



WALPOLE SUBMISSION

To the European Commission Public Consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)

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4 November 2010

EU Registration Number: 75067822295-13

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Introduction

Walpole is the not-for-profit organisation that furthers the interests of the British luxury industry by harnessing and sharing the collective knowledge, experience and resources of the membership.

Walpole is part of the European Cultural and Creative Industries Alliance which is composed of the four major European luxury goods and creative industries associations, Altagamma (Italy), Comité Colbert (France), the Circulo Español del Lujo (Spain) and Walpole British Luxury (UK). The European luxury sector is a key driver of sustainable growth and is of particular significance to Europe by contributing to its overall economic health, competitiveness, creativity, innovation and employment. The industry is responsible for the employment of 800,000 people in Europe and has sales of approximately 170 billion euros. We support the Commission's open consultation and welcome the recognition of the importance of electronic commerce for Europe's economic and competitive growth.

The European Commission wishes to study in detail the various reasons for the limited takeoff of electronic commerce, as stated in the Retail Market Monitoring Report "Towards more efficient and fairer retail services in the internal market for 2020" and evaluate the implementation of the Directive, in accordance with its Article 21, as announced in the Communication "A Digital Agenda for Europe". For this purpose, Commission services wish to consult interested parties directly and receive their reaction and experience on a number of subjects.

Electronic commerce constitutes an important means to promote cross-border trade, improving the accessibility of Europe's population to more varied products, to more qualitative products, and exerting greater price competition in the on-line and off-line world. However, 10 years after the adoption of the "directive concerning certain legal aspects of information society services and, in particular, electronic commerce" the so called Electronic Commerce Directive, the development of retail electronic commerce remains limited to less than 2% of European total retail trade. The "Electronic Commerce" Directive aims to remove barriers to the establishment of providers of information society services and to the cross-border provision of on-line services in the internal market, therefore giving both to businesses and citizens legal certainty.

Executive summary

To respond fully to the questions as set in the consultation document, Walpole has consulted its member companies and the response below includes the ideas and examples of British luxury brands and the Walpole Board of Directors. We ask the Commissioner to note that we have answered the questions where we believe that we have specific and useful insight based on our experience and remit.

The luxury goods industry is of major strategic importance to the European economy. The industry is a flagship for European originality, creativity, innovation and quality that is responsible for the employment of around 800,000 people in Europe and has sales of approximately €170 billion worldwide. Its products are sold under prestigious brands with an aura of desirable exclusivity, superior quality and high value, including the best of European craftsmanship and heritage.

Here in the UK, the luxury industry is an important contributor to our economy, providing jobs, training and apprenticeships, supporting traditional craft skills and new technologies as well as supporting the global perception of Britain and particularly London as a creative and design capital. Luxury brands and business have been particularly important to our economy during the economic downturn as international customers have sought to take advantage of the exchange rates and purchase luxury items.

In the UK Luxury businesses are very engaged online. A recent study by Ledbury of 60 CEOs for Walpole found that online is becoming an increasingly important sales channel for luxury brands with 56% of survey participants increasing their online investment last year. At the same time Luxury brands are also keen to develop personal relationships with their customers and 40% of industry respondents said they would be relying more on private events, parties & previews this year.

Such innovation on and offline underpins the future viability, creativity and innovation of the Luxury sector – securing the jobs and heritage associated with this crucial cultural industry.

Members of Walpole recognize the potential of e-commerce to enhance their business through the more efficient management of relationships both with other businesses and with the consumer. At the same time there are a number of barriers that hamper the growth of e-commerce, however they also recognize that this is a two-sided coin presenting both opportunities and risks.

The development of e-commerce in the EU is currently hindered by a lack of harmonization and clarity within the EU with respect to the responsibilities of online operators along the digital value chain.

Members of Walpole have raised concerns over the level of uncertainty within the current Directive regarding the principles for definition of internet services covered by the Safe Harbour Provision. These concerns reflect the significant innovation that continues to take place since the current Directive was drafted in the late 1990s. Clarification of these principles along with those

for the definition of the levels of liability of service providers will enable our members to more effectively and efficiently select the most appropriate methods for the rectification of intellectual property violations.

Like in the offline environment, opportunities and responsibilities must be shared among operators along the Digital value chain considering the economic and business realities of each operator's business model. This is crucial so that certainty and consumer trust can be increased in order for e-commerce to thrive in Europe.

This is not the case today and the lack of certainty and clarity for both consumers and businesses operating online is the biggest obstacle to e-commerce growth.

In order to ensure that consumers and the luxury industry fully benefit from the potential of e-commerce, action by industry can also be supported by government at national and EU level to:

- 1) Improve consumer confidence by:
 - Clarifying – without reopening - the liability provisions of the E-commerce Directive
 - Streamlining the process of removing counterfeiters and unauthorized dealers from ecommerce platforms including through the introduction of harmonised notice and take down systems.
 - Providing users and ecommerce sites with tools to authenticate authorised dealers on the internet
 - Educating customers about the dangers of purchasing counterfeits.
- 2) Ensure that the current EU selective distribution rules are implemented so that:
 - customers receive the luxury experience that they expect both offline and online.
 - the significant investments made in brand value by manufacturers and authorised dealers are safeguarded
- 3) Encourage rapid adoption and implementation of a streamlined EU Patent System.
- 4) Clarify the principles of both Safe Harbour Provision and also Service Provider liabilities.
- 5) Full harmonization of consumer law throughout the EU Member States
- 6) Harmonization of VAT reporting systems
- 7) Implement a Notice and Takedown regime for trademarks
- 8) Encourage investment in broadband capacity.

Walpole

The UK's association of luxury businesses and cultural members

Walpole is the not-for-profit organisation that furthers the interests of the British luxury industry by harnessing and sharing the collective knowledge experience and resources of the membership. Walpole's unique membership of over 160 of Britain's most prestigious companies includes haute couture, jewellery and watches to leather goods, apparel, tableware, accessories, fine fragrances, hotels, luxury publishing and many other luxury products and services. Members include Asprey, Alfred Dunhill, Burberry, Thomas Pink, Christie's, DAKS, the Economist, Financial Times, Gleneagles, Goodwood, Harrods, The Glenmorangie Company, Jaguar, Jimmy Choo, Orient Express, Purdey, The Savoy, Royal Doulton, Sotheby's. In addition Walpole works in partnership with world famous cultural institutions such as the Sadler's Wells, Somerset House, BAFTA and Victoria & Albert Museum to name a few and Global Corporate Partners such as Barclays Wealth, Davenport Lyons and McKinsey & Co.

Walpole's remit covers a range of activities including cross-industry networking, promotion, business development, political engagement, thought leadership, mentoring the up and coming Brands of Tomorrow and nurturing the smaller crafts industries.

In particular Walpole would like to draw the Commissioner's attention to several aspects of our work and the British luxury goods industry that are of special relevance to this Consultation.

Digital Agenda

Walpole has been an active thought leader in the online agenda since 2005, realising the opportunities, challenges and the necessity to embrace online presence. Pioneering work in the digital agenda has included seminars, workshops, toolkits, research and awards which have supported industry adoption and development in the digital space.

In particular Walpole stages an annual Luxury eBusiness Forum which brings together leading experts and practitioners to share their insights on the latest developments in the digital sphere, reviewing best practise in ecommerce, mobile, online marketing and social networking for luxury brands. Past speakers have included representatives from Louis Vuitton, Net-A-Porter, Facebook, CondeNast, and Google.

Research in the area has included a global luxury study by Walpole with Forrester Research to understand industry adoption of online and digital technologies (2008) and most recently the launch of the first UK Luxury Benchmark Study by Walpole in conjunction with Ledbury Research. The study provides valuable insight into the impact of the recession, how businesses and customers have been effected and expectations for the future. Notably all respondents recognised the value and growth potential of the online channels.

From the initial slow start luxury brands are rapidly adopting online strategies, interactive communication channels, digital marketing techniques and importantly ecommerce. The industry here in the UK has many inspirational and successful stories of both established and new businesses taking advantage of the dynamic platforms offered by the Internet. For example, Net-

A-Porter revolutionised retailing, taking many creative brands into the then uncharted waters of ecommerce. Mulberry's ecommerce and web presence is used as a pioneering and results driven example of innovation online. Smaller brands such as Astley Clarke have established distribution of their products initially through online channels, developing their physical stores once the brand is established. Burberry's decision to show their A/W10 collections using the latest 3D technology was an imaginative use of new technology enabling an improved experience for viewers and customers and extended the awareness to audiences around the world. Customers were also able to purchase the goods during the show, providing a seamless customer experience.

