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**The Justification, Consequences, and Con-
troversy of Article 17 in the Directive on
Copyright in the Digital Single Market**

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Abstract

The Directive on Copyright in the Digital Single Market is the European Union's attempt to update its copyright law for the modern internet. It proved incredibly controversial. Parties from all sides of the internet community waged an aggressive campaign against it, while a hundred thousand citizens marched and millions more signed a petition to stop it. Much of the controversy surrounded the Directive's Article 17, which seeks to hold internet platforms accountable for distributing copyright-infringing content uploaded by its users. Supporters argue it will rebalance the relationship between content creators and the platforms that profit unfairly from their work. Critics claim it will censor creative expression and break the internet as we know it.

This paper explores the motivation underlying Article 17, then considers how the final text and its implications align with the Directive's ultimate goals. Overall, Article 17 is well-intentioned in its attempt to address significant problems in the EU's copyright regime. However, inadvertent consequences of its efforts could both harm internet users and put European tech companies at a disadvantage relative to their competitors in the United States.

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1 Introduction

The internet has changed since 2001. Significant portions of the European Union’s copyright laws have not. The Directive on Copyright in the Digital Single Market (“Copyright Directive” or “Directive”) is the European Union’s (“EU”) attempt to modernize these laws, which are older than YouTube, Facebook, and Reddit.¹

The Copyright Directive, which came into force on June 7, met fierce resistance at every step in the process. Internet platforms targeted by the Directive fought vehemently against it, as did open content foundations, such as Mozilla and Wikimedia, and policy centers like the Electronic Frontier Foundation (“EFF”).² More than 100,000 people across Europe marched against it.³ Over 5 million people have signed a petition to stop it on change.org.⁴ The EFF claimed the directive is the most controversial in the EU’s history.⁵

At the heart of this controversy lies Article 17.⁶ Broadly, Article 17’s purpose is to hold internet platforms accountable for distributing copyright-infringing content uploaded by its users.⁷ Supporters argue it will rebalance the relationship between content creators and the

¹Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) 2019 O.J. (L 130) p. 92–125

²YouTube | #SaveYourInternet - Article 13, <https://www.youtube.com/saveyourinternet/> (last visited Apr 7, 2019); #SaveYourInternet – Fight the #CensorshipMachine, <https://saveyourinternet.eu/> (last visited Apr 2, 2019).

³More than 100,000 Europeans march against #Article13, BOING BOING, <https://boingboing.net/2019/03/23/artikel-13.html> (last visited Apr 2, 2019).

⁴Sign the Petition, CHANGE.ORG, <https://www.change.org/p/european-parliament-stop-the-censorship-machine-save-the-internet> (last visited Apr 7, 2019).

⁵Cory Doctorow, THE EUROPEAN COPYRIGHT DIRECTIVE: WHAT IS IT, AND WHY HAS IT DRAWN MORE CONTROVERSY THAN ANY OTHER DIRECTIVE IN EU HISTORY? ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any> (last visited Apr 7, 2019).

⁶Article 17 was renumbered from being Article 13 in the most recent version of Directive.

⁷Frequently Asked Questions on Copyright Reform, OFFICIAL WEBSITE OF THE EUROPEAN UNION (2018), <https://ec.europa.eu/digital-single-market/en/faq/frequently-asked-questions-copyright-reform> (last visited Mar 29, 2019).

platforms that profit unfairly from their work.⁸ Critics claim it will “wreck the internet” by censoring creative expression.⁹

Overall, Article 17 is well-intentioned. It tries to address significant problems in the EU’s copyright regime. However, inadvertent consequences of its efforts could both harm internet users and put European tech companies at a disadvantage relative to their competitors in the United States.

2 Background

2.1 The Digital Single Market

The current European Commission¹⁰ wants to create a Digital Single Market that guarantees “the free movement of goods, persons, services, capital and data” throughout the EU.¹¹ Unlike the EU, the internet has no borders. Nonetheless, the EU Member States currently have their own internal digital markets subject to their own rules and regulations.¹²

The Commission believes these online barriers prevent the EU’s digital economy from reaching its full potential.¹³ By reducing them, the Commission hopes to create a market where businesses can provide and citizens can access goods and services across the EU,

⁸*Id.*

⁹Article 13 will wreck the internet because Swedish MEPs accidentally pushed the wrong voting button, BOING BOING, <https://boingboing.net/2019/03/26/jfc-fml-jfc.html> (last visited Apr 2, 2019); Julia Reda, UPLOAD FILTERS JULIA REDA, <https://juliareda.eu/eu-copyright-reform/censorship-machines/> (last visited Apr 1, 2019).

¹⁰The European Commission, the executive institution of the European Union, is currently led by President Jean-Claude Juncker and has been in office since 2014.

