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The EU Copyright Directive: "Fit For The Digital Age" or Finishing It?

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The EU Copyright Directive: "Fit For The Digital Age" or Finishing It?

Cover Page Footnote

J.D. Candidate, 2020

THE EU COPYRIGHT DIRECTIVE: "FIT FOR THE DIGITAL AGE" OR FINISHING IT?

*Andrew Tyner**

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*J.D. Candidate, 2020.

I. INTRODUCTION

Since its proposal in 2016, the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (“the Directive” or “the Copyright Directive”) has been controversial. While the Directive was rooted in good intentions, intended to “improv[e] the bargaining position . . . and the control rightsholders have on the use of their copyright-protected content” in the digital space,¹ critics loudly proclaimed it as the death of the internet as we know it. Notable architects and pioneers of the Internet, including Tim Berners-Lee (inventor of the World Wide Web) and Jimmy Wales (founder of Wikipedia), penned a letter to European Parliament addressing some of their concerns.² They particularly highlighted the dangers posed from Article 13 of the Directive. Article 13, at the time, suggested that websites bear the responsibility of automatically filtering all of the content their users uploaded. Critics like Tim Berners-Lee posited that this would not only contribute to the growing atmosphere of surveillance on the web, but it would also place too large a burden on the smaller internet platforms – to the advantage of larger companies like Facebook, Google, and YouTube.³

However, criticism of the Copyright Directive did not stop with Article 13. Commentators also noted that Article 11 would have similar negative effects, but on the spread of news and information around the web.⁴ Article 11 would require online platforms to pay a “link tax” to publishers of information such as news websites.⁵ This “link tax” had particular opposition from groups like Wikipedia and GitHub, which rely on users to share not just news, but academic information on their sites.⁶ While Article 11 was modified to provide that private, non-commercial internet users would be exempt from such a tax, the ambiguous language of Article 11, along with a failing history of similar implementations across Europe, lead some to believe it could result in the manipulation of access to news or even censorship.⁷

¹ *Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 9, COM (2016) 593 final (Sept. 14, 2016) [hereinafter Directive].

² Letter from Vint Cerf et al. to Antonio Tajani MEP, President of European Parliament (June 12, 2018) (on file with Electronic Frontier Foundation).

³ *Id.*

⁴ Daniel Oberhaus, *EU Passes Controversial Copyright Law With “Link Taxes”*, MOTHERBOARD (Sept. 12, 2018, 10:54 AM), https://motherboard.vice.com/en_us/article/bja8wq/eu-passes-controversial-copyright-law-with-link-taxes.

⁵ *Id.*

⁶ *Id.*

⁷ James Vincent & Russell Brandom, *Everything You Need to Know About Europe’s Copyright Directive*, THE VERGE (Sept. 13, 2018, 2:14 PM), <https://www.theverge.com/2018/9/13/17854158/eu-copyright-directive-article-13-11-internet-censorship-google>.

In response to these and other criticisms, the European Parliament has been working continuously on amendments and revisions, hoping to calm fears among critics and rally votes among MEPs. A number of these amendments were approved on September 12, 2018.⁸ The next phase will be a series of dialogues between the European Parliament, the European Commission, and member states to hammer down the details before the Directive comes up for final vote in the spring of 2019.⁹ Part II of this note will discuss Articles 11 and 13, as well as their amendments; the Articles' effects on access to information in Europe's digital space; and the Articles' potential inconsistency with European concepts of fundamental rights. Part III will demonstrate that while the European Union is attempting to establish stronger property rights for creators, the steps it has taken pose great danger to the concepts of decentralization, access to information, and freedom of speech – all of which are foundational to the internet's origins. Part IV will conclude by arguing that Articles 11 and 13 ultimately disserve the Directive's goals of stimulating the growth and creativity of digital content.

II. BACKGROUND

The European Copyright Directive was first proposed in 2016.¹⁰ What followed was a frenzy of lobbying efforts from both supporters and critics. Some of the most vocal proponents of the measure included large content providers and creators like Paul McCartney, James Blunt, and the International Federation of the Phonographic Industry (IFPI).¹¹ Content creators contended that the Directive would fix the "value gap,"¹² i.e. the difference in monies paid to the music industry and content creators by services with a license to play the music — like Spotify and Apple — versus forums where music can be shared and listened to for free — like YouTube and Facebook.¹³ The reason for this is that while subscription services like Spotify and Apple Music have less users than Facebook and YouTube, they bring in substantially more revenue each year.¹⁴ In 2016, audio subscription services' 212 million users contributed around \$3.9

⁸ Oberhaus, *supra* note 4.

