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Nathan Guzé

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Net Neutrality and the European Union's Copyright Directive for the Digital Single Market

BY NATHAN GUZÉ*

Abstract: The European Union's Copyright Directive for the Digital Single Market should cause concern for net neutrality advocates. This article casts a critical gaze at Article 17 (previously Article 13) of this new Directive. It chronicles the Directive's life: starting as a reaction to the perceived inadequate copyright protections provided by the previous Information Society Copyright Directive through to its then-present status circa May 2019. Next, net neutrality is defined, and its benefits and detriments are weighed to ultimately determine the policy is desirable. Article 17's call for eliminating safe-harbor provisions for content hosts and its call for content filters signal opposition to net neutrality, despite the European Union's supposed support for this policy. This new Copyright Directive seeks to support all creators, but it will only further entrench support for remunerative efforts towards those who can finance enforcement efforts: the most-famous creators and performers. The Directive's enactment sets up a potentially bleak future for creativity on the internet – a cornerstone of the web that users have come to expect – and set in place an internet for the haves, not the have-nots. Ultimately, the Digital Single Market Directive is not net neutral and not in the general consumer's best interest.

* Nathan Guzé, J.D. is a 2020 graduate of Loyola Law School. He also holds an M.A. in Music Industry Administration from California State University Northridge and a B.A. in Music from the University of California Riverside. This paper is a student note written primarily in 2018-19. I would like to thank my fiancé Chelsea McCants for her support throughout law school, Professor Atik for his advice and guidance on this paper, and the rest of the Loyola of Los Angeles International and Comparative Law Review for their assistance in this note's creation. It was wonderful to work with you all for two years.

INTRODUCTION

Copyright laws are essential to incentivizing artists, authors, inventors, and other visionaries to engage in creative pursuits and to share the fruits of their labor with the rest of society. These laws provide peace of mind to these creators and copyright owners by ensuring their compensation and control over the works and punishment for infringers. In 2018, the European Union's governing bodies proposed a new Copyright Directive for the Digital Single Market ("DSM Copyright Directive"). If adopted by its member states, the directive will regulate the enforcement against copyright infringement and the unauthorized use of copyrighted material in the online digital world.¹ This directive includes the controversial Article 13,² which has been dubbed the "meme ban" colloquially and the "value gap" provision officially. Catchy names aside, the implementation of this article could change how the internet functions around the world.

A. A Brief History of the Copyright Directive for the Digital Single Market

In the late twentieth century, the World Intellectual Property Organization ("WIPO") called for changes in member-state copyright laws.³ The United States provided initial drafts and spearheaded negotiations for the influential WIPO Internet Treaties.⁴ These proposed changes were forward-thinking and anticipated the many new and

1. James Vincent, *EU Approves Controversial Copyright Directive, Including Internet 'Link Tax' and 'Upload Filter'*, VERGE (Sep. 12, 2018, 7:12 AM), <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved> (report on the Sept. 2018 European Union approval of new Copyright Directive language. Criticizing Articles 11 and 13 and states that a vote is likely in January 2019).

2. Note that the European Parliament's approved language of the Copyright Directive for the Digital Single Market has renumbered the value gap provision/meme ban from Article 13 to Article 17. For the sake of continuity with external materials, it shall be referred to as Article 13 in this article. See Resolution of 26, March 2019 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. (COM 0593), 121 (2019).

3. Mihály Ficsor, *Copyright for the Digital Era: The WIPO Internet Treaties*, 21 COLUM. - VLA J.L. & ARTS 197, 197-99 (1997) (discussing the negotiation process behind the WIPO Copyright Treaty ("WCT") and WIPO Performances and Phonograms Treaty ("WPPT") and the subsequent agreements. Providing the unique identifier "WIPO Internet Treaties").

4. Mihály Ficsor, *The WIPO "Internet Treaties" The United States as the Driver: The United States as the Main Source of Obstruction — As Seen by an Anti-Revolutionary Central European*, 6 J. MARSHALL REV. INTELL. PROP. L. 17, 20-27 (2006) (discusses the United States' role in implementing the WIPO Internet Treaties and how that affected the adoption of the Digital Millennium Copyright Act).

changing roles copyright would play in the internet age. Ultimately, the signing of the treaties resulted in the United States adopting the Digital Millennium Copyright Act (“DMCA”) in 1998.⁵ This act made the copying and dissemination of creative digital works found in the form of computer files unlawful.⁶ Furthermore, it created ‘safe-harbor’ laws, which allow for-profit online content sharing service providers to avoid liability for hosting user-uploaded content that contains or is comprised of copyrighted materials.⁷