¹¹Digital single market, OFFICIAL WEBSITE OF THE EUROPEAN UNION, https://ec.europa.eu/commission/priorities/digital-single-market_en (last visited Mar 30, 2019).

¹²*Id.*

¹³*Id.*

regardless of nationality or location.¹⁴ The Commission estimates creating such a market “could contribute €415 billion per year to economic growth, boosting jobs, competition, investment and innovation in the EU” and “help Europe hold its position as a world leader in the digital economy.”¹⁵

2.2 The Copyright Directive

The Copyright Directive steps towards the broader goal of creating a single digital market by attempting to harmonize copyright laws across the EU. The Commission’s long-term copyright goal is to ensure “authors and performers, the creative industries, users and all those concerned by copyright are subject to the same rules, irrespective of where they are in the EU.”¹⁶

The fragmented set of copyright laws currently in effect throughout the EU is not well adapted for the contemporary digital landscape.¹⁷ For example, licenses to copyright-protected content do not cross borders in the EU.¹⁸ Rather, using copyright-protected content throughout the whole EU requires licenses in each of the 28 Member States.¹⁹

Such fragmentation creates legal uncertainty for everyone involved in the current EU copyright regime, from creators and producers to distributors and consumers.²⁰ This system

¹⁴*Id.*

¹⁵*Id.*

¹⁶Towards a modern, more European copyright framework, COM(2015) 626 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0626&from=EN> (last visited Mar 29, 2019).

¹⁷Questions and Answers – European Parliament’s vote in favour of modernised rules fit for digital age, OFFICIAL WEBSITE OF THE EUROPEAN UNION (2019), http://europa.eu/rapid/press-release_MEMO-19-1849_en.htm (last visited Mar 29, 2019).

¹⁸COM(2015) 626 final, *supra* note 16.

¹⁹*Id.*

²⁰Press release - State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate, OFFICIAL WEBSITE OF THE EUROPEAN UNION (2016), http://europa.eu/rapid/press-release_IP-16-3010_en.htm (last visited Mar 29, 2019).

conflicts with citizens' intuitions and expectations about how services on the internet should work.²¹ After crossing a border, EU citizens are often frustrated to find content they subscribed to back home inaccessible.²² Adding to citizens' frustrations, rules such as copyright exceptions for parody, are also not consistent throughout Member States.²³ A significant portion of citizens resort to accessing content through illegal means.²⁴ Meanwhile, fragmentation also harms content creators and even European culture itself, as it limits the distribution, and thus exposure of works, across borders.²⁵

The Commission believes harmonizing and modernizing copyright laws across the EU will strengthen its creative industries and allow "European culture to flourish and circulate."²⁶ Attempting to address the copyright issues at the national level would lead to more fragmentation.²⁷ Thus, the EU opted to take action with the Copyright Directive.²⁸

2.3 Justifying Article 17

Creating a better-functioning copyright marketplace by protecting the interests of rightsholders is one of the Copyright Directive's principle goals and, ultimately, the justification underlying Article 17.²⁹ The Commission asserts "Europe's creative output will continue

²¹COM(2015) 626 final, *supra* note 16.

²²*Id.*

²³Questions and Answers, *supra* note 17.

²⁴COM(2015) 626 final, *supra* note 16.

²⁵*Id.*

²⁶Press release - Copyright reform: The Commission welcomes European Parliament's vote in favour of modernised rules fit for digital age, OFFICIAL WEBSITE OF THE EUROPEAN UNION (2019), http://europa.eu/rapid/press-release_STATEMENT-19-1839_en.htm (last visited Mar 29, 2019).

²⁷Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, OFFICIAL WEBSITE OF THE EUROPEAN UNION, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0302&from=EN> (last visited Mar 29, 2019).

²⁸*Id.*

²⁹Frequently Asked Questions on Copyright Reform, *supra* note 7.

to flourish and play a meaningful role in Europe's growth, identity and social progress only if competitive creative industries and the required market mechanisms are in place."³⁰ A well-functioning marketplace, according to the Commission, requires that rightsholders actually have the opportunity to license or otherwise get paid for use of their content.³¹ Thus, because copyright rewards creativity, a high level of copyright protection is essential to for Europe's creative industries to function effectively.³²

Implicitly, the Commission desires to avoid the "Tragedy of the Commons" with European creators' works. Essentially, the Tragedy of the Commons is the theory that, when a resource is not protected by individual property rights and is open for common use, it will become overused to the point of degradation because users are incentivized to keep exploiting it for their own gain without bearing the cost of maintenance.³³ Relating the theory to intellectual property, the concern is that, when creators are not sufficiently compensated for their work because consumers can use it freely, they will not be incentivized to innovate or create at all.³⁴

In line with this reasoning, the Commission argues that strong copyright protections are necessary to "to promote creativity and innovation and create trust in the market place."³⁵ To them, rights such as copyright have little economic value if they are

³⁰COM(2015) 626 final, *supra* note 16.

