Branka Marušić* Derogating regulative and enforcement powers in copyright protection in the Digital Market: a Trojan horse for the EU? *

Abstract

The proposal for a Directive on Copyright in the Digital Market contains a proposal to harmonise protection of copyright in the digital market and to close the so called ‘value gap’. The value gap is a term that, in the realm of online copyright dissemination, signifies a situation where the right holder (for example an author of a song) is not adequately remunerated for his or her work. This situation usually occurs when his or her song is made available on an online platform, such as YouTube and him or she is not paid for the use and enjoyment of its work. The current market mechanism to tackle this problem is done via licensing schemes.

This paper will analyse the possible Trojan horse that is hidden in this proposal, in order to ask the question, when it comes to online regulation and enforcement of copyright, is the deployment of Article 114 of the TFEU the correct legal basis for the EU to use in order to enhance accountability of the Internet Service Providers in regulation and enforcement of copyright.

1 Introduction

The European Union (the ‘EU’) legislator, in the light of the new emerging digital market and its Digital Single Market agenda, 1 proposed two packages of legal reforms in 2016. The second one, which was made available in September 2016, contains a proposal for a new Directive on Copyright in the Digital Single Market. 2 In this directive there are several new legislative solutions put forward that aim to harmonise protection of copyright in the digital market and to close the so called ‘value gap’.

The value gap is a term that, in the realm of online copyright dissemination, signifies a situation where the right holder (for example an author of a song) is not adequately remunerated for his or her work. This situation usually occurs when his or her song is made available on an online

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platform, such as YouTube and him or she is not paid for the use and enjoyment of its work. The value gap is then created, because the author of the song does not receive any revenue, whereas YouTube as a service receives a steady revenue stream, derived from advertising, and based on the amount of traffic that it attracts. The allure factor for advertisement and the steady revenue stream, rests on the number of viewers that visit YouTube services, and the fact that the viewers are attracted to the copyright protected material that is made available on its platform.\(^3\)

However, the term value gap suffers from some insufficiencies. Firstly, the concept of value, from an economic perspective, suggests that value in copyrighted works should not be entirely ascribed to right holders. The market and social value that the work accrues is measured\(^4\) differently and evolves over time. In essence what type of monetary value we ascribe to work depends on the users’ perception of this work.\(^5\) Secondly, the value might also be linked with the innovation, or inspiration to innovation a work might entail. It is argued by some that value also entails the transformative works made by the online platforms, by using the works in new forms, contexts and scenarios, by which the initial works are used as a source of innovation and incentivises the further development of ideas and proliferation of copyright.\(^6\)

The current market mechanism to tackle the problem of the value gap is done via licensing schemes. This means, that the right holders organisations enter into agreements with platforms in order to safeguard interest of copyright holders. The typical example of this is YouTube who enters into collective licensing agreements with collecting societies in EU Member States in order to shield itself from the right holders’ demand to be compensated for the use of their material (such as songs, movies, video clips). This compensation is usually done in the form of streamlining part of the advertisement revenue to right holders who have their copyrighted material placed on the


YouTube platform. In Sweden, YouTube entered into a licensing agreement with STIM, and this trend is visible in other EU Member States, such as Croatia and Germany.

However, the need to solve the value gap addressed by the concerns of right holders’ organisations and collecting societies has been tackled by the online platforms industry. Although, in the report made by CISAC- International Confederation of Societies of Authors and Composers it is stated that the digital services do not create or invest in content and that there exists a transfer of value from the creators to the platforms, the Computer & Communications Industry Association (the ‘CCIA’) research paper suggests that digital streaming services enable massive value growth to the right holders’. CISAC in its report lists the fact that the market value of online platforms in the EU has been estimated at nearly 22 billion EUR in 2015, yet revenues returned to the right holders for the use of creative content in the digital environment represented only 7.2% of overall collections in 2016. Moreover, some online platforms do not enter into licence agreements, and those who do, the conditions contained in them significantly differ from the conditions of traditional services, such as television or radio, which might in return jeopardise the value of the rights. However, the CCIA research paper suggests that the music industry has had a boost of revenues in 2017, and global collecting societies’ revenues have been growing steadily to reach 8.6 billion EUR in 2015, a 26% increase since 2008. Moreover, between 2010 and 2015, close to half of the growth in collecting societies’ income came from digital environment sources. Therefore, the question resurfaced, is there even a need to solve the value gap, if the market mechanisms are showing a positive trend in solving it themselves.

The new proposal on the Directive on Copyright in the Digital Market contains a proposal to tackle the issue of closing the value gap on the EU wide level. This proposal essentially seeks to ascertain and legitimise the current market solution in the form of licensing schemes. However, this paper will try to analyse the possible Trojan horse that is hidden in this proposal, in order to ask the question, when it comes to online regulation and enforcement of copyright, can harmonisation be...

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done under Article 114 of the TFEU\(^2\) through enhanced accountability of Internet Service Providers (the ‘ISPs’).