The European Union initially adopted a similar provision under their “Directive on Copyright in the Information Society” (“InfoSoc Directive”) that brought it in compliance with the WIPO Internet Treaties to which it signed.⁸ However, the resulting European Union Copyright law came under scrutiny as the Centre for European Policy Studies (“CEPS”), many European copyright holders, and content owners claimed it did not go far enough to protect copyright holder rights.⁹ These critics felt as though the InfoSoc Directive failed to sufficiently protect copyright-protected works in modern Europe.¹⁰ In a study, CEPS determined that although the InfoSoc Directive aligned European Union legislation with international law, the directive failed on multiple fronts; including strengthening intellectual property protection in light of emerging technological developments, reducing the existing disparities between national legal systems, and ensuring an adequate level of remuneration and compensation of authors and performers.¹¹ Today, computers with internet access can easily find and download songs, videos, articles, photographs, or other creative works

5. See Digital Millennium Copyright Act, Pub. L. No. 105–304, § 512, 112 Stat. 2860 (1998).

6. *Id.*

7. *Id.* at 2877.

8. European Commission Press Release IP/01/528, Commission Welcomes Adoption of the Directive on Copyright in the Information Society by the Council (Apr. 9, 2001) (press release that announced European Union’s passing of earlier version of Copyright directive. Briefly discusses some of the law’s provisions); *WIPO Copyright Treaty Contracting Parties*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Aug. 28, 2019) (shows which countries are signatories to WCT. Shows when European Union and United States both signed on to the treaty).

9. See generally ANDREA RENDA ET AL., *THE IMPLEMENTATION, APPLICATION AND EFFECTS OF THE EU DIRECTIVE ON COPYRIGHT IN THE INFORMATION SOCIETY* (2015), https://www.ceps.eu/wp-content/uploads/2015/11/SR120_0.pdf (identifying problems with the European Union’s earlier Copyright directive. It found that its similar-to-DMCA provisions were inadequately protecting European Union copyrights and called for a new European Union copyright directive).

10. *Id.*

11. *Id.* at ii, iii.

its user desires. While it has recently become easier to legitimately obtain and use copyrighted works via subscription streaming services, one-time downloads, and other methods, it is still not difficult to download the work without authorization from or payment to its rights-holder.

The European Union's DSM Copyright Directive seeks to address these issues that worry policy makers and copyright holders. However, it brings to a head an important policy consideration that is essential for any society to acknowledge in today's internet-age: ensuring that authors', artists', publishers', and other creative and technology-based industry members' concerns in protecting their works are balanced with the consumers' rights in the internet-age. This note seeks to bring that consideration to the DSM Copyright Directive.

B. An Examination of Net Neutrality

Net neutrality must first be considered before the new directive can be examined. Not one widely-accepted definition for this policy exists.¹² The Merriam-Webster dictionary defines "net neutrality" as "the idea, principle, or requirement that internet service providers ("ISPs") should or must treat all internet data as the same regardless of its kind, source, or destination."¹³ At the very least, a widely accepted definition must include "the general principles that owners of the networks that compose and provide access to the internet should not control how consumers lawfully use that network, and they should not be able to discriminate against content provider access to that network."¹⁴

This note will use "net neutrality" to describe the concept of the internet as a place for the free and open exchange of information. It is achieved through a network owner's "neutral" approach to handling and delivering web data, no matter where it comes from or where it goes.¹⁵ This thereby requires internet service providers, content hosts, and other online gate-keepers to not prohibit, filter, or redirect users from most of their desired search results. It also requires governments and societies to treat network owners as mere conduits of data exchange who should be severely limited in their liability only regarding *what* data is transferred.

12. ANGELE A. GILROY, CONG. RESEARCH SERV., R40616, THE NET NEUTRALITY DEBATE: ACCESS TO BROADBAND NETWORKS 1 (2019).

13. *Net Neutrality*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/net%20neutrality> (last visited Apr. 11, 2019).

14. GILROY, *supra* note 12, at 1.

15. Seriously troublesome materials such as child pornography are exempted from the neutrality requirement of this definition.

Consumers have much to gain under a net neutral internet. Such an internet preserves consumers' rights to be protected from network owners' control of data by ensuring that they cannot filter content without a court order.¹⁶ By prohibiting the speech filtration that characterizes monopolized and oligopolized internet communications, a net neutral internet would also foster free and democratic communications.¹⁷ Further, a net neutral internet would encourage competition and innovation by allowing the quality of websites and web-services to dictate their success rather than mere deals with network owners.¹⁸

However, net neutrality sacrifices some concepts that consumers may find desirable. In response to market demands, network owners may wish to offer various price levels for different service levels that consumers may find desirable in their internet use. This is often presented by offering different service packages that allow consumers access to different categories of online services depending on which package or packages are selected.¹⁹ Because more consumers are able to buy in to less expensive partial internet access, network owners may then continue to invest in networks and internet infrastructure for the benefit of consumers.²⁰

Implementation of net neutrality principles could also lead to increased costs for internet access that could effectively block access to it by those who cannot afford it.²¹ Many internet service providers provide partial internet access to the poor for free or at reduced costs under a 'zero rating' concept.²² Under this concept, internet service

16. PETER PHILLIPS, *CENSORED 2007* at 34 (2006).

17. Lawrence Lessig and Robert W. McChesney, *No Tolls on the Internet*, WASH. POST (Jun. 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>.