³¹*Id.*

³²Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, *supra* note 27.

³³Samantha Leung, *The Commons and Anticommons in Intellectual Property*, 16 UCL JURISPRUDENCE REV. 16–28, 18 (2010), <https://heinonline.org/HOL/P?h=hein.journals/ucljurev17&i=33> (last visited Mar 31, 2019).

³⁴*Id.* at 18.

³⁵COM(2015) 626 final, *supra* note 16.

unenforced.³⁶ Copyright infringements on the commercial scale concerns them because of its “frequent and harmful” effects on rightsholders and the EU economy.³⁷

Platforms that host and distribute user-uploaded content, such as YouTube, are a major source of copyright infringement and general rightsholder exploitation.³⁸ Essential parts of the current copyright framework predate these platforms and thus do not address the copyright concerns they raise.³⁹

The concepts of “communication to the public” and “making available” are essential to determining whether an act is covered by copyright.⁴⁰ Under the current framework, whether internet platforms with user-uploaded content are performing an act subject to copyright and are therefore require the rightsholder’s approval is ambiguous.⁴¹ As intermediaries doing “merely technical, automatic and passive” activities, the current framework often exempts internet platforms from liability.⁴²

With the platforms seldom held liable, rightsholders face difficulties in profiting from or even controlling the use of their content on these platforms.⁴³ Since the platforms, not the rightsholders themselves, distribute the content, rightsholders are usually unable to negotiate terms with potential users.⁴⁴ Furthermore, without full information on how their content is being used, rightsholders often find themselves in a weak bargaining position relative to

³⁶*Id.*

³⁷*Id.*

³⁸Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, *supra* note 27.

³⁹Frequently Asked Questions on Copyright Reform, *supra* note 7.

⁴⁰COM(2015) 626 final, *supra* note 16.

⁴¹*Id.*

⁴²*Id.*

⁴³Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, *supra* note 27.

⁴⁴COM(2015) 626 final, *supra* note 16.

the platforms when trying to negotiate payment and terms of use for their work online.⁴⁵ The lack of information also puts the creators themselves in a weaker position when negotiating with publishers and producers.⁴⁶

While the creators and rightsholders struggle to fully benefit from the economic value of their work, the online platforms that distribute it often *do* profit from the work through sources such as ad revenue.⁴⁷ The Commission finds this unequal distribution of the value generated from the content, known as a “value gap”, fundamentally unfair.⁴⁸

Citing revenue data collected by the International Federation of the Phonographic Industry (“IFPI”), a non-profit that represents the interests of the music industry world-wide, the Commission argues copyright reform is necessary to protect the interests of content creators and ensure they have access to just remuneration for their work.⁴⁹ In their annual State of the Industry Report, the IFPI found that recording companies’ revenues increased from 2016 to 2017 due predominately to an increase in streaming revenue.⁵⁰ However, the report identified a massive value gap between revenues earned through video streaming services that allow user-uploaded content and revenues earned through audio streaming services that do not.⁵¹

According to the IFPI, video streaming services, such as YouTube, have the “world’s largest on-demand music audience”, with an estimated 1.3 billion people using the platforms

⁴⁵Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, *supra* note 27.

⁴⁶Anonymous, DIGITAL SINGLE MARKET - FACTSHEET ON COPYRIGHT OFFICIAL WEBSITE OF THE EUROPEAN UNION (2019), <https://ec.europa.eu/digital-single-market/en/news/factsheet-copyright> (last visited Mar 29, 2019).

⁴⁷Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, *supra* note 27.

⁴⁸COM(2015) 626 final, *supra* note 16.

⁴⁹European Commission, IT IS ALL ABOUT PROTECTING YOUTUBE CREATORS! (2018), <https://medium.com/@EuropeanCommission/it-is-all-about-protecting-youtube-creators-26d18c0ea5b5> (last visited Mar 31, 2019).

⁵⁰Global Music Report 2018: State of the Industry, 10–11.