Mentorship

The British luxury industry has a strong legacy of supporting skills and emerging company brands – Walpole has played an active role in fostering this spirit, providing opportunities and practical support through two mentorship programmes.

We would like to draw the Commissioner's attention to The Brands of Tomorrow and CRAFTED mentoring programmes which support entrepreneurs and craftsmen through one to one coaching and a series of bespoke workshops. In the last four years Walpole has mentored over 50 companies and individuals in these two programmes which are self funded by Walpole and supported more recently by sponsors. Both programmes provide advice to these young businesses on establishing online presence and ecommerce.

Crafted

The decline of traditional craft skills and craftsmanship is of serious concern, especially to Walpole, given that so many luxury goods brands rely heavily on such skills and mastery. Building on the pilot programme with the Prince's Trust in 2007, CRAFTED was launched in September 2009. The programme provides one-to-one coaching, mentorship and a series of educational workshops to 12 individuals and businesses including cabinet makers, milliners, shoe makers, textile designers and producers, jewellers, ceramics designers and producers, leatherworkers, silverware designers and tailors.

The mission of Walpole's CRAFTED programme, run in association with Arts & Business, is to foster a sense of entrepreneurialism amongst those who have chosen to develop craft businesses and give them a set of unique opportunities that will aide them to grow and develop beyond the traditional owner-maker scope that many businesses remain stuck in. Mentors from companies such Traditional Arts, Soane, Gieves & Hawkes and Ettinger all give their time and support free of charge. This practical and commercial expertise ensures the survival of traditional craft skills.

Walpole Brands of Tomorrow

Launched in 2007, the bespoke mentorship and coaching programme helps aspiring British luxury brands of the future to fulfill their potential and become global leaders in their field. The programme takes selected companies through a cycle of quarterly educational workshops on areas such as business planning, ecommerce, marketing, distribution and internationalization and one-to-one mentorship meetings with some of the UK's most experienced luxury entrepreneurs. Mentors include CEOs from companies such as Annoushka; Smythson; Liberty, McKinsey & Co and Thomas Pink who all give their time to mentor the successful candidates in every aspect of running a luxury brand, from branding and marketing to IP protection and distribution and team management. Brands of Tomorrow include; Shaun Leane, Astley Clarke, Miller Harris, Bremont Watch Company and Lodger Footwear. Importantly the programme fosters relationships between established and emerging business. This in turn supports the transference of skills, experience and know-how to ensure continued creative development and growth of the luxury goods industry. The Walpole Brands of Tomorrow will be the luxury companies pioneering growth in the next century.

Recognising outstanding achievement and success

The Awards for Excellence is Walpole's largest and most prestigious event which recognises those brands who have achieved the pinnacle of excellence in the luxury industry across ten categories: luxury, design, international, overseas, emerging, on-line, craftsmanship, CSR and luxury service talents. Over 60 judges including the likes of Mario Testino, Lucia van der Post, Dylan Jones, Brent Hoberman, Marcus Wareing, Nick Foulkes, Lord March, Peter York, Nick Candy, Richard Caring and Theo Fennell take part.

In line with the industry's rapid adoption of electronic commerce Walpole introduced an Award in 2008 to recognise the best achievement online. The Luxury Brand Online Award is presented to the company that has shown outstanding innovation and success online.

Great Britain 2012

Walpole is developing a plan for a major exhibition of British design, creativity and lifestyle which is intended to launch in June 2012. The exhibition coincides with the London Olympics and will run from June to September in central London. The exhibition will tour regionally through the UK and then worldwide capitals in the following years. In addition to the international tour, the exhibition will reach audiences around the world through the opportunities provided by the web. Digital galleries and interactive experiences will enable audiences to participate in the Great Britain 2012 exhibition. The exhibition is being curated by Stephen Bayley and offers a strong example of creative and innovative companies collaborating on high profile projects which promote and enrich our culture in Europe and around the world.

The luxury industry and contribution to the European economy

The luxury goods industry is of major strategic importance to the European economy and is crucial for future growth and development. Its products are sold under prestigious brands with an aura of exclusivity, cutting-edge creativity, superior quality and high value, including the best of European craftsmanship and heritage. The industry is responsible for the employment of around 800,000 people in Europe, provides vital training in crafts skills and has sales of approximately €170 billion worldwide.

Importantly, luxury brands have been major growth drivers through the economic crisis. Many luxury brands have reported +10% growth despite the global economic downturn and importantly luxury businesses have continued to support employment and make significant investments in their businesses.

For example,

- The luxury sector has invested in technology in the economic downturn. In a recent study by Walpole with partner Ledbury Research, 56% of companies invested in their online businesses and technology in 2009.
- Luxury brands also invested in products and marketing. In the Walpole and Ledbury Research study, 33% invested in their product range and offering and 28% in their marketing activity.
- Member companies have invested in employment, both in their own businesses and in their suppliers. One instance in the UK is Smythson, leather and bespoke stationary. In order to support the makers of one of their diary products, Smythson, bought the manufacturing company in order to ensure the continuation of the skills and employment of a small company which would otherwise have been forced into closing the business during the recession.

The luxury industry's value and position is recognised by European citizens, who have strong opinions about the contribution of the luxury industry to European culture, the economy and perception around the world. In a survey by TNS Sofres, when asked about the role that the luxury industry plays in securing Europe's economic health and competitiveness with respect to the rest of the World, 69 % of UK consumers felt that the luxury industry plays an important role. When asked about the prestige and appeal of city centres, 75% of UK customers felt that the luxury industry plays an important role.

The unique nature of luxury brands

The European luxury industry is unique. Our business models, designs, products, distribution and communications have been uniquely grown and developed through years of sustained investment, development and careful management.

Creativity and innovation at the heart of luxury businesses

Creativity and innovation are at the heart of luxury businesses. The industry and our brands are inspired by European culture, art and heritage to create unique designs, products, retail environments and communications. As well as finding inspiration, luxury brands inspire creativity and innovation in a virtuous circle.

Many of the world's best known luxury companies were founded by creative individuals and craftsmen, whose beautiful designs and products led to international demand. Within the senior management structure of luxury and fashion businesses there are individuals who are solely responsible for the creative direction of their brands. In many cases the future and success of a brand will rely heavily on the vision and innovation of the creative director. For example, the re-invention of the British fashion house, Burberry, has in no small measure been due to the strong and intuitive direction of creative director, Christopher Bailey. Similarly the re-invigoration of luxury automotive brands Rolls-Royce Motor Cars and Aston Martin are due to the progressive and highly engineered design work of their chief designers. In the food and restaurant business, pioneering chefs such as Heston Blumenthal are leading creative revolutions and creating remarkable culinary experiences.

Importantly, the creativity from luxury companies sets trends throughout Europe which spill over to other businesses inspiring innovation and development. Luxury fashion designers set influential styles, trends which in turn are a driving force of innovation and creativity. Automotive designers, such as Marek Reichman of Aston Martin inspire the entire automotive industry and iconic design features filter down to other businesses.

The luxury business model is known for creativity and innovation in presentation, communications and customer service. Luxury companies are world famous for their imaginative fashion shows, which are broadcast to audiences around the world. For example Fendi's catwalk show on the Great Wall of China reached a global audience of millions. Burberry's decision to show their A/W10 collections using the latest 3D technology was an imaginative use of new technology enabling an improved experience for viewers and customers. Our offline and online retail environments are designed in collaboration with leading architects and designers to create an inspiring, unique customer experience.

The luxury industry has been particularly innovative in the online space creating a unique paradigm linking the physical nature of our products and services with the opportunities created by the digital revolution. After an initial slow start and reticence to operate online, the industry now fully embraces the opportunities that the digital space offers for development, presentation,

interaction with customers and new technologies. Products are designed using state of the art computer programmes, teams within our businesses are able to work more closely together, craftsmen are able to share skills, and customers are given greater access to brands and products. Major investment is being made in this area to develop bespoke ecommerce platforms and CRM technologies to improve knowledge of customers and facilitate personalisation. When all of this is combined with the physical nature of products and the experiences provided through stores and retail networks European citizens are given a complete and seamless customer experience.

