transparent and biased comparison tools.

EXAMPLE

Providing consumers with a mobile-friendly gateway to useful, fact-based information... beyond the label.

In 2013 Nestlé launched a new global initiative encouraging consumers to go 'Beyond The Label' by scanning a QR code which takes them to a mobile product website at the point of purchase or consumption. Through its brands Nestlé wants to enable consumers to make informed choices by providing transparency of the nutritional profile and environmental and social impacts of its products. This also helps building brand trust as consumers will be able to find out more about what the products are made of, how they fit into a balanced diet and lifestyle, how they were produced, and how Nestlé acts and promotes sustainable sourcing and supplies. Nestlé is rolling out the use of QR codes across its product portfolio in both emerging and developed markets to help people discover more about the products they purchase and consume.

¹⁴ Comparison tools, report from the Multi-Stakeholder dialogue, "Providing consumers with transparent and reliable information", 18-19 March 2013

SHAPING THE ENVIRONMENT FOR DIGITAL NETWORKS AND SERVICES TO FLOURISH

The e-commerce value chain is complex, not least because of the many economic actors involved: brand manufacturers, online service providers, resellers/retailers, payment providers, distributors etc. In addition, the online environment has empowered consumers/users making of them the new “superpower”¹⁵ and has blurred the boundaries between users/consumers and sellers/providers.

Like in the offline environment, opportunities and responsibilities must be shared among operators along the digital value chain, taking into account the nature of each operator’s business model. However, the development of e-commerce in Europe is currently hindered by a lack of clear responsibilities.

Therefore, consumers have legitimate concerns when shopping online: data protection, fake reviews or misleading information on websites, counterfeit goods and uncertain enforcement of consumer rights. They can only be answered if all actors in the digital value chain act responsibly and fairly.

AIM shares the view that the biggest barrier to the development of e-commerce today is that consumers and businesses do not have sufficient legal certainty and trust when operating online. If legal certainty and consumer trust can be increased, e-commerce, and particularly cross-border e-commerce, would thrive in Europe.

In April 2014, the European Consumer Summit on “*Boosting consumer trust in the digital market place*” dealt specifically with this issue. During the plenary, the rapporteur of the seminar on “*trust online*” recommended explicitly to “...*considering the role and liability of intermediaries*”¹⁶.

One source for the lack of consumer trust can be found in illicit practices that are made possible by new functionalities developed by certain operators, who neglect their responsibilities to consumers and other economic entities.

This is the case when online auction sites offer counterfeit goods for sale or when trade marks are used in paid referencing systems without the consent of the trade mark owner, creating confusion (see examples on the following pages). AIM considers this issue particularly worrying. In March 2014, the European Council reaffirmed the importance of intellectual property rights (IPR) and highlighted the need to fight counterfeiting¹⁷.

¹⁵ Presentation of Werner Stengg, Head of Unit e-commerce, DG Markt, during the 2014 Consumer Summit (<http://www.european-consumer-summit.eu/2014/presentations.html>).

¹⁶ Link to the presentation on “trust online” during the Consumer Summit 2014: http://www.european-consumer-summit.eu:80/2014/presentations/DAY_2/SEMINAR_REPORTS/4-Trust_Online.ppt

¹⁷ European Council conclusions 20-21.03.2014, p.5 and p.6

A recent public study has estimated that IPR-intensive sectors account for around 39% of EU GDP and, taking indirect jobs into account, up to 35 % of all jobs¹⁸. The Memorandum of Understanding¹⁹ on the sale of counterfeit goods via the Internet, between right holders and Internet Platforms and facilitated by the European Commission, has started to lay the groundwork for practical voluntary cooperation between these actors but there is still a long way to go.

While more and more actors are committed to solving this issue, the level of counterfeit goods remains alarming. At EU level, statistics on customs detentions for suspected violations of IPR at its external border recorded 86,854 cases in 2013²⁰. Around 70% of these cases related to postal and courier traffic, a reflection of the growth of e-commerce. One Member State has estimated that 81% of IP infringing products are associated with organised crime²¹.

These problems are made worse when online service providers, blogs and social media do not take adequate precautions to prevent illicit online activities.