For the purposes of this paper the term ‘derogating regulative and enforcement powers’ will be addressed through the prism and parameters set by the Court of Justice of the European Union (the ‘CJEU’) in its case law on when and in what circumstances the EU can delegate some of its powers to independent entities under the provision of Article 114 of the TFEU, which serves as a basis for harmonisation of laws. This will be used as a benchmark in order to evaluate an inverted situation, where the rules of harmonisation are used to derogate from traditional understanding on how we harmonise rules in the internal market. To be more precise, unlike delegation of powers established in Article 114 of the TFEU, under which the EU either allocates some of its powers to an independent body or harmonises national laws, here, there seems to be a situation where harmonisation tools are used for enhancing accountability of an independent market operator to regulate and enforce copyright online, and essentially advocating self-regulating models and not government controlled ones. Additionally, the notion of derogation of harmonisation powers, for the purposes of this paper, should be linked with the meaning of providing independent entities the capacity or ability to direct or influence the behaviour of others or the course of events, in an online environment. Due to the fact that harmonisation of intellectual property rights falls into the shared competences of the EU and its Member States, and that the inverted situation of delegation of powers under Article 114 addressed in this paper falls in the fluid space between public and private law mechanisms, the term derogation of powers seems more suited to describe the current proposal. This is so, because, in the traditional delegation of powers conducted under Article 114 of the TFEU, harmonisation of laws was done mostly in the offline, physical market sphere, and they relied on traditional public law mechanisms that were to be employed in approximation and harmonisation of laws. In this specific instance, due to the fact that harmonisation tackles issues and market players online, in a digital market sphere, the fluidity between public and private law is more exacerbated and evident, and sometimes these two notions are hard to distinguish. This is more evident if we take into consideration that the regulative landscape of online market players often consists of self-regulating rules of conduct and contractual relationships, which are considered a more private law mechanism. For these purposes, term derogation of powers seems more apt to use, because, although the same principles and parameters for delegation of powers could be applied to analyse the legal structure of the proposal, the factual setting is inverted.

This paper will be divided into three parts. The first part will discuss the current regulation and enforcement landscape online in matters concerning copyright. The second part will address the legislative proposal for ISP liability as well as current parameters and principles which need to be taken into consideration while regulating and enforcing copyright online. The paper will then conclude with an analysis of the effects of the legitimisation of market solutions specifically taking

into consideration whether (a) there is a need to harmonise this field by the EU and to what extent can one enhance accountability of ISPs, (b) are ISPs equipped to provide the same level of protection in an online world that is afforded to actors in an offline setting, and (c) the issue of democratic deficit that occurs when EU deregulates powers to third actors.

2 Current regulation and enforcement landscape online in matters concerning copyright

In recent years, the online environment has been in the forefront of proliferation of ideas, information, content, and booming digital industry. The wireless thread of internet changes the way how we communicate among each other, how we receive our information, books, clothes, meet our friends and enjoy our free time. The intrusion of this new infrastructure, which we use not only for business but also for leisure, has come to be viewed as a new outlet for proliferation of content, both by right holders, end users and third parties hosting and storing this content.

Against this backdrop, the issue of how do we protect right holders’ interests and award their intellectual endeavour, and not ‘break the internet’ while doing so, has been proven to be quite a task. The intuitive step made by the EU legislator in regulating the online arena was to place liability regimes on the ISPs as intermediary facilitators of the flow of content that occurs between the right holders’ as suppliers of content and the end users as consumers of this content.

The definition of what an ISP represents, is fragmented and often confusing to grasp. For the purposes of this paper, two definitions will be presented. The first one is the definition of an ISP provided by EU law, and the second one is the definition of an internet intermediary by the Organisation for Economic Co-operation and Development (the ‘OECD’). These two definitions will be presented in order to define the scope of the online intermediary actors that are in the focus of this paper as well as to exemplify which ISP actors this paper analyses. Additionally, these two definitions are here to illustrate the problem which the legislators have in determination of online actors and their role in the online digital market.

The E-Commerce Directive\(^\text{13}\) provides for a definition of an ISP as any natural or legal person that is providing an information society service. Information society service is defined with three distinctive characteristics. The first one is that this service is provided at a distance, which indicates that the parties are not simultaneously present at the same place. The second one is that this service is offered via electronic means, which means that the service is initially sent and received at its destination by means of electronic equipment for the processing and storage of data, and entirely transmitted, conveyed and received by wire, radio, optical means or other electronic means. And lastly, that this service is offered and received at the individual request of a recipient of the service, which indicates that the service is provided through the transmission of data on individual

request. It should be borne in mind that in order to fall in the scope of application of the E-Commerce Directive, the information society service must be normally provided for remuneration, however this does not exclude the services that are not provided for remuneration.

Riordan suggests that this definition is narrower than the general class of internet services because it only applies to economic operators and not purely non-commercial activities. This would mean that not all internet intermediaries are caught in the scope of application of harmonised rules, but only the ones that fulfil the abovementioned criteria. However, being a commercial entity is not a prerequisite to fall under the liability rules. This information is important, because it aids in defining the liability of these actors, which will be discussed later in this paper.