⁹ Vincent and Brandom, *supra* note 7.

¹⁰ Scott Roxborough, *Paul McCartney, James Blunt Back New European Copyright Law*, THE HOLLYWOOD REPORTER (July 4, 2018), <https://www.hollywoodreporter.com/news/paul-mccartney-james-blunt-back-new-european-copyright-law-1124974>.

¹¹ *Id.*

¹² *Id.*

¹³ Global Music Report 2017: Annual State of the Industry, *Rewarding Creativity: Fixing the Value Gap*, IFPI, at 25, (2017), http://www.ifpi.org/downloads/GMR2017_ValueGap.pdf.

¹⁴ *Id.*

billion in revenues to rightsholders.¹⁵ Compare this with user-uploaded video services' 900 million users, which contributed only \$553 million to rightsholders in the same year.¹⁶ Further, Spotify pays content owners around \$20 per user, while YouTube pays content owners less than \$1 per user.¹⁷

On the other hand, larger online platforms like Google pushed back against the Copyright Directive. Google spent over \$36 million lobbying European Members of Parliament (MEPs) and EU member states.¹⁸ Platforms like Google (which owns YouTube) Facebook, Instagram, and Twitter were concerned the Directive would create large costs in creating content ID and filtration systems that act before users post.¹⁹ Not only would the Directive force websites like YouTube on a similar playing field with other subscription based streaming services, but the filtration system would block certain user uploaded content, reducing site traffic.²⁰ Moreover, companies feared that faulty filtration systems would fail to distinguish between actual copyrighted material and content that falls within fair use or is not copyrighted at all.²¹

Google's lobbying efforts were not been limited to traditional tactics, however. Reports emerged in late 2018 that Google was using a website it funded to spam MEPs with phone calls, emails, and tweets.²² According to websites like *The Times*²³ and *The Trichordist*,²⁴ Google funded a Vancouver based company called OpenMedia.org.²⁵ According to David Lowery, a professor of music business at the University of Georgia, OpenMedia encouraged its visitors to spam politicians with messages supporting policy goals that benefit Google and

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Daniel Sanchez, *Google Spent More Than \$36 Million to Scuttle Article 13 & the Copyright Directive*, DIGITAL MUSIC NEWS (July 3, 2018), <https://www.digitalmusicnews.com/2018/07/03/google-article-13-copyright-directive/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Vincent and Brandom, *supra* note 7.

²² Chris Cooke, *As Copyright Directive Campaigning Starts up Again, Article Thirteen Opponents Plan to Take to the Streets*, CMU (Aug. 17, 2018), <http://www.completemusicupdate.com/article/as-copyright-directive-campaigning-starts-up-again-article-thirteen-opponents-plan-to-take-to-the-streets/>.

²³ Matthew Moore, *Google Funds Website that Spams For Its Causes*, *The Times* (Aug. 6, 2018), <https://www.thetimes.co.uk/article/google-funds-activist-site-that-pushes-its-views-rg2g5cr6t>.

²⁴ David Lowery, *The Google Funded Astroturf Group that Hacked The EU Copyright Vote (In Pictures)*, *The Trichordist* (July 28, 2018), <https://thetrichordist.com/2018/07/28/the-google-funded-astroturf-group-that-hacked-the-eu-copyright-vote-in-pictures/>.

²⁵ *Id.*

others in Silicon Valley.²⁶ While the tactics did not crush the passage of the Copyright Directive entirely, amendments to Articles 11 and 13 did follow.