One of the main goals of the E-Commerce Directive is to harmonise and coordinate national regulatory measures adopted in relation to the activity of online service providers within the EU. However, as the Commission acknowledged in the 2012 Commission Staff Working Document on Online Services, the E-Commerce Directive was followed by the adoption of a myriad of national regulations affecting the operation of online services (including their own legal specificities)²². This has led to national courts delivering divergent and even contradictory rulings in cases concerning equivalent situations, bringing about legal uncertainty to the EU-wide operation of online services²³. The rules concerning the duties and liability of online service providers regarding the information hosted by them have not been an exception to this general trend.

To address the challenges linked to irresponsible behaviour by some actors in the digital supply chain described above, AIM makes the following policy recommendations:

- > Applying equivalent rules and regulatory principles online & offline taking into consideration the specificities of the online environment

As an overarching guiding principle, we believe there is a need to adapt the regulatory framework so that the offline and online worlds receive an equivalent treatment and protection, for consumers as well as intellectual property rights.

¹⁸ *Intellectual Property Rights intensive industries: contribution to economic performance and employment in Europe*. See: oami.europa.eu.

¹⁹ http://ec.europa.eu/internal_market/iprenforcement/memoranda/counterfeiting/index_en.htm

²⁰ See: http://europa.eu/rapid/press-release_IP-14-890_en.htm?locale=en Former Commissioner Algirdas Šemeta, in charge of Taxation, Customs, Anti-fraud and Audit declared: "Innovation and creativity is where Europe creates value. Protecting Intellectual Property Rights is not only important for health and safety of European consumers but also supports growth and job creation in the EU."

²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246390/horr73.pdf Cybercrime is excluded from the estimate.

²² See 2012 Commission Staff Working Document on Online Services, at Section 3.1.1 and 3.2.1

²³ See 2012 Commission Staff Working Document on Online Services, at Section 3.4.2.1

EXAMPLE

Online auction sites offering counterfeit goods. The online sale of counterfeit goods is one of the most crucial issues faced by brand owners when it comes to e-commerce. Counterfeiting has a dramatic and damaging effect on consumers and businesses and its production processes do not comply with social, ethical or environmental standards. While the internet is not in itself the source of counterfeiting, it has nevertheless become an important vehicle for the sale of fake goods worldwide. Its global reach and accessibility, the possibility for traders to remain anonymous and for offers to be placed and withdrawn instantly has made it one of the most attractive channels for the sale of counterfeit goods, in particular through online auction sites without any control.

EXAMPLE

Trade marks used in paid referencing systems without the consent of the trade mark owner. A striking example is the active sale by search engines of trade marks as ad triggering keywords to third-party advertisers without the consent of the trade mark owner and . Companies invest a great deal in developing their products and promoting their trade marks and it is legitimate that they try to protect them from abuses. In the offline environment, it is well established that a company can prevent its trade marks from being used by a competitor to boost its own sales. However, this is what is happening with online paid referencing systems, which allow the use by any third party advertiser of a registered trade mark without the consent of the trade mark's owner in order to generate sponsored links and take advantage of them to attract new clients. This compromises two essential functions of trade marks, as a guarantee to consumers concerning the origin of goods and services, and as a means of preventing companies from taking unfair advantage of the good reputation of others.

EXAMPLE

In August 2013, the toy manufacturer LEGO became aware of yet another case of **unauthorized commercial use of the LEGO trade mark** and design, a “LEGO Brick Speaker” shaped as a LEGO brick offered for sale on an auction website. The sales offer was detected in the course of LEGO’s Internet monitoring and enforcement programme. A complaint based on trade mark infringement was filed via the complaint procedure on the website as would usually be available on larger e-commerce websites. Such procedures often work relatively well in a clear-cut cases resulting in infringing sales offers being removed from the site. But very often it is a dilemma that it is not possible to get data from the website operator about the specific seller of the infringing product as direct contact to the seller is desirable in order to avoid future sales of the product in question.

We understand that regulating the always-evolving online environment is complex. In this context, some consider that a rule-free internet is the only way to promote innovation and ensure consumer benefit. However, Per Strömbäck, founder of Netopia, Forum for the Digital society recently questioned the assumption that any attempt to influence technology or regulate the internet would be both misguided and dangerous for freedom.