However, for the purposes of illustration of what kind of ISPs exists, the OECD proposes a more delineated and specific definition, which provides for sub-categories of intermediaries grouped on the basis of facilitation of transactions between third parties on the internet. This definition proposes six sub-categories of intermediaries, and these are (a) access and service providers, (b) data processors, hosts and registrars, (c) search engines and portals, (d) e-commerce platforms, (e) payment systems and (f) participative networking platforms. It should be noted that OECD also recognises the differences between intermediaries that only facilitate the flow of content and the ones that publish and sell their own content.

The main idea of the above definitional illustrations is to summarise the problem of allocation of liability for online copyright infringements. In general, when there is an ISP that produces itself the content which is copyright infringing, then that ISP is liable for the infringement. This is the so called primary liability for copyright infringement which in general terms can be stated is harmonised on an EU level. However, when the ISP is only a facilitator of the flow of content then it will not be held liable if it does not have control over the content (either by knowledge or active participation in proliferation of that content) that is transmitted via its platform infrastructure. This is the so called secondary liability and under the terms of the E-Commerce Directive this general rule only applies to economic operators that fall under the ‘safe harbour’ provisions of that same Directive. For clarification purposes, the safe harbour provisions provide for reasons of exclusion of liability that may rise at a national level of Member States, and have been widely
incorporated into national legislation of Member States for both civil and criminal matters.\(^{19}\) The E-Commerce Directive recognises three safe harbour provisions and these are the ‘mere conduit’,\(^{20}\) the ‘hosting provider,’\(^{21}\) and the ‘caching’\(^{22}\) provision. Additionally, there is no general obligation to monitor the content that is stored and transmitted by the ISP under the aforementioned three categories.\(^{23}\) It should be reaffirmed here again, that the safe harbour provisions only apply to ISPs when they are intermediaries of the information (passive facilitators of the flow of content), and not the originators of the information.

For ease of reference, three distinctions should be made regarding the terms of primary and secondary liability. The first one relates to the scope of application of the primary and secondary liability. Whereas primary liability concerns itself with the actors who are directly involved in the infringing activity, secondary liability concerns actors who are infringing copyright in a commercial setting, either by dealing in infringing copies or facilitating infringement (when facilitating infringement, the condition of commercial setting is not as relevant). The second distinction concerns the knowledge of the infringing action. Usually in primary infringement the liability for the infringing act does not yield the assessment of whether the actor concerned had knowledge in order to ascertain infringement. However, in the assessment of secondary liability, it is the knowledge of the fact that an infringing act has occurred that determines whether liability can be ascribed.\(^{24}\) Lastly, the standard for the liability regime has been set on an international and at the EU level. Regarding the primary liability international agreements such as WCT,\(^{25}\) and the TRIPS Agreement\(^{26}\) provide for the setting of the outer limits of scope of copyright protection by providing that ideas are not protected under copyright, only the expression of them. This has been implemented through the EU copyright harmonisation framework and national laws of Member States. Additionally, under the CJEU interpretation of copyright infringement, in order for it to occur there needs to be found that ‘any part’ of the work is reproduced, as long as that part fulfils the criteria of protection and that is that it is original and author’s own intellectual creation.\(^{27}\) By

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\(^{20}\) ISPs that transmit information from one point on a network to another at the request of the recipient of the service or that simply provide access to a communication network.

\(^{21}\) ISPs that store information provided by a recipient of a service.

\(^{22}\) The automatic, intermediate and temporary storage of information for the sole purpose of making more efficient the onward transmission of that information.


this, primary liability for copyright infringement on the EU level provides for a standard of adjudication of occurrence where a work (expression of an idea, and not the idea itself) is infringed. In regards of secondary liability of the ISPs under the EU law regime, as stated above, it is negatively defined through exclusions of liability. This was done through the E-Commerce Directive, and not a specific copyright harmonising directive because it was recognised by the EU legislator that ISP liability does not only pertain to matters of copyright, but it can also fall in the realm of defamation, hate speech, sale of counterfeiting goods and other possible legal basis. Two issues here need to be noted. The first issue is that the immunity afforded by the safe harbour provisions excuse liability for damages, other monetary remedy, and criminal sanction, but they do not prohibit an injunctive relief (an order to stop or remove infringing activities). And secondly, that some courts, such as the European Court of Human Rights (the ‘ECtHR’) when assessing ISP liability for hate speech (another basis for ISP liability) was reluctant to go into analysis of the application of safe harbour provisions as implemented in the national law of an EU Member State, in order to provide an immunity from liability for the ISP. Therefore, when it comes to secondary liability of the ISPs, there is a lack of harmonisation for injunctive relief at this moment on an EU level, as well as the fact that there exists an adjudicative reluctance to employ the safe harbour provisions across the board for all basis of exclusion of liability.