⁵¹*Id.* at 27.

to listen to music.⁵² These platforms returned to recording companies an estimated \$0.66 per each of these users in 2017.⁵³ For comparison, audio streaming services that license content, such as Spotify, returned about \$20 to record companies for each of their estimated 272 million users in 2017.⁵⁴

If video streaming platforms returned even as little as 5% as much as audio streaming platforms per music-listening user, the music industry could receive an increase of over \$6 billion in revenue. For an industry whose revenues in 2017 were only 68% of those in 1999, such an increase would make a significant difference.⁵⁵ Meanwhile, internet platforms continue to profit from music streaming even if users upload copyright infringing content, all while avoiding liability under the EU's current copyright framework.⁵⁶

The Commission's objectives in directing the EU's legislative branches to address the issues surrounding the value gap were to ensure creators and rightsholders a more equitable distribution of the value generated by their content, put them in a better negotiating position, and overall provide them clearer rights and greater control over the distribution of their content.⁵⁷ Two foundational changes to the copyright framework are supposed to meet these objectives.⁵⁸ First, actions taken by platforms to store and distribute user-uploaded content are to be considered unambiguously covered by copyright.⁵⁹ Thus, the platforms must have rightsholders' permission to distribute the content even though users uploaded it.⁶⁰ Second,

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.* at 11.

⁵⁶COM(2015) 626 final, *supra* note 16.

⁵⁷Questions and Answers, *supra* note 17.

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

the platforms would be obligated to do their best to ensure they are not distributing unauthorized content, by obtaining authorization, not distributing the content, or removing it and preventing future infringing uploads.⁶¹ Otherwise, the platforms themselves would be held liable.⁶² Article 17 of the Copyright Directive sets out the explicit rules meant to bring about these changes.

3 Article 17

Controversy and discord permeate the discussion over Article 17's rules and implications. Fairly evaluating the arguments of its supporters and critics requires stepping through the text itself, paragraph by paragraph, and determining what exactly it says.⁶³

3.1 Definitions and Exceptions

Article 17 predominately refers to the actions of “online content-sharing service providers.” Article 2(6) provides the definition for such a service:

‘Online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.⁶⁴

The specifications that such services “store” and give access to works “uploaded by its users” sets a noteworthy bound on the definition. Even though, for example, internet service providers and even web browsers arguably are a service that provides “access to a large

⁶¹Frequently Asked Questions on Copyright Reform, *supra* note 7.

⁶²Questions and Answers, *supra* note 17.

⁶³The version of Article 17 referenced and cited herein comes from the proposal of the Copyright Directive accepted by the European Parliament on March 26th, 2019.

⁶⁴Directive (EU) 2019/790, *supra* note 1, Article 2(6).

amount of copyright-protected works,” they fall outside the scope of this definition. As outlined in the recitals of the Directive, this definition targets “only online services that play an important role on the content market by competing with other services, such as online audio and video streaming services, for the same market.”⁶⁵

Article 2(6) also outlines explicit exceptions to this definition including: “not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, electronic communication service providers..., online marketplaces, ... and cloud services.”⁶⁶ These exclusions focus the definition on services that profit from unauthorized use of copyrighted content.⁶⁷

3.2 Article Summary

3.2.1 Holding online content-sharing service providers liable

Article 17 begins by defining actions taken by online content-sharing service providers that “gives the public access to copyright-protected works or other protected subject matter uploaded by its users” as acts of communication.⁶⁸ It then takes a step further to explicitly require these service providers get authorization from the rightsholders, as defined in the EU’s 2001 Copyright Directive, which includes authors, performers, audio and film producers, and broadcasting organizations.⁶⁹ Thus, from the start, Article 17 removes any

⁶⁵*Id.*, Recital 62, at 61.

⁶⁶*Id.*, Article 2(6), at 91.

⁶⁷*Id.*, Recitals 61-62, at 60-61.

⁶⁸*Id.*, Article 17(1), at 121.

⁶⁹*Id.*, Article 17(1); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OFFICIAL JOURNAL L 167 , 22/06/2001 AT 0010 - 0019; <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> (last visited Mar 30, 2019), Article 3.

ambiguity about whether these service providers are taking actions covered by copyright. This rule opens online content-sharing service providers to liability, remedying one of the Commission's key issues with the current copyright framework.⁷⁰ Later, paragraph 3 tries to cut off a path service providers could have used to avoid liability. It takes the acts of communication by online content-service providers, as defined in paragraph 1, outside the scope of the data storage exception to liability defined in Article 14(1) of the 2000 directive.⁷¹

With online content-sharing service providers open to liability, paragraph 4 sets out a series of obligations that online content-sharing service providers must meet to avoid liability for communicating or making available to the public unauthorized content. The providers are liable unless: a) They "made best efforts to obtain authorization"; b) made best efforts, "in accordance with high industry standards", to make works for which rightsholders provided "relevant and necessary information" unavailable; and c) after receiving notice from the rightsholders, acted "expeditiously" to disable access to or remove the notified work and make best efforts to prevent future uploads.⁷² Later, paragraph 8 requires platforms provide rightsholders with information on both how they are complying with the paragraph 4 obligations and how authorized content is being used.⁷³ Paragraph 4's obligations are controversial. Critics of Article 17 argue they force internet platforms to implement upload filters.⁷⁴ However, paragraph 8 attempts to address these concerns head-on by

⁷⁰Directive (EU) 2019/790, *supra* note 1.