However, this level of creativity and innovation is only possible due to the significant and sustained investment made by the luxury industry across the whole business model. The global reach of brands combined with this investment in creativity supports the image of Europe and countries such as Britain, Spain, France and Italy as designers and style leaders know for cutting-edge creativity and the highest quality production methods. Our products are desirable across the world.

All of this creates a unique relationship and cycle of creation, innovation and inspiration across Europe and our businesses with the result of reaching far beyond geographical boundaries and initial investments. This view is supported by European citizens who understand the value and contribution to cultural perception and the importance of creative professions. In a survey by TNS Sofres, when asked about the cultural influence of Europe on the world stage, 71% of UK consumers felt that the luxury industry plays an important role. When asked about the prestige of creative professions, 74 % of UK consumers felt that the luxury industry plays an important role.

Heritage, Craftsmanship, Manufacturing and Employment

Some of the world's most famous luxury brands are hundreds of years old, with unique heritage and inspiring stories of ground-breaking innovation and endurance through turbulent & dramatic times. From the Walpole membership companies such as Fortnum & Mason recently celebrated their 300 year birthday and SMEs such as John Smedley and Boodles are both over 200 years old. The tradition of luxury brands continues to inspire entrepreneurs and a new range of luxury brands have flourished in the last 35 years including, Soane, Bill Amberg, Mulberry, Jimmy Choo and some of the newest members of Walpole, Brands of Tomorrow such as Bremont Watches and perfumery, Ormonde Jayne.

Intertwined with the heritage are unique craft skills which have been handed down through generations of families and small businesses. Far from being stagnant these skills and craftsmen constantly innovate to create new production methods, work with new raw materials and harness new technologies to design, and importantly train the next generation of craftsmen. For example, family run businesses such as tailors Henry Poole & Son and Dege & Skinner continue to train and develop the next generation of family members to run the business. Ettinger, now run by the third generation of the family, support leatherworking skills in the Midlands as well as mentoring new artisans through programmes such as Walpole's CRAFTED. Design and production methods in companies such as Rolls-Royce are leading examples of traditional skills working

alongside cutting-edge technologies, creating new skills and new skilled artisans. Wallpaper designer and manufacturer, Cole & Sons, employ a work force that is made up of artisans whose ages range from 20 to 65.

Across Europe it is possible to see clusters or hubs of artisan skills which are the living legacy of the luxury industry. For example, in the UK there is a strong tradition of leather work and skills in the Midlands, textiles, in particular, cashmere in Scotland, and china and porcelain production in Staffordshire. Throughout Europe, artisan skills and the economies of the local areas are threatened as business moves manufacturing out of Europe and into Asia. Luxury businesses are important supporters and innovators in craftsmanship helping to safeguard Europe's manufacturing base, craftsmanship skills and reputation. Many luxury brands run apprenticeship programmes to support the next generation of craftsman, investing heavily, and ensuring that these skills are not left to disappear but remain strong and vital parts of the economy and European cultural heritage.

Indeed customers of luxury goods highly value European craftsmanship, quality and manufacturing – goods made in the UK, France and Italy are held in the highest regard around the world for being of superior quality. The value of this reputation should not be under-estimated.

As noted above, the luxury goods industry is responsible for the employment of around 800,000 people across Europe, in major cities and in smaller regional communities. People are employed in design, marketing, finance, distribution, customer service and management directly by brands and we additionally support industries such as publishing and creative services. The European citizen recognises the importance of the luxury industry in employment, when asked about employment in Europe, 73% of UK consumers felt that the luxury industry plays an important role.

Raising standards and creativity across Europe for our citizens

The business model of the luxury industry is strongly focused on the customer. Our raison d'être being to provide outstanding, beautiful products with an aura of exclusivity, created to the highest quality and craftsmanship. The luxury industry sets standards across Europe which spill over and help to raise expectations and quality of products across many areas.

As mentioned above luxury plays an important but sometimes intangible role in creativity which benefits the European citizens. On a mass level the creativity is part of the cultural identity of Europe which is envied the world over but on an individual level people are inspired to try cutting-edge styles and fashions, there are opportunities to join the creative and cultural industries in many different roles and functions, are given the foundations for cultural dialogue and commentary and importantly play a part in people's sense of national identity and pride.

Market overview

The luxury sector has in the main successfully negotiated the global economic downturn. This

has been thanks to sustained growth and demand for luxury goods in Asia and other emerging markets. It is clear that in many areas of e-commerce the European market is dragging behind its competitors.

It is forecast that the total online spend in Western Europe will rise to €114 billion in 2014 and online shoppers are expected to number 190 million by this time. Growth in the luxury sector is likely to mirror this with consumer electronics and clothing leading the way.

In the luxury segment e-commerce can be seen both as a new offering, and also as a compliment to existing offline retail operations. For many members the boutique experience and service offered by offline retail is key to the overall brand experience, and will continue to be at the core of the business model. For many members, whilst e-commerce tools can add to this experience and add to brand emotions they cannot supplant it.

Research suggests that consumers want a seamless experience between on and offline purchasing. Thirty-nine percent of European consumers begin their research process online when making a considered purchase. Those consumers who begin their research process online are also likely to ultimately purchase products online. This is particularly true for luxury consumers who wish to study before making a significant investment or indeed hear about the latest collection via digital marketing or through social networks. More than one in three European consumers mix online and offline channels during a purchasing decision. There are now multiple ways a consumer may chose to buy a product – researching online, visiting the store, buying online but collecting their items in store. The integration of in store and ecommerce platforms give customers the greatest choice, convenience and vitally, for the luxury industry, high-standards of service. To maximize the value added of ecommerce luxury businesses must be able to provide cross-channel researchers and shoppers with a seamless purchasing journey.

Formal response to consultation questions

Walpole Response to the European Commission Public Consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)

Question 19

19. What are your views on the growth of the economic development of electronic commerce and information society services in Europe, in general and compared to its most important competitors? All

Answer 19

For the luxury sector the growth of the digital arena in general, and the growth of electronic commerce has provided important opportunities to reach new consumers and gain market share. However there exists a number of barriers and issues which need to be addressed so that consumer trust can be increased online and so that e-commerce can grow.

Our Member companies have embraced the Internet:

- Brand awareness can be built rapidly and cost effectively by leveraging global reach online;
- Multi-media technology is increasingly used to extend the luxury experience of the brand placing the customer at the forefront of technological innovation;
- Streamline business processes, both internally and with supply chain partners;
- Social media provide an essential tool with which to inform consumers about the costs of purchasing counterfeit goods and how to avoid doing so.

In light of these opportunities and threats the UK luxury sector has engaged enthusiastically and intelligently to improve the sustainability of the sector. Action by industry can also be supported by government at national and EU level. A number of important challenges need to be addressed though:

- Customer protection - widely available online counterfeits provide the customer with an inferior experience (quality, aesthetics, functionality, and craftsmanship). Counterfeiters 'free-riding' presents a very real threat to the viability of the luxury sector's business model;
- Erosion of brand value - the brand must have the ability to fully control the dissemination of its image to avoid the risk of any dilution or distortion to its reputation;
- Erosion of exclusivity and aspirational content - large-scale distribution of a luxury product via the Internet will inevitably devalue the brand and undermine the significant investments made by manufacturers and retailers. Such uncontrolled

supply in the marketplace creates a situation where the risks remain high for the brand, but the returns are low and innovation and investment is diminished;

- Poor purchase experience - if brands are not able to require online sellers of luxury goods to have a physical presence and a concierge service, then a number of key brand manifestations are removed from the value proposition to the customer;

In light of these opportunities and threats the UK luxury sector has engaged enthusiastically and intelligently to improve the sustainability of the sector. Action by industry can also be supported by government at national and EU level:

- Encourage investment in broadband capacity.
- Ensuring that the current EU selective distribution rules are implemented so that:
 - customers receive the luxury experience that they expect both offline and online.
 - the significant investments made in brand value by manufacturers and authorised dealers are safeguarded
- Rapid adoption and implementation of a streamlined EU Patent System.
- The luxury sector and the EU working closely with major ecommerce websites and law enforcement to improve consumer confidence by (i) remove counterfeiters and unauthorized dealers from ecommerce platforms; (ii) provide users and ecommerce sites with tools to authenticate authorized dealers on the internet; (iii) educate customers about the dangers of purchasing counterfeits.
- Full harmonization of consumer law throughout the EU Member States
- Harmonization of VAT reporting systems

Fundamentally tackling the above issues will result in a more certain online environment and a better experience for the consumer online improving their trust in the online environment. Specifically to solve many issues listed above, we ask the Commission clarify the liability regime for online providers and implement a harmonised Notice and Takedown system for trade marks, which will be proposed for the first time in the forthcoming article, "Notice and Takedown for Trade Marks" by FW Mostert and Martin B Schwimmer. This is discussed in more detail at Answer 55 below.