Although the above contextualisation of ISP liability might portray a situation that provides for a clear-cut delimitation of rights and duties of online actors in copyright enforcement, this picture is only an illusion. Three points illustrate the problematics of the current situation. Firstly, there is no consensus on what platform should be deemed an ISP for the purposes of the E-Commerce Directive, and this is evaluated on a case by case basis. To illustrate this the CJEU recognised in cases Google France and L’Oreal vs. E-Bay, that search engines such as Google and sale and purchase websites such as eBay are facilitators of the flow of content, and not originators of content, thus falling under the safe harbour provisions, and in the recent case CJEU recognised that Pirate Bay as an indexing site infringes copyright. In the case law of Member States, on a more general level, the liability has been excluded in some cases for ISPs such as YouTube in

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28 Recital 45 E-Commerce Directive.
30 Joined cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteiciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08) [2010] ECLI:EU:C:2010:159.
31 Case C-324/09, L’Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L’Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi [2011] ECLI:EU:C:2011:474.
Italy\textsuperscript{33} and Spain,\textsuperscript{34} as well as Google in France\textsuperscript{35} and not for Pirate Bay in Sweden.\textsuperscript{36} Furthermore, in order to apply the safe harbour provisions the ISPs heavily rely on notice and take down procedures in order to shield themselves from liability.\textsuperscript{37} Secondly, the subject matter of exclusion of liability and with it the degree of assessment of control over content criteria is subject to national law of Member States which might lead to disparities of allocation of liability on ISPs. And lastly, the case law of the CJEU provides for vague terms, such as the term \textit{diligent} economic operator,\textsuperscript{38} which is obligated to identify illegal actions made over its infrastructural platform, however what the term \textit{diligent} represents is left to the courts and national law of Member States to define.

The liability scheme, provides an introduction into the question on considering how the enforcement of copyright mechanisms are either supported or inhibited by the broad European regulatory framework for E-Commerce. As indicated above, the practical impossibility of pursuing individual infringers has led copyright stakeholders to vest efforts in placing accountability with intermediaries.\textsuperscript{39} A general consensus has arisen that ISPs are the best placed party, in both a theoretical and practical sense, to respond to online infringement.

Two approaches exist for assigning this liability of an ISP in relation to copyright infringement; they are characterised as either vertical or horizontal. The vertical approach is characteristic of intellectual property laws in the United States, where liability regimes are each individually applied to different areas of law. In contrast, laws that are characteristic of the horizontal approach to liability are applicable to any form of infringement regardless of the relevant topic of law. This means that laws not only apply to copyright infringement, but also to other laws concerning matters such as privacy and defamation.\textsuperscript{40} This approach is exemplified in the E-Commerce Directive.\textsuperscript{41}

As was outlined above, the E-Commerce Directive sets out an exoneration scheme for ISP liability at both the civil and criminal level. The public policy reasons behind such liability limitations were said to be in order to preserve freedom of communications, expressions and commerce on the Internet.\textsuperscript{42} However, the question remains what are the enforcement modalities that are left to the

\textsuperscript{33} Tribunale ordinario di Torino, causa n.r.g. 15128/2014, Delta TV programs srl c/a Google Ireland Holdings, Google Inc, YouTube, 23 January 2014.

\textsuperscript{34} Madrid Civil Court of Appeal, case no 505/2012, Gestevision Telecinco c/a YouTube LLC, 14 January 2014.

\textsuperscript{35} Cour de cassation, chambre commerciale , Audience publique du mardi 29 janvier 2013 , N° de pourvoi: 11-21011 11-24713.

\textsuperscript{36} Case B13301-06 Pirate Bay Stockholm’s District Court (17 April 2009) [translation commissioned by IFPI].


\textsuperscript{38} Ibid [31] para 120.

\textsuperscript{39} Peter Danowsky, \textit{The Enforcement of Copyright in a Borderless Online Environment: A Practitioner’s View in Copyright in a Borderless Online Environment} (ed. Axhamn), Norstedts juridik, 2012, p 127-135.

\textsuperscript{40} Ibid [37].


\textsuperscript{42} Annemarie Bridy, \textit{Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement} 89 Oregon Law Review (2010-2011) 81, p 52.
right holder to secure their interest online. These can be found under the InfoSoc Directive[^43] and the Enforcement Directive[^44]. Under Article 8(3) of the InfoSoc Directive, Member States are obliged to ensure that right holders can apply for an injunction against intermediaries when their services are used by a third party in order to infringe a copyright or related right. The Enforcement Directive has a mirroring provision in its Article 11. These injunctions, against ISPs, can be sought in order to bring infringements to an end, but also to prevent those infringements from occurring in the future[^45]. The modality of these injunctions have taken different forms such as personal data collection[^46], website blocking measures[^47], filtering electronic communications[^48], or recently a duty to secure access to a Wi-Fi network via password[^49]. Both the aforementioned directives present a minimum form of harmonisation, and Member States are relatively free regarding the way in which EU level principles are instilled within their own national laws, however how the provisions of the Enforcement Directive should operate alongside the E-Commerce Directive is still largely unclear, despite the fact that under Article 2(3) its operation should not affect the E-Commerce or InfoSoc Directive.

In the current context, where ambiguity exists for the implementation of the EU Directives, and consequently for the legal liability of intermediary actors, ISPs embark upon greater self-regulation to find workable solutions for the sake of preserving their own rights and interests. These solutions range from automated takedown mechanisms that are subject to terms and conditions of individual service provider, to monitoring mechanisms that might struggle with identification of infringing content[^50]. This struggle for content identification is more evident, if we take into consideration that in a single second online, there is at least 2,580,854 emails sent, 43,731 GB of data transmitted by ISPs, and every minute there are over 400 hours of new videos that are uploaded to YouTube[^51]. Additionally, as industry stakeholders attempt to assign a greater accountability for ISPs to execute


intensified monitoring and data collection activities for the purposes of enforcing copyright, the application of safe harbour provisions, is made all the more problematic.