⁷¹Directive (EU) 2019/790, *supra* note 1, Article 17(3); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OFFICIAL JOURNAL L 178, 17/07/2000 AT 0001 - 0016; <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN> (last visited Apr 8, 2019), Article 14(1).

⁷²Directive (EU) 2019/790, Article 17(4).

⁷³*Id.*, Article 17(8).

⁷⁴Reda, *supra* note 9.

asserting applying Article 17 “shall not lead to any general monitoring obligation.”⁷⁵ The debate surrounding these obligations is discussed in greater detail later in this paper.

The next two paragraphs of Article 17 limit the reach of paragraph 4’s obligations. Paragraph 5 sets out some factors for consideration when judging whether a provider met its Article 17(4) obligations. These factors include “the type, the audience and the size of the service,” the type of content uploaded by the user, and “the availability of suitable and effective means and their cost for service providers.”⁷⁶ Next, paragraph 6 releases new companies that have both been providing the service in the EU for less than three years and have an “annual turnover” less than EUR 10 million from the obligations of paragraphs 4(b) and 4(c).⁷⁷ These companies are still obligated to make best efforts to obtain authorization for content, as dictated by paragraph 4(a), and disabling access to or removing infringing content when notified by the rightsholders. If a service provider has over 5 million monthly users, they must also prevent future content uploads.⁷⁸ Ultimately, this paragraph tries to make sure startups are not unfairly held to the “high industry standards” required by paragraph 4(b).

Finally, paragraph 10 requires the Commission to organize “stakeholder dialogs” to discuss best practices pertaining to this article.⁷⁹ The Commission must consult “online content-sharing service providers, rightsholders, users’ organizations and other relevant

⁷⁵Directive (EU) 2019/790, *supra* note 1, Article 17(8).

⁷⁶*Id.*, Article 17(5).

⁷⁷*Id.*, Article 17(6).

⁷⁸*Id.*, Article 17(5).

⁷⁹*Id.*, Article 17(10).

stakeholders” and then issue guidance about the Article’s application, especially with regard to the obligations upon online content-sharing providers set out in paragraph 4.⁸⁰

3.2.2 Protecting Users

The other sections of Article 17 try to provide legal certainty and a higher level of rights protections for users. Paragraph 2 states authorizations to use content obtained by the online content-service providers also extend to non-commercial actions by service users.⁸¹ Effectively, this rule keeps the burden of worrying about licensing on the platforms off the average user.

Later, paragraph 7 forbids “cooperation between online content-sharing service providers and rightsholders” from preventing users from uploading content which does not infringe copyright or is protected by copyright exception.⁸² Notably, this paragraph does not just mean service providers and rightsholders cannot conspire or coordinate to prevent users from uploading legal content. Rather, “cooperation” refers to the steps platforms take in fulfilling their obligations to the rightsholders.⁸³

Additionally, paragraph 7 requires all Member States recognize a set of copyright exceptions and limitations: quotation, criticism, review, caricature, parody, and pastiche.⁸⁴ Service providers must also notify users of the copyright exceptions and limitations in their

⁸⁰*Id.*

⁸¹*Id.*, Article 17(2).

⁸²*Id.*, Article 17(7).

⁸³*Id.*, Recital 66-71.

⁸⁴Directive (EU) 2019/790, *supra* note 1, Article 17(7).

terms of service.⁸⁵ These exceptions are optional for Member States under the current copyright framework.⁸⁶

Finally, paragraph 9 tries to prevent rightsholders from abusing the copyright laws. It requires rightsholders justify their reasons for requesting service providers remove content.⁸⁷ It further requires service providers provide a “an effective and expeditious complaint and redress mechanism” with human review for users who dispute the removal of or disabling of content they uploaded, including both in and out-of court remedies to resolve these disputes.⁸⁸

3.3 Consequences and Controversy

3.3.1 The Upload Filter

The controversy over Article 17 stems from critics’ belief that it forces platforms with user-uploaded content to automatically check the uploads for copyright infringement before distributing it online. This automatic process is called an “upload filter.”⁸⁹ Critics argue it is inevitable that platforms will implement such filters because of the massive volume of content uploaded to them.⁹⁰ YouTube users alone upload about 400 hours of content to the

⁸⁵*Id.*, Article 17(9).

⁸⁶Questions and Answers, *supra* note 17.

⁸⁷Directive (EU) 2019/790, *supra* note 1, Article 17(9).

⁸⁸*Id.*, Article 17(9).

⁸⁹Reda, *supra* note 9.