So what do Articles 11 and 13 say? First, Article 11 concerns the protection of press publications in the digital age. In amended form, it provides that “publishers of press publications” have the right to “obtain fair and proportionate remuneration for the digital use of their press publications by information society service providers.”²⁷ This language is what critics have referred to as the “link tax”, which requires online platforms to pay fees to news outlets and other content creators for the news shared on their sites.²⁸ However, part of the amendments to Article 11 included the addition of language which reduced its scope. Specifically, this included the following language: “The rights referred to in paragraph 1 shall not prevent legitimate private and noncommercial use of press publications by individual users.”²⁹ The amendments further clarified that, “[t]he rights referred to in paragraph 1 shall not extend to mere hyperlinks which are accompanied by individual words.”³⁰ These amendments assuaged some critics’ fears and rallied support for the Copyright Directive in European Parliament. Others retorted that the amendments’ vague language simply created new problems.³¹

Article 13 concerns the “[u]se of protected content by online content sharing service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users.”³² Its purpose is essentially to prevent the unlicensed sharing of protected content on the internet. So, if a user shared a copyright protected song on YouTube without first licensing it, YouTube would be liable. In the Directive’s original draft, Article 13 provided that not only would content sharing websites like Facebook or YouTube be liable for their users’ unlicensed posts, but also that they would have a burden to actively monitor posts with tools like “content recognition technologies.”³³

However, after pushback from critics, adjustments were made to omit this language. As a solution, Article 13 now stipulates that “[m]ember states” shall require (1) websites to negotiate licensing agreements with rightsholders to compensate for user posts; or (2) where parties cannot agree on licensing agreements, that websites and rightsholders work together to “ensure that

²⁶ *Id.*

²⁷ *Amendment Adopted by the European Parliament on 12 Sept. 2018, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM(2016) 593 [hereinafter *Amendments*].

²⁸ *Id.*

²⁹ *Id.* at 54.

³⁰ *Id.*

³¹ Vincent and Brandom, *supra* note 7.

³² *Amendments*, *supra* note 27, at 56.

³³ *Directive*, *supra* note 1, at 29.

unauthorized protected works... are not available on their services.”³⁴ This language is far more relaxed than requiring the use of “content recognition technologies, but Article 13’s new language still provides that websites work to monitor user uploads. And because the language charges individual EU member states with the responsibility of implementing guidance for websites and rightsholders in each state, there is nothing stopping the individual states from mandating the use of content recognition technologies.

The amendments to Article 13 further seek to relieve detractors’ fears by addressing, almost directly, the concerns raised in Vint Cerf and Tim Berners-Lee’s letter.³⁵ One of those worries being that content ID technology would misidentify posts, blocking non-protected or fair use content.³⁶ In response, Article 13 now commands member states to guarantee that online service providers have methods available to rectify any false-positives in the copyright protection process, including human review.³⁷ This solution seems to imply that the EU still envisions content recognition technology as the primary method for protecting copyrights online. If not, mandating human review would seem redundant. Furthermore, the amendments recognize the “internet pioneers” anxiety over increased surveillance online. Section 2(b) of Article 13 in its amended state provides that both rightsholders and online service providers shall implement all protection schemes “in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation” and “the cooperation shall not lead to any identification of individual users nor the processing of their personal data.”³⁸

III. ANALYSIS

Articles 11 and 13 pose great danger to the concepts of decentralization, access to information, and freedom of speech — all of which are foundational to the internet’s origins. This criticism is not solely rooted in practical experience and understanding of the internet; rather, the articles undermine important policy goals of copyright law. Consider, for example, the concept of “market hierarchy,”³⁹ which is Professor Neil Netanel’s expansion on the idea of “crowding out,”⁴⁰ popularized by Professors Melville Nimmer and Paul

³⁴ Amendments, *supra* note 27, at 57.

³⁵ Letter from Vint Cerf et al. to Antonio Tajani, *supra* note 2.

³⁶ *Id.*

³⁷ Amendments, *supra* note 27, at 57.

³⁸ *Id.* at 58.

³⁹ Neil W. Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000).