The luxury sector has in the main successfully negotiated the global economic downturn. This has been thanks to sustained growth and demand for luxury goods in Asia and other emerging markets. It is clear that in many areas of ecommerce the European market is dragging behind its competitors.

Question 20

20. More specifically, do you have any indications that delivery problems would be an obstacle to the development of your electronic commerce activity? If so, which? BUS, BUS FED, PUBSER

Answer 20

One major obstacle to the development of ecommerce, particularly cross-border e-commerce, is consumer and trader trust in postal services ability to deliver. A major factor in the growth of UK ecommerce has been the relative reliability of domestic postal service providers, both the Post Office and independent parcel services. This accompanied with clear consumer contract rules regarding the passing of risk and liabilities in the advent of non-delivery give both consumers and businesses the confidence to carry out transactions online.

The situation is however very different when examining the reliability of intra and extra EU cross-border postal services. The regular loss of shipments, unreliability, and opaque charging systems generally act as a disincentive to the cross-border transactions that the EU economy so desperately needs to drive Internal Market growth.

It should be noted however that in the Luxury segment the use of large independent providers (DHL, Fedex, et al) and the application of strong customer guarantees ensure that customers enjoy a level of service as would be expected should they visit a physical store.

Question 21

21. Do you encounter problems in raising capital for your electronic commerce activities from banks or venture capital? If so, please specify? BUS, BUS FED

Answer 21

Access to finance for the development of the sectors ecommerce operations follows the same pattern as for other parts of the business. Lenders and investors are fully aware of the need for Luxury businesses to operate online, the opportunities that exist and the return on investment that this can bring.

Despite their prestige, image and advertising presence luxury businesses are generally small to medium-sized enterprises (SMEs). The luxury business is a very high break even business due to the long-term and significant investments involved.

In the fast moving consumer-goods sector it is possible to launch a product and have an immediate and clear indication of how well it is selling in the stores. It is the norm that original investment costs are recovered within six months. In the luxury sector the return on investment can take anything from 18 months to 2 years. In the first year of production it is not uncommon to spend an amount equal to the first year's sales forecast on advertising and promotion. It often takes 3 or 4 years to start making money.

The innovation necessary to transfer the 'luxury experience' online, from websites to social media tools, to secure ordering facilities, ensuring that systems are secure, etc commands significant outlay. It can involve significant timeframes for investments to start to make a worthwhile return.

Timeframes such as these explain why private-equity specialists have seldom ventured into the sector and why their presence is even scarcer during periods of economic crisis. In view of the important role that the sector plays in the European economy the European Commission should

examine, along with Luxury and the banking sector representatives, what measures could be taken to ensure that the sector, especially SMEs, have access to the capital necessary to develop their businesses in response to the changing business environment.

One possible action would be the creation of a fund that could be expanded through subscription on a private equity basis (a recent example being the Vogue fund set up by a small number of major brands to support emerging fashion). Tax breaks for investment in ecommerce capabilities for SMEs should also be encouraged.

Question 22

22. Is a lack of knowledge of your legal or fiscal obligations in the context of electronic commerce or of the provision of information society services an element dissuading you from entering into such activities? BUS, BUS FED

Answer 22

Understanding the legislative and fiscal patchwork that characterizes the EU online Internal Market is clearly a deterrent for businesses. SMEs in particular view the necessity to comply with 27 different sets of consumer and tax laws as a disincentive to cross-border trade. Indeed many choose quite simply to restrict their trade to their home market. They are therefore denied the benefits of scale that online commerce can bring.

In the area of consumer law the proposal from a Consumer Rights Directive is designed to address this situation and introduce a single set of clear rules that apply across the internal market. This proposal is welcome and long over-due. Unfortunately it appears that national governments and Members of the European Parliament amendment of the proposal will ensure, by continuing to rely on the principle of minimum harmonizing, a continuation of the status quo.

At the same time online traders must register for VAT in each and every country for which their annual sales exceed a certain threshold with the added complication that thresholds and VAT rates vary from country to country. Walpole supports the Commission's proposal to introduce a one-stop scheme for non-established taxable persons to allow traders to fulfill certain VAT obligations, such as to register and submit VAT declarations, in their own Member State. This along with the Commission's proposal to introduce a "simplified invoice" for distance sellers under certain circumstances would make it considerably easier for cross-border all distance sellers to comply with their VAT obligations.

Question 23

23. Are you deterred from undertaking such activity by insufficient offer of competitive legal or fiscal advisory services, specialized in electronic commerce or information society services? BUS, BUS FED

Answer 23

The development of the sale of higher value item on e-commerce platforms may include the use of trustworthy ESCROW services. Our members are aware of consumer concerns regarding the increasing number of fake ESCROW services and the lack of information regarding the regulations (or lack of) associated with on line ESCROW. The sale of higher value luxury goods on line, manufactured by smaller companies and individual craftspeople may be constrained by such concerns. The example below is a quote from a UK business association, and a consumer who did not complete an on-line transaction due to concerns about a recommended ESCROW service, and lack of clear registration or licensing arrangements.

Example

Business Association

"It has come to our attention that certain Escrow services are claiming that they are licensed by the East Lancashire Chamber of Commerce or organizations with a similar name.

If you are considering using one of these services, you should be aware that the Chamber of Commerce does not license any of these companies, the use of the name of the Chamber of Commerce is unauthorized, any link to the Chamber of Commerce website is unauthorised and legal action against the companies responsible is being investigated."

Consumer

"I contacted the website hosting company, I don't know if they can do anything about it though".

This also illustrates the important points that consumers often do not know who is responsible and do not know who to turn to when experiencing problems online? We believe a clarification of the liability regime will go a long way to provide certainty for consumers and businesses and restore consumer trust online.

Question 24

24. Do you have information according to which payment problems (lack of choice in terms of methods of payment, confidentiality issues, refusal of payment cards from another Member State, etc) would be an obstacle to the development of your electronic commerce activity? If so, can you assess and illustrate these problems? BUS, BUS FED

Answer 24

Payment problems from both the business and consumer side continue to be a major obstacle to the growth of ecommerce. For businesses, particularly SMEs fee levels charged by credit card companies and online payment system providers tend to be prohibitive.

Consumer and business trust in data protection continues to be a major issue. In Sweden 30% of online consumers believe that their personal financial information is secure. This falls to 18% in Spain. In Italy 54% of online consumers are concerned about the security of their financial

information online. In comparison 25% of French consumers are confident that their data is safe online.¹

Different payment cultures also serve to undermine the internal market. UK retailers easily offer a whole range of payment options (credit card, debit card, Paypal). In France Carte Bleu cards dominate. In contrast German online businesses still prefer bank transfer pre-payment or indeed cash on delivery despite German consumer being the least worried about online data security.² These cultural attitudes understandably affect retailers' choice of payment provider. Flexibility, as found in the UK, does however give the online business a competitive advantage and ability to reap the benefits of the internal market.

Question 28

28. Are you aware of information on the types and growth of e-commerce businesses and on whether this substitutes or complements off-line retail services? If so, please specify All except PRIV

Answer 28

It is forecast that the total online spend in Western Europe will rise to €114 billion in 2014 and online shoppers are expected to number 190 million by this time. Growth in the Luxury sector is likely to mirror this with consumer electronics and clothing leading the way.

In the Luxury segment ecommerce is clearly a compliment to existing offline retail operations. The boutique and services found there that form part of the overall brand experience will continue to be at the core of the business model. Whilst ecommerce tools can add to this experience and add to brand emotions they cannot supplant it.

Luxury businesses and their approved distributors make large capital investments in their physical premises in order to meet the service levels and brand experience desired by their customers. Walpole members therefore welcome the realization of the necessity to protect these investments and avoid free-riding by online pure players and unofficial distributors found in the recent revision of EU Regulation 2790/99 and Guidelines on Vertical Restraints which clarify manufacturers ability to ensure that distributors comply with objective criteria, including the necessity to have bricks and mortar premises.