⁹⁰Cory Doctorow, ARTISTS AGAINST ARTICLE 13: WHEN BIG TECH AND BIG CONTENT MAKE A MEAL OF CREATORS, IT DOESN’T MATTER WHO GETS THE BIGGER PIECE ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/deeplinks/2019/02/artists-against-article-13-when-big-tech-and-big-content-make-meal-creators-it> (last visited Mar 25, 2019).

platform every minute.⁹¹ Checking all user-uploaded content would be impossible without some sort of automated process.

Article 17's supporters, however, are adamant that Article 17 does not force platforms to implement upload filters.⁹² Considering the text of the Article alone, this sentiment is correct. Article 17(4) requires platforms accord with "high industry standards" and make "best efforts" with their obligations towards copyright protected content.⁹³ However, it does not define exactly what the "high" standards and "best efforts" are and never explicitly tells platforms what actions they must take or technologies they must implement to satisfy their obligations.⁹⁴ In fact, other sections of Article 17 seem to dissuade platforms from implementing such upload filters. Article 17(8) specifically states "application of this Article shall not lead to any general monitoring obligation."⁹⁵ Rather, details of platforms' obligations are supposed to be determined in the "stakeholder dialogues" required by Article 17(10).⁹⁶

Nevertheless, Article 17's literal text does not change the practical consequences of its obligations. Platforms must prevent uploads of material that infringes known copyright-protected content.⁹⁷ Despite not having a "general monitoring obligation," this task is still impossible without some sort of automatic and algorithmic evaluation process that checks every user upload. Furthermore, the "high industry standards" and "best efforts"

⁹¹Saba Hamedy, YOUTUBE JUST HIT A HUGE MILESTONE MASHABLE, <https://mashable.com/2017/02/27/youtube-one-billion-hours-of-video-daily/> (last visited Apr 8, 2019).

⁹²Frequently Asked Questions on Copyright Reform, *supra* note 7.

⁹³Directive (EU) 2019/790, *supra* note 1, Article 17(4).

⁹⁴*Id.*, Article 17(4).

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

requirements could foreseeably lead to requiring platforms to implement upload filters. After all, websites such as Facebook and YouTube already implement such filters.⁹⁸

Pragmatically, Article 17's obligations require platforms with user-uploaded content to implement upload filters. Thus, critics argue that Article 17 undercuts its own intentions since these filters will negatively impact users.⁹⁹

3.3.2 Article 17 hurts the users it was supposed to protect

Article 17's proponents believe it will lead to stronger and more clear rights for users.¹⁰⁰ Rather than negatively impacting users, it will rebalance the relationship between rightsholders and online platforms by specifically targeting platforms that profit from copyright infringing content.¹⁰¹ Supposedly, Article 17 will create a safer legal position for users by making platforms responsible for uploaded content in some situations and solidifying users' rights to copyright exceptions in situations such as parody.¹⁰² Article 17 explicitly addresses these goals in paragraphs 1 and 7.¹⁰³

Despite its intentions and literal text, however, the obligations Article 17 imposes upon platforms have severe consequences for users in practice. In particular, platforms implementing upload filters in the hope of avoiding liability could harm free expression and the

⁹⁸#SaveYourInternet – Fight the #CensorshipMachine, *supra* note 2.

⁹⁹Owen Bennett & Raegan MacDonald, EU COPYRIGHT REFORM: A MISSED OPPORTUNITY OPEN POLICY & ADVOCACY, <https://blog.mozilla.org/netpolicy/2019/03/25/eu-copyright-reform-a-missed-opportunity> (last visited Apr 2, 2019).

¹⁰⁰Frequently Asked Questions on Copyright Reform, *supra* note 7; commission2018; Eleonora Rosati, THE EU'S NEW COPYRIGHT LAWS WON'T "WRECK THE INTERNET" SLATE MAGAZINE (2019), <https://slate.com/technology/2019/04/eu-copyright-directive-article-13-wreck-internet.html> (last visited Apr 2, 2019).

¹⁰¹European Commission, NO, NO, NO, WE ARE NOT BANNING MEMES! (2018), <https://medium.com/@European-Commission/https-medium-com-europeancommission-no-no-no-we-are-not-banning-memes-copyright-proposal-abf4d21f65d2> (last visited Mar 31, 2019).

¹⁰²Rosati, *supra* note 100; Frequently Asked Questions on Copyright Reform, *supra* note 7.