Mr. Strömbäck also questions a certain notion of “free” in a way which illustrates well the objective of AIM’s recommendation:

“Here is an old joke by Richard Stallman, one of the pioneers of Silicon Valley: “Free as in Speech or as in Beer?”. Of course, free speech is a human right, free beer not so. Freedom of speech is not the freedom to distribute somebody else’s work to a global audience without permission. Freedom of speech is not the freedom to take anything one finds online without consequence. Quite the opposite, it is an abuse of free speech. Free beer, dressed up as free speech.”²⁴

- > Providing guidance for a unitary approach of the principle of “duty of care” for intermediaries

In the preamble of the E-Commerce Directive, Recital 40 indicates that online service providers have a “*duty to act, under certain circumstances, with a view to preventing or stopping illegal activities*”. Moreover, Recital 48 declares that Member States may require online service providers to apply “*duties of care*” that can reasonably be expected from them in order to detect and prevent certain types of illegal activities. The lack of a uniform interpretation of the concept of “*duty of care*” as well as the

²⁴ Per Strömbäck, Netopia, seminar on digital policy and intellectual property in the House of Commons, in London, 17 June 2014.

potential national fragmentation of its application can be particularly burdensome once applied to the e-commerce environment, which is cross-border by nature. Last but not least, the interaction of the “duty of care” with the concept of “actual knowledge” or “awareness” (Article 14) and the absence of a “general obligation to monitor” (Article 15) is far from straightforward.

Therefore, AIM considers that the European Commission should provide further guidance and clarification on a harmonised definition and application of the “duty of care”. A uniform and EU-wide principle of “duty of care” based on proportionality should as a minimum apply to online service providers as regards trademark infringements which are “manifestly illegal”²⁵. Indeed, trademark infringements tend to occur in the context of specific online services (ad word referencing services, or online market places) on which a “duty of care” may be presumed due to their specific commercial activity and function²⁶.

As described above, introducing a “duty of care” for online service providers, especially e-commerce platforms, social networks and search engines providing ad word referencing services, would encourage all players involved in the digital value chain to take reasonable and proportionate measures to protect others from damage on their services.

For example, such a duty would require an online service provider to take precautions such as securing the identity of their commercial customers. Online service providers should also apply measures in order to detect and block posts or keywords that contain words, which usually indicate that the associated products are not original goods.

On 1st July 2014, the European Commission published a new EU action plan: “*towards a renewed consensus on the enforcement of IPR*”. AIM was pleased to note that its action point 2 seems to match the spirit of our recommendation. Indeed, the Commission tries to develop an EU due-diligence scheme to apply due diligence throughout supply chains as a means to prevent commercial scale IPR infringements. We hope that the new European Commission will take this action on board as a priority and that it will be followed by appropriate initiatives.

> Enhancing consumer protection against unfair commercial practices online, at EU level

²⁵ See 2012 Commission staff working document on Online Services at Sections 3.4.1 and 3.4.3.1. In Germany, the Federal Court has established that certain trade mark infringements may be manifestly illicit insofar they reflect situations that have made the object of previous rulings (e.g., counterfeit goods). In France, the sale of IP protected goods at abnormal low prices was also found to constitute a “manifest” infringement

²⁶ See national case law having reached similar conclusions, e.g., in Germany, *Internetversteigerung I* and *Internetversteigerung II*, regarding online marketplaces

The [Directive on Unfair Commercial Practices](#) was adopted in 2005 to boost consumer confidence and make it easier for businesses to carry out cross border trading. It has, however, emerged that further enforcement efforts should be made to guarantee a high level of consumer protection, in a national context but particularly at cross-border level.

AIM considers that the protection of consumers against unfair commercial practices online should be strengthened. The reviewed guidelines on the unfair commercial practices directive to be published in 2015 should address specific issues, such as misleading information or fake reviews published by online comparison tools. In addition, AIM supports the 2014 consumer rights awareness campaign of the European Commission to improve the situation on the market, online and offline.

- > Clarifying the scope of the “safe harbour” provided to online service providers through appropriate measures, including the definition of “active” and “passive” roles in the commercial transactions of third parties

The liability exemption for passive intermediaries was created to protect pure data transmitters from third party lawsuits. As established by the European Court of Justice and the E-Commerce Directive, only transmission and storage operations of a mere technical, automatic and passive nature are intended to be covered by it.

However, the implementation and application of the “safe harbour” provision has led to contradictory interpretations. In some instances, considering the text of the national transposition, it is difficult to imagine how the case law of the European Court of Justice can apply correctly²⁷. This situation has been abused and is currently used to avoid business responsibilities on the internet.