18. *SaveTheInternet.com Frequently Asked Questions*, FREE PRESS ACTION FUND, <https://web.archive.org/web/20081211200309/http://savetheinternet.com/%3Dfaq> (last visited Apr. 12, 2019).

19. See, e.g., *Tarifários Móveis Pós-pagos Unlimited*, MEO+SMART NET, <https://web.archive.org/web/20171214100904/https://www.meo.pt/telemovel/tarifarios/unlimited> (last visited Apr. 11, 2019).

20. J. Gregory Sidak, *What is the Network Neutrality Debate Really About?*, 1 INT'L J. COMM. 377, 384 (2007).

21. Brian Fung, *Jesse Jackson is lobbying the FCC against aggressive net neutrality rules*, WASH. POST (Nov. 18, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/11/18/jesse-jackson-is-lobbying-the-fcc-against-aggressive-net-neutrality-rules/?utm_term=.b6643bbdcddf.

22. Scott Canon, *Digital Life: The Trump Path to Free Internet for the Poor*, KAN. CITY STAR (May 19, 2017), <https://www.kansascity.com/news/business/technology/article151477557.html>.

providers accept payment from certain websites and online services in exchange for exemptions from data caps.²³ This would allow poorer users to use bandwidth-hogging services without exceeding their data caps, as their data usage for that website or online service has already been paid.²⁴ However, this can be abused by interests who pay network owners to only allow consumers to access their content.

C. The Copyright Directive for the Digital Single Market Rejects Net Neutrality

The European Union's DSM Copyright Directive is a decision to reject net neutrality. By mandating an expanse of copyright protections via content filtration systems and increased liability for network owners, the European Union is cauterizing a generation's creative abilities by denying them the deliberate, legitimate, and fair use of works by other authors through algorithmic content filters. The potential for abuse is substantial, as these laws can be used to deny rights to free expression and speech by restricting access to online data that is essential to fostering and supporting the creation of original ideas under the guise of copyright protection.

However, the new proposal is not without its merits. Copyright laws exist to give creators and rights-holders a chance to profit and trade their creatively produced works. This new directive seeks to solve the issue of content piracy, which has perplexed many industries since the inception of the internet. While some artists and creators seem to live extravagantly off of their creative successes, there are many others who remain anonymous because of the ease of access the internet provides to the more famous works of others. All a consumer needs to do in order to find the song that is stuck in their head is to search for it on YouTube or Google, and more often than not they can find the song for free. Even if there is an official version available that is free or inexpensive, one may easily find other versions that divert funds and viewership away from the song's original author. This has created what the authors of the copyright directive call "the value-gap," or the gap between the money content hosts make from user generated content and

23. *Id.*; CONSUMER REPORTS, *What are broadband data caps and should you be concerned about them?*, (June 24, 2015), <https://www.consumerreports.org/cro/news/2015/06/broadband-data-caps/index.htm> (defining "data caps" as "monthly limits on the amount of data you can use over your Internet connection").

24. Fung, *supra* note 21.

the money they pass on to copyright holders.²⁵ In response to stakeholders' requests (such as European copyright holders), and in an attempt to comply with WIPO international treaty requirements, the directive contains two major articles that, if passed into member state national law, would bring substantial changes to European copyright regimes.²⁶

First, this article will examine the history behind Article 13 of the DSM Copyright Directive. It will start by reviewing standards set by the WIPO in the multilateral 'Internet Treaties' signed by the European Union. It will then consider how the European Union originally implemented these standards in the InfoSoc Directive. The InfoSoc Directive's criticisms will then be examined to see how it gave life to the DSM Copyright Directive.

Section Two of this article will dive deeper into the concept of 'net neutrality' and its relationship with the DSM Copyright Directive. It will examine hypotheticals and real world examples of net neutrality violations in both corporate and government-backed settings. It will then examine the European Union's history with net neutrality. These examinations will help conclude that the DSM Copyright Directive really is not net neutral.

Section Three will then specifically examine the language of Article 13 to determine that it is not net neutral. Article 13's major provisions are themselves not net neutral, such as the elimination of safe-harbor provisions and the requirement for content filters.

Section Four will then consider who stands to win and lose under the DSM Copyright Directive. Determining why this matters will further prove who the winners and losers are, which will help the reader understand that important net neutrality interests truly are at stake with the DSM Copyright Directive's passage, for the benefit of a select few.