¹⁰³Proposal for a Directive on Copyright in the Digital Single Market, *supra* note at 121, 126.

flow of information on the internet. Controversies surrounding Content ID, YouTube’s current copyright upload filter system, foreshadow potential problems with more robust upload filters. As Cory Doctorow, writing for the EFF, points out, Content ID is prone to making mistakes and has been known to “ensnare[] all kinds of legitimate forms of expression, including silence, birdsong, and music uploaded by the actual artist for distribution on YouTube.”¹⁰⁴

If Content ID already “over-blocks” by disallowing legal content uploaded by its users, the situation will only get worse under Article 17.¹⁰⁵ Currently, platforms are not liable for distributing copyright infringing content uploaded by their users. Once they are liable under Article 17, however, “over-blocking” content with upload filters becomes incentivized, rational behavior for platforms to avoid liability rather than just an unfortunate consequence of a complicated algorithm.

Algorithms especially have difficulty determining whether content infringes copyright or is fair use.¹⁰⁶ This technical limitation also limits the effect of Article 17(7)’s attempts to guarantee users a consistent set of copyright exceptions across the EU.¹⁰⁷ Indeed, despite critics’ concerns over a “meme ban”, Article 17’s text actually protects memes, a form of parody.¹⁰⁸ Yet, platforms’ attempts to comply with Article 17 could very well lead to users having difficulty uploading memes, as the filtering algorithms struggle to identify the parody.¹⁰⁹

¹⁰⁴Doctorow, *supra* note 90.

¹⁰⁵Cory Doctorow, HOW THE EU’S COPYRIGHT FILTERS WILL MAKE IT TRIVIAL FOR ANYONE TO CENSOR THE INTERNET ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet> (last visited Apr 2, 2019).

¹⁰⁶Doctorow, *supra* note 90; #SaveYourInternet – Fight the #CensorshipMachine, *supra* note 2.

¹⁰⁷Directive (EU) 2019/790, *supra* note 1, Article 17(7).

¹⁰⁸Commission, *supra* note 49; Directive (EU) 2019/790, *supra* note 1, Article 17(7).

¹⁰⁹Doctorow, *supra* note 90.

Article 17(7) is supposed to prevent this outcome by forbidding platforms from “preventing users from uploading content which does not infringe copyright or protected by copyright exception.”¹¹⁰ However, as critics argue, platforms may be able to contract their way around this requirement using their terms of service.¹¹¹ Either way, however, platforms presumably would prefer to err on the side of fulfilling their obligations to the rightsholders that could potentially sue them out of business, such as large media companies, rather than those to individual users.

Overall, Article 17 could lead to users having difficulty expressing themselves in legal ways on the internet, which in turn leads to less content on the internet.¹¹² This even impacts websites, such as Wikipedia, which are supposed to be explicitly left outside of Article 17’s scope by Article 2’s carve-outs.¹¹³ While acknowledging the Copyright Directive’s good intentions, Allison Davenport, writing for the Wikimedia Foundation, noted, “As content outside of Wikipedia shrinks, so will the depth, accuracy, and quality of Wikipedia’s content... What affects the internet ecosystem as a whole affects Wikipedia, regardless of direct legal carve-outs.”¹¹⁴ Thus, Article 17’s impact propagates far into corners of the internet it was never supposed to reach and constricts a community it sought to protect.

¹¹⁰Directive (EU) 2019/790, *supra* note 1, Article 17(7); Rosati, *supra* note 100.

¹¹¹#SaveYourInternet – Fight the #CensorshipMachine, *supra* note 2.

¹¹²*Id.*

¹¹³Directive (EU) 2019/790, *supra* note 1, Article 2(6).

¹¹⁴We do not support the EU Copyright Directive in its current form. Here’s why you shouldn’t either., WIKIMEDIA FOUNDATION (2019), <https://wikimediafoundation.org/2019/02/28/we-do-not-support-the-eu-copyright-directive-in-its-current-form-heres-why-you-shouldnt-either/> (last visited Apr 7, 2019).

3.3.3 Article 17 cuts against the broader goals of the Digital Single Market

Creating the Digital Single Market is supposed to boost the EU's digital economy and solidify its place as a world leader in tech.¹¹⁵ Despite bringing the EU closer to creating a Digital Single Market, the Copyright Directive actually works against these overarching goals because Article 17 will put small and medium sized European tech companies at a disadvantage compared to their competitors in the United States.

Upload filters are again the issue. Developing them is incredibly daunting task both technically and financially. Google alone has spent over \$100 million since 2007 developing and maintaining its ContentID system for YouTube.¹¹⁶ Thus, the companies in the best position to develop these filters are actually the American tech giants that the Copyright Directive is supposed to target and whose influence the EU has been trying to reduce for years.¹¹⁷ Ironically, as Raegan McDonald at the Mozilla Foundation laments, many of these companies are already filtering content and thus have a major competitive advantage in the effort to comply with Article 17.¹¹⁸ Smaller tech companies and startups essentially have two options. They can either pour potentially over \$100 million in researching and developing the technology to implement compliant upload filters. Or they can license technology from a big American tech company that has already developed one.¹¹⁹ In trying to reign in those companies'

¹¹⁵Digital single market, *supra* note 11.