There is therefore a need for clarification and realignment with the original intention of what constitutes a truly passive role. This would exclude situations where, for instance, an online service provider influences or determines the drafting of commercial messages or the selection of keywords, or engages contractually to supervise the information hosted by it.

- > Clarifying the scope of injunctions to include prevention of subsequent infringements.

Injunctions are important tools for brand owners in the battle against counterfeiting and other illicit behaviour. Such court orders allow brand manufacturers to request an online service provider to stop an infringement within its control. Clarifying that the scope of these court orders also covers similar subsequent infringements would

²⁷ See, for example, Articles 16 and 17 of the Spanish LSSI ([link](#)) transposing article 14 of the E-commerce Directive according to which “actual knowledge” may only be obtained through “effective knowledge-based means”, thereby excluding potentially the case law of the European Court of Justice on “active role”. Also see Case C-237/08 Google v. LVMH [2010] ECR I-02417; and Case C-324/09 L’Oréal v eBay [2011] ECR p. 0000. See further cases at national level involving eBay’s activity (e.g., in France, Paris Civil Court, Olivier M. v. Google, Paris Commercial Code, Christian Dior Couture v. eBay, and Paris Civil Court, L’Oréal v. eBay).

ensure the sharing of responsibilities more evenly along the digital value chain. For example, an injunction against subsequent infringements would not only oblige an e-commerce platform to take down the offer of a counterfeit product, but also not to allow the same seller to re-register to the e-commerce platform to continue its sales of illicit products.

- > Introducing EU-wide harmonisation of compulsory notice-and-action procedures.

Currently, internet platforms and right holders deal with a plethora of voluntary notice-and-action systems, all of which vary from platform to platform. Harmonisation would create legal certainty and clarify the roles and responsibilities of all actors involved. In its working programme the European Commission has stated that it will take an initiative on notice and takedown procedures²⁸. According to the document, the main policy objectives are “...contribute to a good functioning of Digital Single Market, contribute to combating illegality on the internet, ensure the transparency, effectiveness, proportionality and compliance with fundamental rights of notice and takedown procedures, ensure a balanced and workable approach towards NTD procedures, with focus on fundamental rights and the impact for innovation, growth”. AIM considers that these objectives are still valid and encourage the new Commission to move forward on this issue.

- > Clarifying and adapting the regulatory framework on e-privacy and data protection;
- > Recognizing the needs for brand owners to use targeted advertising online, while obtaining the adequate consent of Internet users and consumers.

The Commission’s Communication “*A coherent framework to build trust in the Digital single market for e-commerce and online services*” refers to a particularly damaging example of legal disparity for companies who want to develop their digital business on a European scale: the European rules on data privacy that are of high relevance for e-commerce and the many new ways of communicating with consumers, not least in relation to online advertising.

The EU e-privacy directive was revised in 2009 to address privacy concerns and harmonise rules on obtaining user consent when placing “cookies” on computers, for instance for “online behavioural advertising” (OBA). Unfortunately, essential elements of the e-privacy directive, among them the consent rules, are interpreted differently by EU member states, creating legal uncertainty.

²⁸ Annex to the Commission work programme 2012:
http://ec.europa.eu/atwork/pdf/cwp2012_annex_en.pdf

The Commission's legislative proposals on data protection from January 2012 also affect legal obligations for handling personal data as part of online advertising and selling, as they would oblige companies to obtain individuals' explicit consent for all categories of information before processing their data.

As the Commission's proposals stand, they could undermine the business models that drive the digital economy (advertising-funded free internet services). Of particular concern are (1) the new and broader definitions of "Personal Data" whereby sensitive and non-sensitive data are subject to many of the same (strict) protections and (2) the new requirement for a single form of explicit consent as a legal basis for processing all forms of personal data.

It will be essential to find workable definitions of "consent" and "personal data"/"sensitive data" that both truly protect consumers' right to privacy and foster the long term development of the digital market place to meet the needs of both the economy as a whole and the demands and expectations of individual consumers.



V. CONCLUSIONS

The digital market place is developing with exceptional speed, helped along by fast technological advances and an ever-increasing consumer appetite for new digital services and products.

Branded good manufacturers have embraced and help shape the new business environment, and are major contributors to the innovation and value-creation that is taking place in the digital environment. As recognised by the European Commission, Europe's economy relies on strong brands. Allowing them to make full use of their opportunities in the digital marketplace is important for Europe's future growth and competitiveness.