The final section will attempt to predict how the future internet will look like with the non-net-neutral DSM Copyright Directive enacted, and whether it is worth passing. Ultimately, this note will make a case for the importance of at least maintaining the internet's status-quo, and at most making it more net neutral.

25. Mark Sutherland, *Rights-Holders Pile on 'Value Gap' Pressure as Article 13 End Game Nears*, MUSIC WEEK (Dec. 14, 2018), <http://www.musicweek.com/labels/read/rights-holders-pile-on-value-gap-pressure-as-article-13-end-game-nears/074779> (defining "value gap").

26. Dave Keating & Peter O'Donnell, *Battle on EU Copyright Law Re-opened by Commission*, POLITICO (May 12, 2012, 11:05 PM), <https://www.politico.eu/article/battle-on-eu-copyright-law-re-opened-by-commission/>.

I. A BRIEF HISTORY BEHIND THE EUROPEAN UNION'S COPYRIGHT DIRECTIVE FOR THE DIGITAL SINGLE MARKET

Both the European Union's and the United States' copyright regimes stem, in part, from their respective agreements to implement what has come to be known as the WIPO "Internet Treaties."²⁷ This consists of two separate treaties: the WIPO Copyright Treaty ("WCT"), and the WIPO Performances and Phonograms Treaty ("WPPT").²⁸ The European Union and the United States signed these treaties in 1996 and 1997, respectively.²⁹ The United States ratified the treaties in 1999 and they went into effect in 2002.³⁰ The European Union ratified the treaties a decade later in 2009, and they went into force in 2010.³¹

The WCT was particularly important in setting the foundation for both the United States' and the European Union's current copyright regimes, as it called for an absolute bar on the circumvention of technological measures that protect copyrighted works.³² Notably, the WCT also called for software and databases to be eligible for copyright protection, too.³³ Since the decision in *Feist Publications v. Rural Telephone Service Co.*,³⁴ the United States has adhered to this WCT provision by providing copyright protection to "factual compilation[s] [such as databases] if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves."³⁵ While the European Union provides similar copyright protections for creatively arranged databases,³⁶ it contrastingly provides *sui generis* protection rights for databases "which show that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents"³⁷

27. RENDA ET AL., *supra* note 9, at 2.

28. *WIPO Copyright Treaty Contracting Parties*, World Intell. Prop. Org., https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Aug. 28, 2019); *WIPO Performances and Phonograms Treaty*, art. 5, Dec. 20, 1996, 36 I.L.M. 76 (1997).

29. *WIPO Copyright Treaty Contracting Parties*, *supra* note 28.

30. *Id.*

31. *Id.*

32. *WIPO Copyright Treaty*, arts. 11-12, adopted Dec. 20, 1996, 2186 U.N.T.S. 121, 4.

33. *Id.* at arts. 2-3.

34. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350-51 (1991).

35. *Id.* at 350-51.

36. Directive 1996/9, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 3, 1 (EC).

37. *Id.* at 9.

The WPPT was notable in that it granted protections to performers and producers of phonographs. It called for the extension of “moral rights” to performers and their fixed and unfixed performances.³⁸ Moral rights are an author’s non-economic right to claim authorship of a work and to object to any sort of negative modification of their work that would prejudice their honor or reputation, even after the economic rights have been transferred to a new owner.³⁹ This treaty also gave performers and producers alike the right to reproduce, distribute, and rent out their performances and phonographic recordings⁴⁰ for a term of fifty years either after the performance became fixed or when the phonograph was published.⁴¹ While these rights for producers and performers were certainly groundbreaking, arguably, the most noteworthy aspects of the WPPT can be found in Articles 18 and 19. Similar to Articles 11 and 12 of the WCT, Articles 18 and 19 of the WPPT called for an absolute bar on the circumvention of technological measures that protect copyrighted works,⁴² and for the creation of adequate legal remedies and protection against such circumventions.⁴³

In order to align its laws with WIPO multilateral treaty obligations, increase intellectual property protection and profitability, and create uniform European copyright laws, the European Union Parliament first passed copyright laws for the digital era in its 2001 InfoSoc.⁴⁴ Before the InfoSoc Directive’s implementation of the WIPO Internet Treaties, member state governments implemented their own individual copyright laws. The Infosoc Directive attempted to harmonize copyright law across Europe by replacing an estimated “two-thirds of national copyright laws” with pan-Europe legislation.⁴⁵ The InfoSoc Directive also implemented many of the WIPO Internet Treaties’ provisions, including legal penalties for the circumvention of technological safeguards.⁴⁶ Thus, in many respects, the InfoSoc Directive was similar to the United States’ DMCA.

38. WIPO Performances and Phonograms Treaty, *supra* note 28.

39. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, *as last revised*, at Paris July 24, 1971, 828 U.N.T.S. 221.

40. WIPO Performances and Phonograms Treaty, *supra* note 28, at 4-6.

41. *Id.* at 7.