Research shows that there is no longer a clear purchase path for consumers. Thirty-nine percent of European consumers begin their research process online when making a considered purchase. Those consumers who begin their research process online are also likely to ultimately purchase products online. This is particularly true for Luxury consumers who wish to study before making a purchase of a lifetime or indeed hear about the latest collection via Twitter whilst in a board meeting in Shanghai. More than one in three European consumers mix online and offline channels during a purchasing decision. To maximize the value added of ecommerce Luxury

¹ Western European Online Retail Forecast 2009-2014, Forrester Research 2010

² IBID

businesses must be able to provide cross-channel researchers and shoppers with a seamless purchasing journey.

Question 29

29. In your view, what are the economic sectors where electronic commerce has developed significantly over the past decade and the fields where, on the other hand, its potential has not yet been sufficiently exploited? All except PRIV

Answer 29

The growth in ecommerce of consumer goods (books, music, electronics, car parts, clothes, collectibles) is well documented. In the Luxury sector take-up of ecommerce solutions has been relatively more sedate as businesses wrestled with the complexities of ensuring that online activities added value to rather than diminished brand equity.

In the luxury sector, however, the brand to consumer relationship is characterized by an individual, multi-sensuous, personalized experience. There are distinct elements of craftsmanship, heritage, and culture that are essential manifestations of a brand's identity and a consumer's purchase that must be reflected online.

Over time luxury manufacturers and authorized distributors have developed advanced luxury e-commerce sites utilizing the latest online innovation to provide their customers with unique value propositions rooted in the off-line boutique experience.

The advent of social media and the increasing accessibility of multi-media software and applications are having a significant effect on the development of such online operations. They enable the communication of brand DNA in new and engaging ways that serve to strengthen brand loyalty. Developments such as augmented reality, which can offer users a life-sized 3D view of products, and advanced chat applications, are being used to create enhanced online services. During London Fashion week in 2010 Burberry live streamed their catwalk show and asked visitors to interact and leave comments. Earlier in 2009 Saville Row tailor Gieves and Hawkes relaunched its ecommerce site to great success, citing a 350% uplift when compared to December.

In the UK Luxury businesses are at the forefront of these developments. A recent study by Ledbury of 60 CEOs for Walpole found that online is becoming an increasingly important sales channel for luxury brands with 56% of survey participants increasing their online investment last year. At the same time Luxury brands are also keen to develop personal relationships with their customers and 40% of industry respondents said they would be relying more on private events, parties & previews this year.

Such innovation on and offline underpins the future viability, creativity and innovation of the Luxury sector – securing the jobs and heritage associated with this crucial cultural industry.

Question 50

50. Does the regulation of advertising contracts require an adaptation in the virtual world? If so, can you specify the problems and the possible solutions. All except PRIV

Answer 50

We believe that the same rules should apply for online advertising as they do for print in that everything has to be legal, decent and honest.

We recognise that there are currently consumer and regulator concerns around the use of behavioural targeting and the use of cookies. To this end our members adhere to Internet Advertising Bureau (IAB) best practice guidelines to ensure transparency to the consumer.

In terms of our members advertising terms and conditions, these have needed to be adapted to take account of both print and online.

Please see the following link for an example:

<http://www.fttoolkit.co.uk/advertising/termsandconditions.html>

Question 51

51. In your view, is it necessary to ensure more transparency on the origin of the contents presented by news aggregators of information¹²? If so, by which mean(s)? All except PRIV

Answer 51

Our media members typical policy is to have a direct route to our end-user so that they can control distribution and pricing of content directly. [

Question 55

55. Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law?

Answer 55

In the UK, notice and take-down provisions have been incorporated in the UK implementing legislation the EC E-Commerce Directive, namely the Electronic Commerce Regulations 2002 (SI 2002/2013). This specifies that any notice from a brand-owner should include the name and address of the sender, details of the location of the information in question; and details of the unlawful nature of the activity or information in question (Regulation 22).

Outside the EU, the US Digital Millennium Copyright Act, codified at 17 USC Section 512(c)(1) provides ISPs with safe harbour immunity from liability arising from "infringement of copyright by

reason of the storage at the direction of a user of [copyrighted] material that resides on a system or network controlled or operated by [the ISP].”

If the ISP chooses to invoke the safe harbour, it must expeditiously remove material that is the subject of a DMCA Notice. The DMCA Notice has to contain certain information – the claimant must identify its copyright, there must be a specific identification of the location of the allegedly infringing material and there must be a good faith allegation of infringement. If the “publisher” of the allegedly infringing material wishes to contest the allegation, they may submit a “counter notice”, also a sworn statement, that “the subscriber has a good faith belief that the material was removed...as a result of a mistake or misidentification of the material. Upon transmission of a Counter notice to the Claimant, an ISP may allow the “reinstatement” of the material within 10-14 business days, unless the Claimant moves in a civil court action to enjoin such reinstatement.

The recipient of a Notice may, pursuant to Section 512(f) of the Act bring a suit against a DMCA claimant for a DMCA notice sent in bad faith. A 512(f) plaintiff must demonstrate that the copyright owner acted with subjective bad faith. A plaintiff may recover all damages that occur as a “but for” result of misrepresentations in the DMCA notice.

However, as mentioned above, there are no harmonized NTD procedures at the EU level. In view of the issues identified above, it is clear there is an opportunity for the European Commission to clarify the situation and specify harmonized notice and take down procedures.

It is submitted that the safe harbour principle be implemented/retained in any new Directive but that the European Commission take a lead and implement a full system of Notice and Takedown which extends to trade marks, not just copyright. For a full discussion on the workings of such a system, see the forthcoming article on “Notice and Takedown for Trade Marks” by F W Mostert and Martin B Schwimmer – in press.

Question 56

56. What practical experience do you have regarding the procedures for notice and take-down? Have they worked correctly? If not, why not, in your view?

Practical experience with Notice and take-down procedures that are in place

Well-known ISPs, search engines and ecommerce companies have put in place specific policies governing their notification procedures; smaller companies may only have *ad hoc* procedures. By way of example eBay (through its Verified Rights Owner or “**VeRO**” programme), Amazon and Gumtree operate policies using a standard form requiring a representative of the rights owner to:

provide their contact details;

identify each listing complained of by item number/sales code;

identify the reason for the objection/complaint;

make a statutory declaration confirming the truth and accuracy of the information provided; and provide an authorised signature on the form.

In many cases, once the rights owner has faxed or posted the initial form further notifications may be transmitted *via* email.

In addition, eBay offer rights owners who enter into its VeRO Reporting Tool User Agreement the ability to download and use a software tool enabling them to report listings directly through the website and to make “bulk reports” of up to 500 items at once. eBay also facilitates rights owners in setting up their own accounts to receive automated search results for potentially infringing items. To take part in this feature, the rights owner must become a member of the VeRO scheme first.

Search engine providers also have notice and take-down procedures in place. Yahoo! and Bing, for example, currently take action upon notice against advertisers who use trade marks as keywords as well as misuse in ad text as well as seller of counterfeit goods.

Google will, upon notice, take down any ads sponsored by sellers of counterfeit goods. Google's current Adwords policy in the EU, however, does not prevent the selection of trade marks as keywords. It will, in response to a complaint in some EU member jurisdictions but not all, do a limited investigation as to whether a keyword (in combination with particular advertising text) is confusing as to the origin of the advertised goods and services. Google provides the example of an advertisement that falsely implies affiliation with the trade mark owner. If Google finds that it is confusing, it will remove the specific advertisement that is the subject of the complaint.

Google permits the following types of advertisements to be displayed against a trade-marked keyword, provided that the advertisement is not confusing, as described above:

- advertisements using a trade-marked term when that term is being used in a descriptive or generic way, such as not in reference to the term as a trade mark;
- advertisements for competing products or services;
- advertisements for resale of the trade marked goods or services;
- advertisements for the sale of components, replacement parts or compatible products corresponding to a trade mark;
- advertisements for informational sites about a product or service corresponding to the trade mark.

(These are described as examples and not an exhaustive list.)

Following receipt of a notification, noted above, the ecommerce company or ISP should attempt to verify and check the complaint. Once put on notice it will be under an obligation to remove the information or item complained of, under Article 14, Ecommerce Directive.