⁴⁰ See David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 287 (2003) (stating “Professor Nimmer thought some expression could not be

Goldstein. For Netanel, conditions of wealth inequality in the market place can lead to “speech hierarchy” which is,

the disproportionate power of wealthy speakers and audiences to determine the mix of speech that comprises our public discourse. By effectively silencing outlying minorities and the poor... [i]t produces a mix of speech that neither encompasses a wide, representative spectrum of viewpoint nor carries the voices of diverse and antagonistic sources.⁴¹

These ideas of crowding out and “speech hierarchy” play an important role in the debate over the Copyright Directive. Lay critics have noted concerns that giving copyright owners more protection will come at a cost to average consumers of the internet and restrict access to information on it.⁴² Professor Netanel has expressed these concerns as two-fold. *First*, that where rightsholders are given too much control, they may suppress the ability of users to access, share, or express protected content. Essentially, “copyright expansion . . . constitutes an unprecedented ability to control the deployment of existing expression.”⁴³ *Second*, such a level of domination by rightsholders could result in the reduction of ideas expressed across the public sphere.⁴⁴

A. ARTICLE 11

Article 11 of the Copyright Directive, even in its amended form, has the potential to do precisely what professors like Nimmer and Netanel fear. Article 11 would require commercial websites to pay a “link tax” for news articles shared on their sites. Essentially, news articles or stories owned by “publishers of press publications” would be protected so that any time they were shared on the internet, the sharer of that story would be required to remunerate the publisher of that information. In a world where a significant portion of news is spread electronically, and especially over platforms like Facebook and Twitter, the effects of Article 11 could be widespread and detrimental. According to a study done by the Reuters Institute for the Study of Journalism at the University of Oxford, nearly 36% of people polled in twelve countries in 2018 used Facebook

separated from its idea and was too important to risk being ‘censored’ by the rights-holder,” and “Professor Goldstein worried both about the scope of copyright and the accumulation of rights by large media firms”).

⁴¹ Netanel, *supra* note 40, at 1884.

⁴² Oberhaus, *supra* note 4.

⁴³ Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 362 (1996).

⁴⁴ McGowan, *supra* note 41, at 289–90 (summarizing Netanel’s view of copyright law on civil society).

for news within a week of the poll.⁴⁵ This was compared with 11% for Twitter, 6% for Instagram, and 3% for Snapchat.⁴⁶ And those numbers ignore sites like YouTube or Reddit, of which, 18% and 4% of their users go to for news.⁴⁷ With tighter control on news product, access to news would decrease and the social dialogue in Europe would decline.

The link tax would certainly cost large companies like Facebook, Twitter, or Google millions of dollars if they were required to cover costs for every news article shared on their platforms. A likely outcome may be that large sites simply pass the cost of news onto their users through fees or simply reduce the news content available. For example, in 2014, Spain implemented a similar tax on news aggregators: platforms like Google News, Flipboard, and Reddit.⁴⁸ The Spanish tax was mandatory for all news aggregators and publishers of news could not opt out.⁴⁹ In reaction to the law, Google News voluntarily shut down in Spain,⁵⁰ leaving online consumers to get their news elsewhere. And while larger platforms like Google News could sustain such a tax, smaller news aggregators were unable to afford such fees – closing down entirely.⁵¹

In addition to costing news aggregators money, the Spanish tax was counterproductive for publishers. Because aggregators shut down, news publishers lost between ten and fifteen percent of web traffic.⁵² Furthermore, because publishers could not opt out of the law, news aggregators refused to pay the tax to include news from smaller publishers on their platforms, causing those smaller news outlets to lose a more significant amount of traffic.⁵³ This would indicate that publishers' interests are actually in line with those of platforms that share their published news. In fact, a study commissioned by Spanish publishers found that news aggregators have a "Market Expansion Effect" – "[a]ggregation services reduce search times, which allows readers to consume more news. This

⁴⁵ Nic Newman et al., *Digital News Report 2018*, REUTERS INST. 1, 11 (2018), <http://media.digitalnewsreport.org/wp-content/uploads/2018/06/digital-news-report-2018.pdf?x89475>.

⁴⁶ *Id.* at 11.

⁴⁷ Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. (Sept. 17, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

⁴⁸ Joe Mullin, *New study shows Spain's "Google tax" has been a disaster for publishers*, ARS TECHNICA (July 30, 2015, 5:04 PM) <https://arstechnica.com/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Mathew Ingram, *External traffic to Spanish news sites plummets after Google move*, GIGAOM (Dec. 16, 2014, 10:32 AM), <https://gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move/>.