42. *Id.*

43. *Id.*

44. RENDA ET AL., *supra* note 9, at 13.

45. *Id.* at 6.

46. Directive 2001/29, 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, 2001 O.J. (L 167) 6, 1 (EC).

A. Criticism of the InfoSoc Directive Leads to its Reconsideration

The InfoSoc Directive sought to achieve four goals for European Copyright law: (1) align European Union legislation with international copyright law, (2) strengthen intellectual property protections in the digital era, (3) reduce existing disparities between member-state national legal systems regarding copyright law, and (4) ensure adequate levels of remuneration and compensation for authors and performers.⁴⁷ Internal European Union reports conducted by the Centre for European Policy Studies (“CEPS”) determined that the InfoSoc Directive adequately achieved its first goal by implementing the three-step test for intellectual property rights exceptions and limitations into European Union Member State’s laws; broadening the definition of intellectual property rights, and endorsing anti-circumvention measures as a viable means of enforcing copyright laws against individual actors.⁴⁸ However, CEPS went on to later determine that the InfoSoc Directive only partially achieved, or even failed to achieve its other goals.⁴⁹

Per the CEPS report, the InfoSoc Directive failed to adequately enforce copyright laws to the extent that European Union legislators envisioned.⁵⁰ It relied heavily on prosecuting and enjoining those who circumvent technological protection measures.⁵¹ However, these protective measures turned out to be an inferior means of protecting online content, as circumventors were hard to locate and take to court.⁵² As a result, one of the few options available to infringed-upon copyright holders was to seek an injunction against online intermediaries for the takedown of infringing content, rather than seeking redress with the infringing content posters themselves.⁵³ However, CEPS determined these injunctions were inadequate because of the many protections content hosts enjoyed due to their status as

47. RENDA ET AL., *supra* note 9, at 125.

48. *Id.*; see generally *About CEPS*, CEPS <https://www.ceps.eu/about-ceps/> (last visited Apr. 12, 2019) (stating CEPS is a private non-profit Brussels-based “think-tank and forum for debate on European Union affairs” that “offer[s] exchanges, [and] provide[s] insights and potential solutions for EU policy...” It gets its funding through corporate and institutional membership fees, project research, foundation grants, conference fees, and publication sales.); CTR. FOR EUR. POLICY STUD., ANNUAL REPORT 2017–2018 at 27–28 (2018), https://www.ceps.eu/wp-content/uploads/2019/04/CEPS_Annual-Report-2017.pdf (detailing sources of funding via pie chart, including various EU Federal and Member State, corporate, and private funding).

49. *Id.*

50. *Id.* at 126.

51. *Id.* at 125.

52. *Id.* at 126.

53. *Id.*

“mere conduits” under the InfoSoc Directive and other similarly situated European Union Directives.⁵⁴ Thus, there were few options for copyright holders to seek enforcement of their copyrights, rendering the InfoSoc Directive impotent as a means of protection.

The InfoSoc Directive also faced a major issue in regard to member state implementation. Because the European Union sought to strengthen copyright protections and the InfoSoc Directive had to reflect the WIPO Internet Treaties’ obligations, the Directive’s goal of creating a homogenous internal market was found incompatible and was forced onto the back burner.⁵⁵ Furthermore, member states’ implementation of varying exceptions and limitations of the WIPO Internet Treaties’ three-step test led to a wide variety of copyright regimes across the Union.⁵⁶

CEPS’s last criticism was in regard to the InfoSoc Directive’s inability to ensure adequate levels of remuneration and compensation for a majority of copyright holders.⁵⁷ This inability was based on the Directive’s reliance on vague terms such as “market mechanisms,” “appropriate rewards,” and “fair compensation” for authors and performers to determine the fair value of a copyrighted work via a hands-off approach.⁵⁸ Ultimately, CEPS’s major issue with the perceived inadequate remuneration levels was that fair remuneration in the InfoSoc Directive was not based on a “‘fair’ distribution of revenues along the value chain for legitimate uses of creative content . . . which generate the bulk of the revenues,” but rather on “unauthorized but legitimate . . . uses of an author’s or performer’s creative content.”⁵⁹

CEPS further based its “market forces” criticism of fair remuneration on the fact that the InfoSoc Directive failed to determine what “fair remuneration” is and how it is determined.⁶⁰ CEPS acknowledged “the uniform interpretation of equitable remuneration implies that Member States should ensure a proper balance between the interests of performers and other right-holders, in relation with the economic value of the use under consideration.”⁶¹ However, this provided little guidance in determining what “fair remuneration” actually is. This was further complicated by contractual provisions that

54. *Id.*; see also Council Directive 2000/31, 2000 O.J (L 178) 12-1(EC).

55. RENDA ET AL., *supra* note 9, at 126.

56. *Id.*

57. *Id.* at 108-09.