However existing NTD schemes are either not sufficient or not effective and the fact that they are all different imposes significant uncertainty and burdens for businesses and consumers wishing to register complaints.

Problems with notice and take-down procedures

Some of the above noted procedures appear reasonable at first sight and with specific companies may work effectively for all parties involved – brand owner, on-line sellers and intermediaries, and consumers.

As a general rule, however, the good practice standards set forth by eBay, Yahoo! and Microsoft are not practiced by all on-line sellers and intermediaries and, indeed, cause disruption and confusion for both brand owners and consumers alike. As a result, brand owners face widely varied policies, which lead to chaotic enforcement policies and a resulting insecurity for consumers. And complex, ever changing, qualified policies such as Google's keyword policy are difficult to implement on an international basis.

Often the manner in which take down is implemented by many providers, if at all, results in infringing items being sold for some time before a brand is able to take notice of the item, contact the provider, and finalize a takedown request.

In addition, the current system makes it very difficult to check on the rights the entity advertising or selling claims as most notice and take down procedures only allow brand owners to file complaints and not details on the advertiser/seller are forwarded to the rights owner. They are simply told the other party claims rights. And with the need to keep the identities of user's secret, brand owners are left with little recourse except to file litigation against the advertiser and/or platform itself.

On top of the difficulties with anonymity, individuals can create multiple seller accounts with a number of user IDs allowing them to circumvent any suspension by opening or using other accounts.

We understand that that for these and other reasons many brand-owners – for example L'Oréal³ – do not even participate in eBay's VeRO programme, rightly or wrongly, considering it to be onerous and ineffective.

Possible solutions and improvements

There has been much discussion over the desires of platforms such as eBay and Google simply providing more choice for consumers and the need for brand owners to stop trying to control sales through trade mark enforcement. However it must be remembered that many of these platforms derive their income from the sales that occur on their sites or the number of advertisements that it appears, so it is not surprising that its policies lean towards facilitating sales rather than preventing infringements. Neither approach helps the consumer and prevents fraud.

If the policy objective is to promote ecommerce then a balance has to be struck between protecting the legitimate interests of brand-owners (to encourage them to invest and participate) and consumers (to protect them against counterfeits and other illegal sales) and the freedoms of on-sellers and other intermediaries. The Current notice and take-down procedures referred to above may arguably be consistent with the minimum legal requirements, but brand-owners

³ *L'Oreal SA v eBay International AG*, High Court decision dated 22 May 2009 ([2009] EWHC 1094 (Ch), [2009] E.T.M.R. 53, [2009] R.P.C. 21) at paragraph 86.

represented by Walpole consider that they do not go far enough for the legitimate interests of brand-owners and consumers to be protected across all platforms. It is time to move beyond industry voluntary standards and implement a minimum level of conduct platforms must adhere to.

The ECD currently lacks a harmonized notice and take-down procedure like the one set forth in the US DMCA for example. The preferred option at the time the ECD was enacted was to encourage the adoption of voluntary agreements and codes of conduct between business operators as demonstrated by Recital 40 of the ECD. However, this approach of favoring voluntary agreements between stakeholders has produced uneven results.

The Commission should consider recommending harmonized NTD procedures, which would undoubtedly help to further legal certainty and, ultimately, consumer trust. This would make notification procedures more efficient to all online providers.

Moreover, it should be borne in mind that scope and content of NTD procedures may vary depending on the care followed by online providers in the monitoring of their websites. In addition we believe that online providers that cannot benefit from the “safe harbour” provisions (because their activities go beyond the mere storage of data) should take any measures, technical or procedural, automated or non automated, aimed at the timely prevention and adequate response to attempts to perform or repeat illicit acts online as soon as technically and reasonably feasible.

This could include for instance for online platforms to proactively filter and block any posts or keywords that contain words which usually indicate that the products associated to them are not original goods (such as “fake”, “replica”, “knock-off”, “-70%”, etc.), used alone or in connection with a trademark or other distinctive sign.

Similarly, online platforms should proactively filter and block any posts or keywords relating to the promotion or sale of products that can only be legally sold within selective distribution networks by authorized retailers (such as trademarked perfumes and cosmetics) in the event the seller is unable to prove that it acts as an authorized retailer.

In that respect, we would like to mention the position of one of the leading English High Court intellectual property judges, His Honour Mr Justice Arnold QC, who said that he was “*in no doubt that it would be possible for eBay [the online provider] to do more*” to “*prevent, or at least minimise, sales of counterfeit and other infringing products on the its website*”.⁴ He referred to ten additional steps that it was at least technically possible for the online provider to take (in this case eBay), including:

- (i) filter listings before they were posted on the eBay site;
- (ii) use additional filters, including filters to detect listings of testers and other not-for-sale products and unboxed products;
- (iii) filter descriptions as well as titles;
- (iv) require sellers to disclose their names and addresses when listing items, at least when listing items in a manner which suggests that they are selling in the course of trade;

⁴ *L’Oreal SA v eBay International AG* at paragraph 277.

- (v) impose additional restrictions on the volumes of high risk products, such as fragrances and cosmetics, that can be listed at any one time;
- (vi) be more consistent in their policies, for example regarding sales of unboxed products;
- (vii) adopt policies to combat types of infringement which are not presently addressed, and in particular the sale of non-EEA goods without the consent of the trade mark owners;
- (viii) take greater account of negative feedback, particularly feedback concerning counterfeits;
- (ix) apply sanctions more rigorously; and
- (x) be more rigorous in suspending accounts linked to those of users whose accounts have been suspended.

The judge noted that some of these steps “*would be more technically challenging and costly than others*”. However, in so far as they would significantly reduce the quantity of products illegally being offered for sale, for the good of brand-owners and consumers, the burden should be upon the intermediaries to demonstrate that they would in reality be difficult or expensive to implement and would threaten their business models.

The judge was persuaded that the law as it currently stood – lacking any legal requirement to carry out these additional measures – allowed eBay to facilitate and profit from infringements without becoming jointly liable with the seller for the infringements.⁵

While whether or not Mr Justice Arnold’s analysis is specifically true for eBay is up for debate, however it goes without saying the Mr Justice Arnold’s overall theme is correct. There are things that service providers and sellers can voluntarily do that would assist the brand owner in tracking down infringement and fraud online while at the same time not applying the entire burden to do so on the service provider. Unfortunately, the on line retailers and service providers are not going to voluntarily take on these activities. As a result, Walpole members strongly recommend that the law be changed to strengthen the protection afforded to brand-owners, and provide a minimum level of cooperative and uniform enforcement among the parties involved.

Answer 56 (part 1)

Please see below the timetable of a typical detection and takedown procedures for websites selling counterfeit goods from one of our members.

Date	Activity	Notes
4-Jun-2010	Detected	Website detected by MarkMonitor system.
14-Jun-2010	Categorized	Analyst determines this is an ecommerce site selling counterfeit XXX jewelry.
14-Jun-2010	Queued for Escalation	Site added to enforcement queue.
14-Jun-2010	Enforcement Sent	'Domain Discontinue Use' Notice sent to registered domain owner.

⁵ *L'Oreal SA v eBay International AG* at paragraph 382.

14-Jun-2010	Status set to "Monitor"	Monitor for change in status
30-Jun-2010	Queued for Escalation	No response from domain owner or change in website content, escalate to ISP.
30-Jun-2010	Enforcement Sent	'DMCA Copyright Notice' sent to Internet Service Provider
30-Jun-2010	Status set to "Monitor"	Monitor for change in status
3-Sep-2010	Infringing Content Removed	ISP shuts down infringing website.
3-Sep-2010	Status set to "Closed"	Enforcement successful.

Date	Activity	Notes
23-Feb-2010	Detected	Website detected by MarkMonitor system.
17-Mar-2010	Categorized	Analyst determines this is an ecommerce site selling counterfeit XXX jewelry.
17-Mar-2010	Queued for Escalation	Site added to enforcement queue.
8-Apr-2010	Enforcement Sent	'DMCA Copyright Notice' sent to Internet Service Provider
8-Apr-2010	Status set to "Monitor"	Monitor for change in status
18-Apr-2010	Content Removed	Site no longer has content but IP still active.
4-Jun-2010	Site Inactive	Site no longer resolves
4-Jun-2010	Status set to "Closed"	Enforcement successful.