⁵³ Mullin, *supra* note 50.

not only increases the total number of site visits, but increases the audience of less popular news outlets that otherwise would not have received attention."⁵⁴

Following the logic in the NERA study, the link tax in Article 11 would be counterproductive to the goals of the Copyright Directive and copyright principles in general. The link tax would financially burden news aggregators at a cost to consumers of news. Further, it is contrary to the interests of publishers. Large and small publishers alike would lose an avenue of access to their websites, which as a whole would reduce the very profits that Article 11 is attempting to protect.

The damage that Article 11 could do to speech and the spread of information online is not limited to large platforms like Google or Facebook. Despite its amended language, Article 11 still threatens smaller platforms and sharers of online news. The added language to Article 11 for "legitimate private and noncommercial use of press publications by individual users"⁵⁵ could exempt specific users of the internet from the link tax. If users were simply sharing an article or piece of news for no other purpose than to spread information, they could be exempt. However, one problem for the drafters of the amendment is that there is no average user of the internet. News and information sharing occurs in many different forms across the internet. For a law that is supposed to apply to the entire internet, Article 11 does little to define types of "private and noncommercial use." Questions arise from this added language. Would the link tax apply to news aggregators, to blogs, or RSS feeds? Would the size of one's online following determine that site or post's level of commercialism? Would nonprofits or NGOs sharing news relevant to their mission be included?

The reality is that very little on the internet is "private and noncommercial." While personal blogs, YouTube pages, and other social media accounts may be private and noncommercial in that they belong to an individual or small group whose primary goal is not profit-seeking, the structure for ad revenue on the internet could mean that any site with ads is commercial. Without a concrete definition of private and noncommercial use, individual member states could enforce the link tax inconsistently across Europe, creating a disparity between EU members' access to information and news, while also, creating a disparity between the types of news shared in different EU countries.

Finally, it is unclear whether the exception supplied for "mere hyperlinks" in Article 11's amended form would alleviate the suppression the link tax causes to individuals attempting to share news. The amended language provides that press publishers' rights to "fair and proportionate remuneration" do not apply to

⁵⁴ NERA ECONOMIC CONSULTING, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual* at x (July 9, 2015), <https://www.aeepp.com/pdf/InformeNera.pdf>.

⁵⁵ Amendments, *supra* note 27, at 54.

“mere hyperlinks which are accompanied by individual words.”⁵⁶ This language was added in response to critics and in line with a nonbinding opinion from the Advocate General of the European Court of Justice. The Advocate General’s opinion from 2016 noted that while “each act of communication of a work to the public has to be authorized [sic] by the copyright holder... hyperlinks which are placed on a website and which link to protected works that are freely accessible on another site cannot be classified as an ‘act of communication.’”⁵⁷

While the amended language allows for “mere hyperlinks which are accompanied by individual words,”⁵⁸ it is unclear the extent to which it applies. The meaning of “individual words” is not defined. Yet, the number of words and detail allowed to accompany a hyperlink is critical. In an age where much of the public discourse occurs online, access to published news is essential to informed debate. The interpretation of “individual words” could be detrimental to the expression and summation of ideas surrounding published and copyrighted material online. At best, the vague language could be implemented asymmetrically across Europe. At worst, the language could be read narrowly to prohibit anything but the most minimal description to accompany a hyperlink.

The latter construction would not only limit the hyperlinks function, but also limit the freedom of individual users to express their opinions regarding the information those hyperlinks store. Hyperlinks are useful in that they provide a shortcut to an article. But a consumer or reader is less likely to click on that hyperlink if he has no context for where it leads. Further, hyperlinks with accompanying words are ubiquitous on the internet – found everywhere from social media and blogs to online encyclopedias (Wikipedia) and copyrighted news articles. Accompanying words often express opinions about or describe content found within the hyperlink. Better, evidence shows that hyperlinks give credibility to the person using them and promote the reader’s desire to seek more information on a given topic – similar to citing sources in academia.⁵⁹ If words suddenly could not compliment hyperlinks then expression, description, and citation to copyrighted material would decrease significantly. Not only would informed public discourse suffer, but also, similar to Spain’s link tax study, so would the very publishers whom Article 11 is attempting to protect.

⁵⁶ *Id.*

⁵⁷ Court of Justice of the European Union Press Release No 37/16, Advocate General’s Opinion in Case C-160/15 (April 7, 2016).