58. *Id.*

59. *Id.* at 110.

60. *Id.* at 108-09.

61. *Id.* at 111.

Member States allow relevant parties to make in determining the final remuneration amount to authors and performers.⁶²

CEPS's final criticism on the determination of adequate remuneration to authors and performers under the InfoSoc Directive was, in part, based off of a perception that such remuneration was based on a compensation-per-use approach rather than a lump-sum approach.⁶³ Their report determined this approach disproportionately benefitted "best-selling" authors, as opposed to less-than-successful authors.⁶⁴ Pay-per-use placed more entrepreneurial risk and per-transaction costs on the author/performer, who may not want to or be able to take these on.⁶⁵ Lump sums however shielded an author/performer from unexpected negative shifts in market consumption patterns.⁶⁶

The CEPS report on the InfoSoc Directive led Members of European Parliament ("MEPs") to agree to reconsider Europe's copyright regime.⁶⁷ In 2012, the European Commission announced it would review the InfoSoc Directive to identify and eliminate its inefficiencies.⁶⁸

B. The Jean-Claude Juncker Presidency and the Rise of the Digital Single Market

After the election of Jean-Claude Juncker to the European Union presidency in 2014, the Union attempted to create a Digital Single Market ("DSM").⁶⁹ In one of his first official communications, President Juncker stated:

A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a

62. *Id.* at 112.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Dave Keating & Peter O'Donnell, *Battle on EU Copyright Law Re-opened by Commission*, POLITICO (May 12, 2012, 11:05 PM), <https://www.politico.eu/article/battle-on-eu-copyright-law-re-opened-by-commission/>.

68. *Id.* at 2.

69. European Commission Memo MEMO/14/523, Questions and Answers: The Juncker Commission (Sep. 10, 2015) (discussing Pres. Juncker's creation and implementation of European Union's Digital Single Market. Outlines legislators/legislative bodies that will be involved).

high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally.⁷⁰

In his call for a European DSM, President Juncker also called for the weakening of European telecommunications regulations and the reduction of copyright and data protection legislation.⁷¹ He argued that this would increase Europe's ability to take advantage of borderless digital technologies.⁷²

President Juncker then assigned the Vice-President of the DSM and others in the cabinet to determine the proper steps to the implementation of a European DSM.⁷³ Upon finding that a DSM could increase the European Union's gross domestic product by up to €415 billion per year, and that the InfoSoc Copyright Directive could be salvaged and made effective, the European Parliament affirmed support for the creation of the DSM.⁷⁴ However, in order to create this DSM that President Juncker imagined, the flawed 2001 InfoSoc Copyright Directive would need to be revisited.

70. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*, at 1, COM (2015) 192 final (May 6, 2015), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192> [hereinafter *A Digital Single Market Strategy for Europe*].

71. *Id.* at 3.

72. *Id.* at 2.

73. European Commission Memo MEMO/14/523, *supra* note 69.

74. *A Digital Single Market Strategy for Europe*, *supra* note 70 (communicating the Commission's desire to create European Union Digital Single Market. Says it must do so by breaking down telecommunications regulation and copyright legislation); European Parliament Resolution of 9 July 2015 on the Implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, EUR. PARL. DOCS. (P8_TA(2015)0273) (2015) (European Union Parliament vote on resolution to create and implement the European Union Digital Single Market. References WIPO "internet" treaties as influences in the creation of this project); *see also* European Commission Press Release STATEMENT/19/1839, Copyright Reform: The Commission Welcomes European Parliament's Vote in Favor of Modernized Rules Fit for Digital Age (Mar. 26, 2019), http://europa.eu/rapid/press-release_STATEMENT-19-1839_en.htm [hereinafter *Copyright Reform*]. (The European Commission stating that the proposed Copyright Directive for the Digital Single Market will "strengthen creative industries, which represent . . . 6.8% of [European Union] GDP . . .").

C. *The Birth of the Copyright Directive for the Digital Single Market*

The European Parliament renewed their efforts to address the need for a new comprehensive copyright directive for all of Europe. After about two years of discussions, the European Parliament decided on language for the DSM Copyright Directive's first draft.⁷⁵ In July 2018, 318 MEPs voted against opening implementation discussions with European Union member countries, 278 voted in favor, and thirty-one abstained.⁷⁶ Many MEPs feared that this directive would lead to censorship or filtration of the internet and restrictions on freedom of speech.⁷⁷

In September 2018, however, a revised version of the DSM Copyright Directive gained approval from the European Parliament and was set to be presented to member states for further discussion and implementation.⁷⁸ Although it had much in common with its earlier June predecessor, it had some key differences. The revised DSM Copyright Directive specifically called for artists to receive payment when their works are shared partially or in their entirety on online content hosts.⁷⁹ However, this proposed Directive exempted micro-and small-platforms from its mandates.⁸⁰ The Directive also included provisions that Parliament thought would secure freedom of expression for Europeans.⁸¹ The text of this stage of the Directive also called for platforms to check for copyright infringing works upon their upload.⁸² However, it called for this to be conducted in a way that avoided catching non-infringing works and that implemented adequate redress