Date	Activity	Notes
27-Mar-2010	Detected	Website detected by MarkMonitor system.
19-Apr-2010	Categorized	Analyst determines this is an ecommerce site selling counterfeit XXX jewelry.
19-Apr-2010	Queued for Escalation	Site added to enforcement queue.

14-May-2010	Enforcement Sent	'Domain Discontinue Use' Notice sent to registered domain owner.
14-May-2010	Status set to "Monitor"	Monitor for change in status
26-May-2010	Queued for Escalation	No response from domain owner or change in website content, escalate to ISP.
26-May-2010	Enforcement Sent	'DMCA Copyright Notice' sent to Internet Service Provider
26-May-2010	Status set to "Monitor"	Monitor for change in status
28-Jun-2010	Infringing Content Removed	Site owner changes content of site to handbags. No XXX content present at this time.
28-Jun-2010	Status set to "Monitor"	Enforcement successful.

Answer 56 (part 2)

Additional examples from another member

www.replicahandbags-mall.com

This website is hosted in the Netherlands.

Action already taken:

2 Cease and desist letters have been sent to the registrant.

An enforcement notice has been sent to the ISP, though no response has been received.

<http://mulberryoutlet.nl/>

This website is hosted in the Netherlands.

Action already taken:

2 Cease and desist letters have been sent to the registrant.

Our next steps will be to email the ISP with an enforcement notice.

<http://www.bag2life.nl/mulberry.html>

This website is hosted in the Netherlands.

Action already taken:

2 Cease and desist letters have been sent to the registrant.

2 enforcement notices have been sent to the ISP, though no response has been received.

<http://www.borseprada.com/mulberry>

This website is hosted in Italy.

Action already taken:

2 Cease and desist letter have been sent to the registrant.

The site was down for a while (29th September) following their second cease and desist letter, but has since re-appeared with the same infringing content.

Question 65

65. Are you aware of specific fields in which obstacles to electronic commerce are particularly manifest? Do you think that apart from Articles 12 to 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain?

Answer 65

We believe that like in the offline environment, opportunities and responsibilities must be shared among operators along the Digital value chain considering the economic and business realities of each operator's business model. This is crucial so that certainty and consumer trust can be increased in order for e-commerce to thrive in Europe.

The original intent of the E-Commerce Directive ("ECD") was to create a "safe harbour" for basic internet intermediaries with the aim of promoting a swift and efficient development of the internet. However, significant technological developments in the internet have led to the emergence over the last years of many new online services that are provided by online providers and which developed in addition to the basic services described in Articles 12-14 ECD.

These additional services are generally commercial activities, supported by advertising, which go beyond the mere storage or transmission of data and are not any more passive, automatic and technical in nature.

However, in many instances, online platforms carrying out commercial activities that go beyond basic storage of data claim that they must be considered as "hosting" providers within the meaning of Article 14 ECD because they also offer basic internet services. Based on this, these intermediaries further claim they should benefit from the "safe harbor" provisions of the ECD and thus to be exempted from any liability.

The ECD original intent has therefore been co-opted in practice by those online providers claiming to act as "basic" internet intermediaries in order to elude responsibility along the Digital value chain.

The result is that currently there is confusion and lack of clarity and a proliferation of court cases with different outcomes across Europe with regards to the interpretation of the liability exemption in the ECD. Such legal uncertainty keeps on growing: today, many cases referred by national courts are pending before the ECJ seeking for guidelines from European institutions, leading to slow decision-making that hinders legal certainty in the fast-moving online market.

This lack of clarity is inconsistent with (i) the definition of what should be achieved via adoption of Directives at an EU level and (ii) the aim and spirit governing the European Single Market which

needs equivalent rules across the Member States to function smoothly.

The European Commission has already stated in the Digital Agenda that liability for intermediaries should be re-examined in the context of technological advances.⁶ In addition, the EU 2020 strategy calls on EU and national legislation to be adapted to the digital era, including updating rules on liability.⁷ The European Parliament supports this approach in its Report on the Development of E-Commerce in September 2010 in which it calls for the European Commission to update “*the rules on the limited liability of information society services so as to keep up with technological progress, in the context of the e-commerce directive*”.⁸

There is therefore **an opportunity for the Commission to clarify the question of who qualifies for the “safe harbor” provisions without a need to reopen the E-commerce Directive**. The concept of “hosting” is effectively defined in Article 14 ECD as consisting in the activity of storage. This focus on storage is consistent with Recital 42 of the Directive, which refers to information which is “transmitted” (which is caught by the “mere conduit” exemption in Article 12) and “temporarily stored” (caught by the hosting and caching exemptions in Articles 13 and 14) “for the sole purpose of making this transmission more efficient”; as well as the *preparatory works* relating to the Directive. It is clear that the policy intention was to limit liability exclusively for those storing and transmitting data.

This was clearly confirmed in the 23 March 2010 European Court of Justice (“ECJ”) Google ruling, which held that the Article 14 ECD hosting defence applies to an internet referencing service provider “*in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored*”.⁹ The ECJ also stated that in order to establish whether the liability of an internet referencing provider may be limited under Article 14, it is necessary to examine whether the role played by the service provider is “*merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores*.”

Under Article 14 ECD, hosting providers only play the role of technical intermediaries in the storage of data; they operate their hosting services on an exclusive basis, *i.e.*, their services are “*limited*” (*cf.* Recital 42) to the technical process of data transmission; and they do not have knowledge of or control on the data transmitted or stored. If a hosting provider meets these criteria, they should legitimately benefit from the “safe harbor” provision.

Yet the many lawsuits in Europe suggest this is not clear and we think the Commission should clarify where to draw the line between the “basic” services limited to the storage and processing of data and the other activities that go **beyond** the storage and transmission of data within the meaning of Article 14 ECD.

⁶ EC Digital Agenda p. 12, footnote 13: “In addition, it may be necessary to update provisions such as limited liability of information society services in line with technological progress.”

⁷ p. 10, EU 2020 COM (2010)

⁸ Report on completing the internal market for e-commerce (2010/2012(INI)), Rapporteur: Pablo Arias Echeverría, Article 59.

⁹ ECJ joined cases 23 March 2010: Google France, Google, Inc. v Louis Vuitton Malletier (C-236/08), Viaticum SA, Luteciel SARL (C-237/08), CNRRH, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08)

This clarification should specify that when online operators do not limit their activities to mere storage and transmission of data at the direction of a user but go beyond that, by actively using, presenting, organizing or modifying users' materials for commercial purposes, they do not qualify as hosting providers within the meaning of the ECD.

This would mean in practice that online providers that cannot benefit from the "safe harbor" provisions should take any measures, technical or procedural, automated or non automated, aimed at the timely prevention and adequate response to attempts to perform or repeat illicit acts online as soon as technically and reasonably feasible.

In addition as outlined above the Commission should consider recommending harmonized NTD procedures, which would undoubtedly help to further legal certainty and, ultimately, consumer trust.¹⁰ This would make notification procedures more efficient to all online providers (including those benefitting from the "safe harbor").

Finally, the Commission should also implement clear guidance as to **how information can be shared** between legitimate stakeholders in the spirit of cooperation in order to efficiently fight against online illicit practices, like the possibility for right owners to request for the disclosure of the identity and contact details of alleged infringers.

At the end we support the idea that the protection of intellectual property and the fight against counterfeiting should be a shared responsibility with regards to society in general, and to the consumer in particular. There is no reason why this burden should fall exclusively on the right owners. This burden should be shared between intermediaries and right owners. The first have control over their own tools and the second are experts in their rights.

Our members are aware of consumer concerns regarding the increasing number of fake ESCROW services and the lack of information regarding the regulations (or lack of) associated with on line ESCROW. The sale of higher value luxury goods on line, manufactured by smaller companies and individual craftspeople may be constrained by such concerns. The example below is a quote from a UK business association, and a consumer who did not complete an on-line transaction due to concerns about a recommended ESCROW service, and lack of clear registration or licensing arrangements.

Example

Business association

"It has come to our attention that certain Escrow services are claiming that they are licensed by the East Lancashire Chamber of Commerce or organizations with a similar name.

If you are considering using one of these services, you should be aware that the Chamber of Commerce does not license any of these companies, the use of the name of the Chamber of Commerce is unauthorized, any link to the Chamber of Commerce

¹⁰ While not imposing a notice and take-down procedure was deemed to be the best approach at the initial stage, the ECD did expressly envision the possibility of a future amendment introducing a procedure of this kind in Article 21(2) ECD 2000/31/EC - L 178/15

website is unauthorised and legal action against the companies responsible is being investigated."