¹¹⁶Doctorow, *supra* note 90.

¹¹⁷Kenan Malik, *Europe's efforts to curb the internet giants only make them stronger* | Kenan Malik, THE GUARDIAN: OPINION, March 31T06:00:08.000Z, 2019, <https://www.theguardian.com/commentis-free/2019/mar/31/europe-efforts-to-curb-internet-giants-only-make-them-stronger> (last visited Apr 2, 2019).

¹¹⁸Raegan MacDonald & Owen Bennett, EU COPYRIGHT REFORM: THE FACTS OPEN POLICY & ADVOCACY, <https://blog.mozilla.org/netpolicy/2018/09/07/eu-copyright-reform-the-facts> (last visited Apr 2, 2019).

¹¹⁹Malik, *supra* note 117.

profits from copyright infringing material, the EU may have inadvertently increased their influence by putting them in the position to police copyright enforcement across the internet.¹²⁰

Article 17 may also deter companies from bringing their services to Europe at all. Every platform seeking to serve European users must consider whether the benefits of doing so would outweigh the costs of complying with Article 17.¹²¹ Owen Williams points out that the EU's General Data Protection Regulation, a much less controversial recent EU legislation designed to protect users' data privacy, has led to an unintended consequence of some websites just blocking European users from visiting and others even refusing to bring their service to the EU at all.¹²²

Even homegrown European startups may opt to move to the relatively more friendly market of the United States, where they arguably have a better chance to grow and compete.¹²³ Despite its intentions, the limitations on obligations for new companies in Article 17(6) do not protect European startups effectively.¹²⁴ In their best case scenario, successful companies will eventually have to comply with Article 17's full obligations, which still eventually ends up limiting their ability to grow and challenge the American tech giants.¹²⁵

¹²⁰*Id.*

¹²¹Owen Williams, EUROPE'S NEW COPYRIGHT LAW WILL SPOOK STARTUPS CRUNCHBASE NEWS (2019), <https://news.crunchbase.com/news/europes-new-copyright-law-will-spook-startups/> (last visited Apr 2, 2019).

¹²²*Id.*

¹²³*Id.*; #SaveYourInternet – Fight the #CensorshipMachine, *supra* note 2.

¹²⁴Directive (EU) 2019/790, *supra* note 1, Article 17(6).

¹²⁵#SaveYourInternet – Fight the #CensorshipMachine, *supra* note 2; Williams, *supra* note 121; Cory Doctorow, THE FINAL VERSION OF THE EU'S COPYRIGHT DIRECTIVE IS THE WORST ONE YET ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/deeplinks/2019/02/final-version-eus-copyright-directive-worst-one-yet> (last visited Apr 2, 2019).

Ultimately, because of Article 17, EU citizens may find themselves without access to services and content enjoyed by those elsewhere in the world.¹²⁶ Ironically, wanting to access these services and content could provoke citizens to employ the very same illegal means that prevents creators from earning the fair value of their work the Commission cited in their justification of the Copyright Directive.¹²⁷ In attempting to remove the copyright borders from the EU's Member States, the Copyright Directive inadvertently created a border in the internet itself.¹²⁸

4 Conclusion

On April 15, 2019, the Council of the European Union approved the Copyright in the Digital Single Market Directive with Article 17 in it.¹²⁹ The EU's Member States will now have two years to implement the Directive.¹³⁰

As proponents celebrate and critics turn their attention to Europe's courts, all parties must wait to see what impact the Directive will actually have on Europe's digital economy and the internet as a whole over the next few years.¹³¹ Given the controversy surrounding the Directive and especially Article 17, the debate over how to best acclimate the EU's copyright laws to the internet age is likely far from over.

¹²⁶Casey Newton, EUROPE IS SPLITTING THE INTERNET INTO THREE THE VERGE, <https://www.theverge.com/2019/3/27/18283541/european-union-copyright-directive-internet-article-13> (last visited Apr 7, 2019); Williams, *supra* note 121.

¹²⁷COM(2015) 626 final, *supra* note 16.

¹²⁸Newton, *supra* note 126.

¹²⁹Press Release - Copyright reform clears final hurdle: Commission welcomes approval of modernised rules fit for digital age, OFFICIAL WEBSITE OF THE EUROPEAN UNION (2019), http://europa.eu/rapid/press-release_IP-19-2151_en.htm (last visited Oct 21, 2019).

¹³⁰*Id.*

¹³¹Press release - Copyright reform, *supra* note 26; O'Brien, *supra* note 131.