75. EUR. PARL. DOCS. (P8_TA (2015) 0273), *supra* note 74.

76. Mark Sweeny & Jennifer Rankin, *YouTube and Facebook Escape Billions in Copyright Payouts After EU Vote*, GUARDIAN (July 5, 2018, 8:44 AM), <https://www.theguardian.com/technology/2018/jul/05/youtube-could-escape-billions-in-copyright-payouts-after-eu-vote> (discusses how the first version of the revised Copyright Directive was shot down and that a revised version was likely to come up in Sept. 2018).

77. *Id.*

78. Vincent, *supra* note 1 (report on the Sept. 2018 European Union approval of new Copyright Directive language. Criticizes articles 11 and 13 and states that a vote is likely in Jan. 2019).

79. European Parliament Press Release, *Parliament Adopts Its Position on Digital Copyright Rules* (Sep. 12, 2018, 1:27 PM), <http://www.europarl.europa.eu/news/en/press-room/20180906IPR12103/parliament-adopts-its-position-on-digital-copyright-rules> [hereinafter *Parliament Adopts Its Position*].

80. Micro- and small-platforms are content hosts that are small in size, number of visitors, and services provided; *Id.*

81. *E.g. Id.* (sharing hyperlinks to news articles along with "individual words" would not be considered copyright infringement).

82. *Id.*

systems.⁸³ Checking mechanisms, or content filtration systems, were required to be operated by human staff and could not be handled by an algorithm.⁸⁴ It also gave artists the ability to claim additional compensation from platforms that see a great benefit from an artist's work when the artist is receiving disproportionately low benefits from its use.⁸⁵ This included claims to the platform's indirect profits that result from the use of the artist's work under threat of the artist revoking their license to the platform.⁸⁶

The European Parliament's September 2018 vote approved the updated language for the DSM Copyright Directive and prepared it for tripartite negotiations between the European Commission, Council of the European Union, and the European Parliament.⁸⁷ A conclusion to these 'trilogue' negotiations was initially expected in early 2019, whereupon language within the legislation would be up for agreement.⁸⁸ If the language had been approved then, the European Parliament would have proceeded to vote on whether to implement the Directive and the European Union's individual Member States would have then been required to implement the Directive into their own national laws.⁸⁹ However, on January 18, 2019, the Council of the European Union rejected a mandate to continue negotiations on the language of the proposed DSM Copyright Directive with the European Parliament.⁹⁰ The Romanian-headed Council Presidency's proposed language for the Directive was rejected by Germany, Belgium, the Netherlands, Finland, Slovenia, Italy, Poland, Sweden, Croatia, Luxembourg, and Portugal due to concerns about Articles 11 and 13.⁹¹

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Vincent, *supra* note 1 (report on the Sept. 2018 European Union approval of new Copyright Directive language. Criticizes articles 11 and 13 and states that a vote is likely in Jan. 2019).

88. Julia Reda, *Copyright Negotiations Hit a Brick Wall in Council*, JULIAREDA.EU (Jan. 18, 2019), https://juliareda.eu/2019/01/copyright-hits_wall/ (discussing stalled trilogue talks on Jan. 21, 2019 due to governing bodies' disagreements on Directive language).

89. Vincent, *supra* note 1.

90. *See generally* Description of the Council of the European Union, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en (last visited Aug. 2019) (discussing the role of the Council of the European Union, including its composition of executive branch government ministers from member states who discuss, amend, and adopt laws, and coordinate policies. Together with the European Parliament, it is the main decision-making body of the Union that negotiates laws proposed by the European Commission).

91. Reda, *supra* note 88 (German MEP discusses Council's rejection of the language of the Copyright Directive proposed by the Romanian Presidency).

The Romanian Presidency of the Council of the European Union then had the opportunity to come up with language for the proposed DSM Copyright Directive that adhered to the language approved in the September 2018 vote and that would still be passed by a qualified majority of the Council.⁹² A “qualified majority” is fifty-five percent of the Council that represents at least sixty-five percent of the European Union population.⁹³ This was however further complicated by the upcoming elections for European Parliament in May of 2019.⁹⁴ If an agreement on the proposed DSM Copyright Directive’s language could not be reached by then, it would have been up to the next legislative session to decide on the language, and even the viability, of the proposed Directive.⁹⁵ However, due to the Directive’s long history of support within European Union governance and its well-funded proponents, a new legislative session of the European Parliament would have likely taken up the issue again.

