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Paper proposal: ***Outsourcing regulative and enforcement powers in copyright protection to Internet Service Providers in the Digital Market: a new challenge or a hidden opportunity for the EU?***

This paper would analyse the current legislative proposals in copyright on the EU level, as well as the case law of the CJEU regarding the new role of Internet Service Providers (ISPs) in the regulation and enforcement of copyright protected material online.

The starting point of the general analysis is the idea that the EU legislator, in order to keep up with the rapid changing online environment, in its new Proposal for a Directive on Copyright in the Digital Single Market,[1] tried to validate the current business practices of ISPs and take them a step further. For clarity, the ISPs, that represent the business models of the platform based digital online society, provided both the EU legislator and the CJEU with an opportunity to try delimitating online behaviour, by providing certain rules and guidelines for ISPs to apply.

However, these rules provided more confusion than clarity. Due to this fact, ISPs, such as YouTube or Google, in order to avoid liability for the behaviour of end users, introduced the notice and take down procedures such as QXL and DBA, as well as enforcement tools, such as EBay´s VeRO programme and YouTube´s ContentID. These measures were often criticised for the lack of transparency and potential abuse.

September 2016, marked two events that signalled the change in the role of ISPs. The first event was the CJEU decision in the *GS Media* case[2] that provided an obligation for maintenance of balancing act between right holders and end users, and the second one was the Directive on Copyright in the Digital Single Market. The Directive on Copyright in the Digital Single Market, in Article 13 provided for an introduction of an *obligation* to monitor the activity of users, report back to the right holders, and introduce complaints and redress mechanisms for ISPs that *store and give access to large amount of works* and other subject matter uploaded *by their users*.

In the view of this, two issues surfaced. The first issue, as seen from the perspective of legal certainty and due process, begs the question whether the ISPs are the right actors to regulate and sanction online illicit behaviour, bearing in mind the obligation for maintenance of a balancing act between right holders and end users.

This issue is reinforced with the fact that the regulation on online platforms is done via private licensing, which is covered by non-disclosure clauses that prevent third parties, such as end users, to know what their exact rights and obligations are in order to adjust their online behaviour. Furthermore, in light of due process, are ISPs equipped to guarantee this right, namely, independence of the decision making process and the right to be heard, if we take into consideration that they are private actors themselves that need to shield themselves from liability.

Finally, from a democratic legitimacy point of view, the second issue arises, and that is, if EU and its citizens do feel comfortable in outsourcing some of these powers to an interest based private actor.

[1] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 593 final, 2016/0280 (COD) (hereinafter: the ´Directive on Copyright in the Digital Single Market´).
[2] Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* ECLI:EU:C:2016:644 para. 31.