3 New proposal and set of guiding tools in online regulation and enforcement

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\(^{52}\) that provided an obligation for the maintenance of balancing act between right holders and end users, and the second one was the proposal for the Directive on Copyright in the Digital Single Market. The Directive on Copyright in the Digital Single Market, in Article 13 provides for an introduction of an *obligation* to monitor the activity of users through content recognition technologies, 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*. These two instances provide for a need that whoever regulates and enforces copyright online needs to balance right holder’s property rights and end users right of freedom of expression and information. This balancing act in itself is hard to achieve on the EU and Member State level while regulating and enforcing copyright. The problem might be even more aggravated if there exists a margin of discretion that will allow for this balancing to be placed in the hands of independent market operators, such as ISPs in their ‘online policing’ capacity. However, this paper will not go into the analysis of this issue, it will rather go into the issue of framing the new accountability regime proposed by the Commission. It should be noted that that the current framing of the proposal seems to ascertain more detailed rules for ISPs accountability in observing right holder’s rights. The term accountability and not liability should be stressed here for two reasons. Firstly, deriving from the explanatory memorandum to the proposal as well as the recitals,\(^{53}\) there is an underlying tone used by the Commission that stresses the importance of preserving rights rather than sanctioning its breach. Secondly, unlike the wording and framing of the terms in the E-Commerce Directive, this proposal does not put forward either criteria for liability (or lack thereof) nor manner in which this liability should be dealt with.

Taking into consideration the above, this paper will not go into the analysis of compatibility and complementary of the system that is proposed with the current liability regime established under the E-Commerce Directive. What this paper will analyse is the legitimacy of proposing the *de facto* legitimisation of the current market mechanisms that solely rest upon the self-regulating landscape of individual ISPs.


4 Legitimisation of market solutions: what are the issues in derogation of powers

The new proposal for the Directive on Copyright in the Digital Single Market uses as its legal basis Article 114 of the TFEU. The idea behind Article 114 of the TFEU is that this article is invoked when the EU legislator aims to harmonise a field of law on the EU level to further market integration and remove obstacles in the internal market which are made through differing national law enactments and practices.

For clarification purposes, in order to legislate in any specific area of law, the legislator needs to have competences to embark in such an action. Under the principle of conferral of powers, the EU is granted the legislative competence whenever the Treaties empower it to act, in order to achieve the objectives enshrined in the Treaties themselves. Following that, any legislative act must be based on a Treaty provision, and consequently have a legal basis. However, when harmonising the national laws in the field of copyright, the Treaties are silent in referencing such competence. Because, such specific clause was not found in the Treaties, the harmonisation in the field of copyright has been made on the pillars of building the internal market, rather than specific copyright based issue. This was so, since the trade in copyrighted material, be it embedded or complementary to goods or services, can be hindered by differing national copyright protection regimes. Hence, most of the copyright harmonisation measures in the field of copyright, including the recent copyright legislative package has been adopted and proposed under Article 114 of the TFEU.

However, Article 114 of the TFEU contains a functional competence rule. This means, that Article 114 does not provide any guide regarding what the substantive content of the harmonising measure should be. By this Article 114 main purpose is to grant competence to enable the establishment and functioning of the internal market, independent of the substantive content or subject matter of the harmonising measure.

Since the nature of Article 114 is one of functionality, it has no normative or substantial content. By this, this provision is quite flexible competence norm, in the meaning that it enables the EU to harmonise a wide range of subjects, as long as these subjects can be linked with the idea of creation of the internal market. However, this flexibility can be seen as a making the harmonisation process dependent on the legislator’s discretion, creating a situation of what Weatherill calls a competence creep.

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The specific issue of competence creep, or the degree of legislator’s discretion, will be addressed through a suggested provision of Article 13 of the Directive on Copyright in the Digital Single Market. Focus on this specific article and not the entire copyright reform is made to illustrate the problem of protection and enforcement of copyright online.

In this specific case, the framing of the solution of harmonisation hints at the fact that Commission proposes to Member States to give room to market mechanisms developed by the ISPs to provide for an environment where ISPs ‘cooperate with right holders to ensure the functioning of concluded agreements’, ‘Member States facilitate the cooperation between ISPs and right holders through stakeholder’s dialogue’ in order to ‘define best practices’. By this, the traditional paradigm where the EU instructs Member States to regulate a certain area, is shifted to a more nuanced and suppressed notion of ‘let the market regulate’. What is meant by this, is the idea that although not directly framed, there is underlying assumption that the current private law mechanisms developed by the ISPs in the form of licensing schemes should be taken from a traditional private law outlook and placed under the umbrella of public law mechanism in order to highlight their regulative and enforcement role online. The idea here rests on the notion that ISPs are the best suited to have the technology and the ‘know-how’ to find the solution to bridge the value gap problem in copyright.58 The rationale is that the one who provides the infrastructure for creation, dissemination and consequently enables copyright infringement would be the one who would know how to control these actions.