Consumer

"I contacted the website hosting company, I don't know if they can do anything about it though".

Question 66

66. The Court of Justice of the European Union recently delivered an important judgment on the responsibility of intermediary service providers in the Google vs. LVMH case¹⁵. Do you think that the concept of a "merely technical, automatic and passive nature" of information transmission by search engines or on-line platforms is sufficiently clear to be interpreted in a homogeneous way?

Answer 66

Walpole members are concerned that the application of Google's new Adwords, which enables any advertiser to purchase an ad triggering keyword corresponding to any registered trademark without requiring the consent of the trademark owner, could lead to trademark infringement. Walpole members believe that the Google policy puts consumers at risk from misleading advertising that could lead them to unknowingly purchase counterfeit products. This in turn leaves open the possibility that Google may be found liable for any illicit activity by clients of its Adwords service.

Walpole, as a member of the European Cultural and Creative Industries Alliance (ECCIA) notes Google's statement of 4th August 2010 that it will investigate at the request of the trademark owner on a case-by-case basis to verify whether the advertising text it sells is likely to confuse web users as to the origin of the advertised goods.

In the *Google* cases, the Court of Justice held that Article 14 of the Directive allowed an ISP to avoid liability for storing data at the request of an advertiser if it had not played an active role of such a kind as to give it knowledge of, or control over, the data. It benefited from the defence unless, once it had obtained knowledge of the unlawful nature of the data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data.

However, in adopting its new policy, Google may obtain knowledge of unlawful and infringing activities of certain advertisers through third party complaints, and yet in its discretion decide not to take down the infringing listing. It is submitted that Google will be liable for joint infringement with the advertisers where it makes an incorrect infringement assessment and inappropriately retains the listing.

Walpole members would like Google not merely to carry out a case-by-case investigation, but go further by creating a "Best Practice" policy forvetting their advertisers and giving advertisers with penalties for non-adherence to their own already existing good practice standards. In addition, the notice and take-down rules should be strengthened in the terms suggested by H.H. Mr Justice Arnold (see response to question 56 above). Also please refer to "The Notice and Track Down" section of the article "Notice and Takedown for Trade Marks by FW Mostert and martin B Schwimmer. The findings of the Court of Justice in the *Interflora v Marks & Spencer* case,

currently the subject of a reference (case C-323/09) should also be taken into account in framing a policy that is consistent with the obligations upon intermediaries to respect the legitimate interests of brand-owners.

The concept of "*merely technical, automatic and passive nature*" of information transmission derives from Recital 42 of the Directive and was used by the Court of Justice to characterise data transmissions which are to benefit from the safe harbour of Article 14. The fact that the scope of Article 14 is currently the subject of a reference to the Court of Justice in *L'Oreal SA v eBay International* (above: C324/09) demonstrates that the concept is insufficiently clear and will require sharper definition in any new Directive.

Question 69

69. Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? Please detail your answer.

Answer 69

Whilst the lack of investment in law enforcement with regard to the Internet can be said to be one reason for the counterfeiting and piracy problem, there can be no long-term solution to this problem without a multi-stakeholder approach. The EU, national governments, and businesses must work together to provide a regulatory framework capable of both dissuading counterfeiters from breaking the law and persuading consumers not to support this socially, economically and environmentally damaging problem.

This can be achieved by the Luxury sector, Government, Law Enforcement, and major ecommerce websites working together to:

- (i) remove counterfeiters and unauthorized dealers from ecommerce platforms;
- (ii) provide users and ecommerce sites with tools to authenticate authorized dealers on the internet, thereby building online consumer confidence;
- (iii) provide the finance needed to promote consumer focused campaigns on the real costs, detriment and dangers of purchasing counterfeits.

APPENDIX A WALPOLE MEMBERSHIP

CORPORATE PARTNERS

BARCLAYS WEALTH	BRAND UNION	OGILVY	MCKINSEY & CO
BLICK ROTHENBERG	DAVENPORT LYONS	MCARTHUR GLEN	JAMES CROPPER

MEMBERS

ALFRED DUNHILL	THE DORCHESTER	HOLLAND & HOLLAND	THE ROYAL AUTOMOBILE CLUB
ANNABEL'S	DRAKES	HOME HOUSE	ROYAL DOULTON
ASPREY	THE ECONOMIST	INTELLIGENT LIFE	THE RUG COMPANY
BACKES & STRAUSS	EDMISTON AND COMPANY	THE IVY	SAVOIR BEDS
THE BALMORAL, EDINBURGH	EDWARD GREEN	JAGUAR	SCOTT'S
BILL AMBERG	ETTINGER	J. SHEEKEY	SMYTHSON
BOODLES	FINANCIAL TIMES	JIMMY CHOO	SILVER CROSS
BOVEY CASTLE	FORTNUM & MASON	JOHNSTONS	SILVERLINING
BRITISH AIRWAYS FIRST	GEO. F. TRUMPER	JOHN SMEDLEY	SOTHEBY'S
BROWN'S HOTEL	GEORGE	THE LANESBOROUGH	SOANE
BRUCE OLDFIELD	GETTY IMAGES	LE CAPRICE	TEMPERLEY LONDON
BURBERRY	GIEVES & HAWKES	LEWIS MOBERLY	THEO FENNELL
CANDY & CANDY	GLENEAGLES	LIBERTY	THOMAS PINK
CHARBONNEL ET WALKER	THE GLENMORANGIE COMPANY	LINKS OF LONDON	TREVOR PICKETT
CHEWTON GLEN	GOODWOOD	MARK CLUB	VERTU
CHIVAS BROTHERS	THE GORING HOTEL	MAYBOURNE HOTEL GROUP	URBAN CAPRICE
CHURCH'S ENGLISH SHOES	GUARDS POLO CLUB	MOSIMANN'S	W NAGEL
CHRISTIE'S	HACKETT LONDON	MULBERRY	WALKERS SHORTBREAD
CLIVE CHRISTIAN	HALCYON DAYS	MYLA	WATERFORD CRYSTAL
THE CLUB AT THE IVY	HAMILTON & INCHES	OLIVER SWEENEY	WEDGWOOD
COLE AND SON	HARPER'S BAZAAR	ORIENT-EXPRESS	WENTWORTH CLUB

COMITTI LONDON	HARRODS	PURDEY	WILLIAM GRANT
DAKS	HARRY'S BAR	QUINTESSENTIALLY	
DAPHNE'S	HENRY POOLE & COMPANY	RESERVE BRANDS	
		GROUP	
DEGE & SKINNER	HILDON	ROAST	
INTERNATIONAL ASSOCIATE			

TIFFANY & CO	HUGO BOSS	POLO RALPH LAUREN	TECHNOGYM
FRIENDS			
ARTS & BUSINESS	GLYNDEBOURNE	RADA	TEAM ORIGIN
BAFTA	HISTORIC ROYAL PALACES	ROYAL ACADEMY OF DANCE	THOROUGHbred BREEDERS
BRITISH FILM INSTITUTE	HURLINGHAM POLO ASSOCIATION	ROYAL COLLEGE OF ART	ASSOC
DESIGN COUNCIL	LAMDA	ROYAL OPERA HOUSE	VICTORIA & ALBERT MUSEUM
DESIGN MUSEUM	THE LONDON LIBRARY	SADLER'S WELLS	VISITBRITAIN
ENGLISH NATIONAL OPERA	NATIONAL PORTRAIT GALLERY	SOMERSET HOUSE	VISIT LONDON
FILM LONDON	NATIONAL THEATRE	SPENCER HOUSE	WELSH NATIONAL OPERA

BRANDS OF TOMORROW

2007	2008	2009	2010
ASTLEY CLARKE	DE ROEMER	BRITT LINTNER	ABAHNA
BREMONT	ORMONDE JAYNE	CAMEL BABY & CHILD	BASSO & BROOKE
FITZDARES	SHAUN LEANE	GENTLEMEN'S TONIC	CHARLOTTEOLYMPIA
NYETIMBER	THE REAL FLOWER	LITTLE VENICE CAKE	JOSEPHINE HOME
MILLER HARRIS	TIMOROUS BEASTIES	LODGER	MAWI
		ME&EM	ROCOCO
		MUNGO & MAUD	WOLF & BADGER
		ORLEBAR BROWN	