⁵⁸ Amendments, *supra* note 27, at 54.

⁵⁹ See generally Porismita Borah, *The Hyperlinked World: A Look at How the Interactions of News Frames and Hyperlinks Influence News Credibility and Willingness to Seek Information**, 19 J. OF COMPUTER-MEDIATED COMM. 576 (2014).

B. ARTICLE 13

Similar concerns plague Article 13 as Article 11, despite significant amendment to Article 13's original form. Critics' primary issue with Article 13 stemmed from its use of Content ID technologies and upload filters.⁶⁰ As noted previously, the language of Article 13 has been redrafted to omit the use of phrases like "content recognition technology". However, Article 13 still silently relies on the use of such methods and technology, as implied by the mention that such "mechanisms shall be processed without undue delay and be subject to human review."⁶¹ Amended Article 13 envisions first that online service providers work directly with rightsholders to license the works that may be shared online. If this fails, Article 13 requires EU member states to ensure that online content sharing services provide for mechanisms to prevent the sharing of copyrighted work without proper licensing.⁶² For the Directive's drafters, these mechanisms would preferably be content recognition technology subject to human review.⁶³

Because individual EU member states will be charged with enforcing Article 13, critics fears are sustained. There is nothing to stop a member state from requiring the use of content recognition technology or worse, upload filters. Upload filters are a subset of content recognition technology, the primary distinguisher is that upload filters act prior to a user sharing content, rather than identifying the protected content after it has been posted.⁶⁴ Whether the shared content is blocked before or after posting, if the content is not protected or is fair use, the result is the same – censorship.

Content recognition technology is problematic because it does not often work. Critics point to YouTube's content ID system, which is known for over-blocking fair use and non-protected content.⁶⁵ Users' posts could be blocked for posting any of the following: videos with copyrighted songs in the background, or pictures with a copyrighted band poster in the background, or snippets of a copyrighted book in a social media post, even parodies or memes.⁶⁶ Content recognition technology would be especially troublesome for online user-contributed encyclopedias, like Wikipedia. Everything from pictures to book

⁶⁰ Vincent and Brandom, *supra* note 7.

⁶¹ Amendments, *supra* note 27, at 57.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Vincent and Brandom, *supra* note 7.

⁶⁵ Cory Doctorow, *The EU's Copyright Proposal is Extremely Bad News for Everyone, Even (Especially!) Wikipedia*, ELEC. FRONTIER FOUND. (June 7, 2018), <https://www EFF.ORG/deeplinks/2018/06/eus-copyright-proposal-extremely-bad-news-everyone-even-especially-wikipedia>.

⁶⁶ *Id.*

quotes, all important parts of the user-driven encyclopedia, could be blocked because of overprotection, despite fair use.⁶⁷ The bad outcomes are as wide as the internet itself and relying on an automated tool that errs toward overprotection would lead to the exact outcomes that Professors Nimmer and Netanel feared. Article 13 would drive up the cost of sharing content or expressing ideas online. If the automated technology blocked a user's post, that user would be forced to choose between what may be a costly appeal to the online service provider and the rightsholder or simply concede the post to be blocked. Worse, users who feared that their shared or original content, incorporating fair use material, would be blocked, may simply decide not to post online. Overall, this would decrease creative expression online.

The failures of content ID technology are not limited to false positives. Since YouTube's implementation of its content ID system, trolls and angry rightsholders have used the system to take advantage of innocent posters. For example, in 2012 BMG (owned by Sony) took down a Mitt Romney ad showing President Obama singing "Let's Stay Together" by Al Green, despite fair use claims.⁶⁸ The trend to make false claims over copyright infringement is growing in the U.S. For example, groups now exist to target noncommercial infringers, threatening frivolous litigation and extracting settlements.⁶⁹

Furthermore, content recognition technology is expensive. Google spent over \$60 million developing YouTube's content ID system.⁷⁰ Unlike companies like Google or Facebook, smaller websites do not have the ability to spend \$60 million developing a content recognition algorithm specific to their site. Similar to the case study in Spain, this content recognition mechanism requirement could drive smaller content sharing platforms out of business, leaving only the existing large sites to dominate the market. Tim Berners-Lee has called this phenomenon the "balkanized web".⁷¹ The central worry is that as larger platforms gain more control over the online space, not only will these companies gain more financial power and control over their consumers but the number and diversity of ideas and expression will decrease. With power centralized in large internet companies, select platforms have more control over the ideas shared and the cost of sharing,

⁶⁷ *Id.*

⁶⁸ Cory Doctorow, *Europe's New Copyright Rules Are Like YouTube's Content ID System—for the Entire Internet*, MOTHERBOARD (June 14, 2018, 11:16 AM), https://motherboard.vice.com/en_us/article/mbk47b/europe-copyright-rules-content-id.