Due to the fact that in its framing outlook this proposal seems to suggest to Member States to leave the issue of ‘policing online copyright infringement’ to the market, the basic question is, can EU do that under the set parameters of Article 114 of the TFEU? Can this derogation in which there is a need to regulate, but the legislator is aware of its physical world constraints to wholeheartedly dive in the harmonisation process, even possible under the current legal boundaries of employment of Article 114 of the TFEU as a proper legal basis for harmonisation.

The overview of legitimising market solutions will firstly tackle the issue of derogation of powers under Article 114 of the TFEU, with providing an analysis whether this is a correct legal basis for solving the problem of the value gap through EU wide harmonisation. To further this, the analysis will go into the question whether the ISPs are equipped to provide the same level of protection in an online world that is afforded to actors in an offline setting, and lastly the analysis will touch upon the issue of democratic deficit that occurs when EU derogates regulative powers to third actors.

4.1 Article 114 TFEU as a proper legal basis for closing the value gap

The legislative solution put forward in order to solve the value gap issue rests on two pillars. The first pillar is providing an appropriate legal basis under EU law to harmonise the field of online copyright and with it close the value gap problem, and the second pillar is the legitimisation of the

current content identification technologies and complaints and redress mechanisms used by ISPs to strengthen the licensing schemes that are concluded between the ISPs and right holders. 59

In order to evaluate whether Article 114 TFEU is a proper legal basis that can be used to legitimise the current market solution, two issues need to be highlighted. The first issue is that the Article 13 provides for a role for Member States as facilitators of a stakeholder’s dialogue between the ISPs and rightsholders, which occurs in order to find best mechanisms to ensure the effectiveness of licensing schemes. And secondly, that this role of facilitator, essentially places the regulative and enforcement power in the hands of ISPs, rather than the Member States.

In general, Article 114 TFEU is regarded as a proper legal basis through use of directives as legal mechanisms for harmonisation and approximation of laws on an EU wide level. However, in order to apply Article 114 TFEU as a proper legal basis, two conditions need to be fulfilled. The first one is that the directive needs to adopt measures for the approximation of national provisions and the second is that these national provisions need to aim at the establishment and functioning of the internal market.

Even if we disregard the fact that in the present case we are not strictly dealing with approximation of national provisions but with the approximation of self-regulating online practices that differ between individual ISPs, we still need to go into an analysis whether Article 114 TFEU, allows enhanced accountability of online market players, in this instance the ISPs. In order to evaluate this issue, two questions need to be answered. The first one is can EU make ISPs accountable by placing the regulative and enforcement powers upon them and second one is do the mechanisms provided in the evaluation and closing of the value gap amount to harmonisation measures envisaged by Article 114 TFEU.

4.1.1 Derogation of powers under Article 114 - Quis custodiet ipsos custodes?

When assessing the derogation of powers from Member States to a specific actor the criteria established in the Meroni case should be taken into consideration. 60 Although, these criteria were set for delegation of powers to a specific regulating body, and in this case, we have a situation where we analyse enhancing accountability of market operators, and with it derogating the powers of Member States to regulate, the general principles established there can be used for an assessment. This is so for two reasons. Firstly, each ISP creates its own regulative framework for functioning of its platform, thus effectively making it a self-regulative body for its own slice of the digital market. Secondly, the criteria in the Meroni case provide for a general framework when the EU has competence to provide independent entities with the possibility and the power to direct or influence the behavior of others, which can be used to assess whether EU has competence to

signal to Member States that accountability in enforcement of copyright online should be placed upon ISPs and not Member States themselves.

In the light of the above, the *Meroni* criteria state, that the delegation of powers from the EU to a specific actor is valid in a situation of clearly defined executive powers of which the exercise can be subject to a strict review in the light of objective criteria determined by the authority that delegated this power. The validity is brought into question in the situation where there exist a discretionary power implementing a wide margin of discretion which results in the actual transfer of accountability which essentially does not provide for the same safeguards that a government would provide, due to the fact that this transfer is made to a private actor.

By the current proposal, the enhanced accountability in regulative and enforcement powers to ISPs is not clearly defined and is not subject to a strict review. The above two criteria can be placed in two specific boxes that state where there is no effective control by the delegating body, in this case the EU or the Member State, due to the shared competences of the field of harmonisation, and no judicial control over the mechanism provided by enhanced accountability, this action should be viewed as invalid.

In this specific case, the legislative solution does not provide for a clear definition of an effective control, either by the EU or Member States, over the choice or manner in which the ISPs regulate the issue of solving the value gap.

If we observe literature on accountability, in which large volumes have been written most dominantly in the fields of political science and law, the first issue that comes into the forefront is the fact that there is no established definition of accountability. However, as some academics point out there are two generally accepted aspects of accountability. The first one is that the agent has to report to a higher authority or principal, and the second one is that the higher authority or principal can reward or censor the agent. In both of these aspects, it is the agent, who firstly accounts for its conduct, and secondly is sanctioned or reworded based on its demonstrated conduct. However, it should be stressed that an accountable agent must enjoy a certain degree of independence. It is in this balancing act between accountability and independence that we can assess the idea of effective control over the actions of ISPs by the EU or Member State.

The role of facilitators and mediators that is envisaged in the proposal for Member States provides for a discretionary power of ISPs to use the private law licensing scheme mechanism to establish different safeguards than the ones provided by Member States. Empowering the licensing schemes through a traditional public law mechanism of directives and national implementing measures still...
does not tackle the issue that this proposal mainly deals with accountability of a market player for safeguarding the interest of right holders’, and that the underlying idea of the proposal does not hint what occurs in a situation when this accountability is either not achieved or breached. Specifically, the question of reporting to the EU or the Member State as the principle in the accountability model on how, when and in what manner the interests of the right holder are safeguarded is lacking. By this, the accountability model, placed in the current legislative proposal setting, cannot give an answer to what occurs when the ISPs as agents do not adhere to the specific tasks that were derogated to them.

The balancing act of accountability and independence of ISPs can be tested on a specific important safeguard, relevant for all market players, and that is the safeguard of legal certainty, which presumes knowledge of rules in order for actors to align their behaviour.⁶⁴ Due to the fact that licensing schemes, specifically the ones that YouTube concludes with collecting societies in Member States, are often covered by non-disclosure clauses, these private law mechanisms deprive third parties, such as end users, of knowledge of rules as well as the opportunity to adjust their online behaviour. By this, the balance tips over to the independent side of ISP conduct, thus diminishing the accountability in this scheme, rendering the effective control of the principle over the actor unenforceable.

Furthermore, the judicial control over the enforcement of regulative powers is again left to the discretion of the ISPs. The complaints and redress mechanisms is done via the ISPs and Member States are here to ensure that the ISPs have them. How Member States ensure this judicial review, which is done through an alternative dispute resolution to the one provided by Member States and what kind of objective criteria is placed on the assessment of breaches of copyright is an unknown factor. Furthermore, the interplay with the alternative dispute forum provided by the ISPs and a judicial forum provided by the Member States might be problematic. The derogation of powers from EU to Member States in this specific instance of judicial control, is still in its outset heavily dependent on the mechanism developed by ISPs that are at this stage purely automated services that do not take into consideration exceptions and limitations to copyright protection developed on the EU and national level of Member States. Moreover, the question of who is ‘more’ competent to exert the review, and when does the state judicial power come into the forefront becomes more prominent. This situation also creates a problem for the standard of legal certainty, because the online actors might find themselves in the situation of not knowing to whom to address their complaint or a scenario in which there are two competing overlapping adjudicative competences which might come to different conclusions and yield different results. With this it is difficult to ascertain that the second criteria of the Meroni doctrine, of an effective judicial control that is

subject to a strict review in the light of objective criteria determined by the authority that delegated this power is met.

4.1.2 Harmonisation measures envisaged by Article 13 of the Directive on Copyright in the Digital Single Market

In order for a harmonisation measure to be considered valid, a clear constitutional limit for the EU has been placed on the employment of Article 114 TFEU. This constitutional limit consists of two factors. The first one is a very general and broad one which states that the measure needs to improve the conditions for the establishment and functioning of the internal market. The second one clarifies that the adoption of a measure is justified under Article 114 TFEU if the aim is to prevent obstacles to trade resulting from diverse development of national laws. However, the mere disparity is not enough, there must be a direct effect on the functioning of the internal market.

Question here amounts to the fact whether the proposed measure to close the value gap, under the proposal of the Directive on Copyright in the Digital Single Market can be characterised as a harmonisation measure under the constitutional restraints of EU law. The key factor in this analysis is whether the national laws of Member States have been divergent to such a degree to create disparities in the internal market and the clear answer is no. It was the silence of the laws, rather than their volume of voice that caused the ISPs to self-regulate their behaviour online. And consequently, the self-regulation created the divergence of solutions, in a form of regulative mechanisms of the individual ISPs that created the obstacles to trade on the digital internal market.

The proposal to solve the value gap, does not tackle the need for a uniform approach in harmonising this field, it only goes as far as to suggest the facilitating role of Member States in finding the best solution, which will be left to the market. Although, the legislature has a wide margin of discretion in choosing the appropriate harmonisation measure, that measure still needs to be substantiated by at least a clear vision. By this proposal, there does not exist a clear vision of what kind of harmonisation is taking place, what kind of measure will be taken in order to ensure the uniform application of EU law, and how will the divergent approach be solved through this proposal. Therefore, it does not fulfil the criteria of constitutional constraint placed on the use of Article 114 TFEU in approximation of laws and does not serve as a proper legal basis for the enactment of the proposed value gap solution under Article 13 of the Directive on Copyright in the Digital Single Market. However, there might be a case to justify this harmonising action under Article 352 TFEU, which contains a provision on residual competence of the EU to legislate in the cases where it is necessary for the EU to adopt an act to attain objectives laid down by the treaties when the latter have not provided the powers of action necessary to attain them (such as a need to

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65 Case C-376/98 Germany v Parliament and Council (Tobacco advertising) [2000] ECLI:EU:C:2000:544, para 83 and 86.
67 Miroslava Scholten, Marloes Van Rijssbergen The ESMA-Short Selling Case Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants Legal Issues of Economic Integration (2014) 41(4) p 400.
close the value gap). The justification for harmonising action under Article 352 TFEU will not be the subject of analysis of this paper. However, it should be noted that Article 352 has been employed before in the realm of harmonisation of intellectual property rights, but as a legal basis for creation of unitary registered rights, such as community trade mark and design. Since the entry into force of the Lisbon Treaty, new Article 118 of the TFEU that provides for the creation of unitary intellectual property rights on the EU level, has been used instead of it, for example for the establishment of the unitary patent, leaving the Article 352 to be re-examined as a proper legal basis for harmonising action in the realm of intellectual property rights.