⁶⁹ *Copyright Trolls*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/copyright-trolls> (last visited Apr. 2, 2019).

⁷⁰ *How Google Fights Piracy*, GOOGLE, at 6 (2016), <https://drive.google.com/file/d/0BwxyRPFduTN2c91LXJ0YjYsJA/view>.

⁷¹ Liat Clark, *Tim Berners-Lee: We need to re-decentralize the Web*, ARSTECHNICA (Feb. 6, 2014, 11:08 AM), <https://arstechnica.com/tech-policy/2014/02/tim-berners-lee-we-need-to-re-decentralize-the-web/>.

which reduces the potential for users to be exposed to diverse ideas or be able or allowed to share their own expressions. Thus, Article 13 is counterproductive to copyright goals because it diminishes the potential for new expression and reduces the audience size for protected work by limiting the number of platforms where protected work can be accessed.

Finally, content recognition technology and other methods for monitoring content sharing websites risk creating an atmosphere of surveillance on the web. Critics fear that holding online platforms liable for the sharing of protected content would lead platforms to constantly surveil their users. Further, users' information and online data may be exposed to rightsholders in the enforcement process. Notably, the EU amended Article 13 to require that enforcement mechanisms be implemented "in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation" and "the cooperation shall not lead to any identification of individual users nor the processing of their personal data."⁷² But this amendment does not completely eliminate privacy concerns. If Article 13 further centralized the internet, as Tim Berners-Lee fears, large internet companies as well as EU member countries would have access to greater amounts of users' personal data. An internet composed of a few large companies equipped with content recognition technology would normalize automated surveillance.

⁷² Amendments, *supra* note 27, at 58.

IV. CONCLUSION

Whatever mechanisms member states require to implement Articles 11 and 13, there will be conflicts with the European Union's Charter of Fundamental Rights.⁷³ As this note has explained, the Articles' overreaching copyright protections will weaken online platforms' ability to do business cheaply, curb internet users' ability and willingness to share information or expression, and encroach on internet users' privacy rights in the online space. Not only do the Articles have negative policy outcomes, but they are also likely illegal. The EU's Charter of Fundamental Rights provides for rights to copyright,⁷⁴ to conduct business,⁷⁵ to be secure in personal data,⁷⁶ and to expression and information.⁷⁷ And as the Court of Justice of the European Union has explained regarding implementation of EU directives, "Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights."⁷⁸ Member states will be charged with the difficult task of balancing the Copyright Directive with the Charter of Fundamental Rights.

Ultimately, the European Union's attempt to establish stronger property rights for creators will have negative legal and policy implications. Articles 11 and 13 are inconsistent with current principles mandated by the EU's Charter of Fundamental Rights. And, the Articles pose great danger to the concepts of decentralization, privacy, access to information, and freedom of speech – all of which are foundational to the internet's origins. But worst of all, the Articles' effects will be counterproductive to the Directive's goal – "stimulat[ing] innovation, creativity, investment and production of new content, [] in the digital environment."⁷⁹

⁷³ See generally Dr. Reto M. Hilty & Dr. Valentina Moscon, *Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market*, MAX PLANCK INST. FOR INNOVATION AND COMPETITION, at 4 (2017), https://www.ip.mpg.de/fileadmin/impj/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon_rev_18_19.pdf.

⁷⁴ Charter of Fundamental Rights of the European Union, art. 17(2), 2012 O.J. (C 326) 2.

⁷⁵ *Id.* art. 16.

⁷⁶ *Id.* art. 8.

⁷⁷ *Id.* art. 11.

⁷⁸ Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, 2008 E.L.R. I-00271.

⁷⁹ Amendments, *supra* note 27, at 1.