4.1.3 Democratic deficit in the enactment of regulation and enforcement of rights online

The above mentioned two issues deal with the possibility to use Article 114 as a valid legal basis for derogation of power to ISPs. However, even if this article served as a proper legal basis, the question remains whether this proposal has democratic legitimacy and with it, does EU have a mandate to regulate. To understand democratic legitimacy several factors, need to be taken into consideration. Firstly, democratic legitimacy rests on the idea of principles and procedures that are followed under which collectivised and binding decisions must be accepted by those who have not participated in making them.68 Essentially, it is a top down procedure made by democratically elected bodies that enact rules to be followed by citizens. However, on an EU wide level, involving EU citizens in the full range decision making process of EU policies would be an undue burden. Therefore, in this kind of situations it is often presumed that individuals lack the proper knowledge to purse their interest, so these tasks are delegated to elected political authorities who are then under an obligation to carry out these tasks effectively.69

Secondly, although the democratic legitimacy of the EU has been heavily criticised, the fact that each Member State has agreed to transfer some of its legislative powers and with it their legislative sovereignty to the EU still stands. Some academics70 have chosen to call this a hybrid polity that derives much of its legitimacy from the nation state governments.

However, what the constitutional framework of the Treaties did not envisage was the transfer of power from the Member States to the EU, and from the EU to the independent, unaccountable market players in the form of ISPs. And in this transfer of powers lies the democratic deficit and consequently the lack of mandate of this legislative proposal. It is characterised by a simple fact that the regulation and enforcement of the solution to tackle the online value gap is in principle

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left to a third actor that was not envisaged neither by founding Treaties of the EU, Member States that subscribe to these Treaties, nor the EU citizens.

4 Conclusion

In the eve of the last day of war between the city of Troy and Greeks, the Greeks decided to offer a gift to the city of Troy. This gift was supposed to signal the surrender of Greeks, and a victory of Troy. The gift was a wooden horse. The Troy’s priest Laocoön, took a look at this offer and stated: ‘*Quidquid id est, timeo Danaos et dona ferentes*’. And he was right. The Greeks used the wooden horse to conquer the city of Troy.

In the current legislative proposal on copyright reform, the ISPs were offered a gift by the EU legislator. This gift was to enhance the accountability of ISPs in online enforcement of copyright. The gift should be observed through two perspectives. The first perspective entails the notion that each ISP and its pertaining infrastructural platform is a ‘city state’ or ‘polis’ of itself, and that they themselves write, observe and enact rules applicable for their own polis and their own population (users). The second one entails the competence of the EU to derogate powers and enhance accountability of the ISPs. As stated in the introduction part of this paper, this derogation of powers has three components, which makes it an unusual choice of regulation. The first component concerns itself with the fact that under the umbrella of shared competences the EU chooses to imply to Member States that certain types of regulation need to be left to the market. With this there exist a certain validation that the entities that make the fabric of the online infrastructure are the best suited to control actions that arise on that infrastructure. The second component concerns the fact that the employment of this type of regulation can compromise the legal certainty standard established under EU and Member States legal regimes. When we validate specific regulative solutions, we also validate their intrinsic problems. The intrinsic problems connected to the ISPs self-regulating model, are most prominently lack of legal certainty in formulating online behaviour of parties, which is mostly due to the fact, that this formulation of the online behaviour is done through licensing schemes which fall under the terms of secrecy through non-disclosure clauses for some actors (such as end users). Furthermore, the parallel network of alternative dispute resolution mechanisms brings into the forefront the issue of adjudicative competences and the possibility of disparities in the criteria used for determination of the scope of copyright protection (as well as copyright infringement). The third component tackles the issue of the mandate to regulate in the online arena. If such a mandate was not envisaged, can a unilateral decision to bring about order where there is none or very little, create a mandate on its own.

Perhaps, the solution for tackling the problem of the value gap should be solved by the market itself via private strategies for the enforcement of copyright, with the appropriate exoneration from

71 Eng. ‘Whatever happens, I fear the Greeks, even when they bring presents’.
liability that could be clarified either by the CJEU or the legislator by modernising the E-
Commerce Directive, and effectively applied at the Member State level. This will in turn provide
greater clarity for all copyright stakeholders, and free relevant parties from the legal limbo they
are currently attempting to operate within online. Providing yet another piece of EU harmonising
legislation that raises more questions than provides solutions would only add to the problem of
delimitations of online ISP liability and lack of legal certainty for market players.