However, this contingency did not come to fruition because as of February 13, 2019, the Romanian delegation for the Presidency of the European Council has reached a provisional agreement with the European Parliament on the language of the proposed Copyright Directive.⁹⁶ This language still contains most of the same controversial language that caused concern with Articles 11 and 13, however it did update language regarding exceptions and limitations, licensing practices, and copyright marketplace regulations.⁹⁷ Even though the Romanian Presidency of the European Council and the European Parliament have provisionally agreed to this new language, it must now be submitted to the member states that comprise the Council and to the European Parliament for their confirmation.⁹⁸ Upon approval of the

92. *Id.*

93. *Id.*

94. Foo Yun Chee, *In Win for Tech Giants, EU Copyright Reforms Stalled*, REUTERS (Jan. 21, 2019, 5:19 AM), <https://uk.reuters.com/article/uk-eu-copyright/in-win-for-tech-giants-eu-copyright-reforms-stalled-idUKKCN1PF1AO> (discussing results of the Council of the European Union’s vote on the Copyright Directive in 2019).

95. Matt Reynolds, *What is Article 13? The EU’s Divisive New Copyright Plan Explained*, WIRED (May 24, 2019), <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>.

96. Council of the European Union Press Release, *EU Copyright Rules Adjusted to the Digital Age* (Feb. 13, 2019), <https://www.consilium.europa.eu/en/press/press-releases/2019/02/13/eu-copyright-rules-adjusted-to-the-digital-age/> [hereinafter *EU Copyright Rules Adjusted*].

97. *Council Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COD (2016) 6637/19 (Feb. 20, 2019), <https://data.consilium.europa.eu/doc/document/ST-6637-2019-INIT/en/pdf>.

98. *EU Copyright Rules Adjusted*, *supra* note 96.

provisional language, the directive will again be submitted to both institutions for approval. A vote on this language was expected to take place in March or April of 2019.⁹⁹

In spite of protests directed at Article 13 and the DSM Copyright Directive, generally, from many European Union citizens and online platforms¹⁰⁰ and petitions against the passing of the Directive,¹⁰¹ on March 26, 2019, the European Parliament approved a revised version of the DSM Copyright Directive by a vote of 348 in favor to 274 against, with thirty-six abstentions.¹⁰² As of this writing, the European Union member states will now have a chance to vote on approval of the DSM Copyright Directive text.¹⁰³ If the text is accepted, member states will have two years to implement it into their national systems.¹⁰⁴ Of the changes included in this revised version, the most notable is one of nomenclature. The often-vilified Article 13 has now been renamed to Article 17.¹⁰⁵ These revised articles call for the exclusion of this Directive's applicability to graphics interchange format files ("GIFs"), memes, and news article snippets and place lighter obligations on micro and small-content platforms.¹⁰⁶ However, just because these contentious areas now seem to enjoy exemptions on the Directive's face, it does not mean its operation will actually spare content platforms from infringement worries.

II. HOW DOES NET NEUTRALITY RELATE TO EUROPE'S COPYRIGHT DIRECTIVE REVISION?

As initially discussed above, net neutrality names the principle that calls for internet service providers to enable access to all content and

99. Timothy B. Lee, *European Governments Approve Controversial New Copyright Law*, ARS TECHNICA (Feb. 21, 2019), <https://arstechnica.com/tech-policy/2019/02/european-governments-approve-controversial-new-copyright-law/>.

100. *Reaction as MEPs Back Controversial Online Copyright Reforms*, EURONEWS (Mar. 26, 2019), <https://www.euronews.com/2019/03/26/meps-back-online-copyright-reforms-that-critics-fear-will-curtail-freedom-of-information>; Morgan Meaker, *Inside the Giant German Protest Trying to Bring Down Article 13*, WIRED (Mar. 26, 2019); <https://www.wired.co.uk/article/article-13-protests>.

101. *Id.*

102. European Parliament Press Release, 20190321IPR32110, European Parliament Approves New Copyright Rules for the Internet (March 26, 2019), http://www.europarl.europa.eu/pdfs/news/expert/2019/3/press_release/20190321IPR32110/20190321IPR32110_en.pdf.

103. *Id.*

104. *Id.*

105. Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, *supra* note 2.

106. Parliament Adopts its Position, *supra* note 79.

applications, regardless of the source and without favoring or blocking particular products or websites.¹⁰⁷ Without net neutrality, internet service providers could intentionally block, slow down, or charge access to specific content and websites. Internet service providers have an incentive to violate net neutrality principles for a variety of reasons. The DSM Copyright Directive calls for provisions that would violate net neutrality principles. To help clarify these violations, it is important to consider both corporate and governmental net neutrality violation examples and hypotheticals to get an idea of how this proposed directive might actually play out.

A. Hypotheticals and Examples of Corporate Net Neutrality Violations

In our first hypothetical, suppose that Comcast created original programming that competes with Netflix. In order to get Comcast consumers to stop using Netflix, Comcast could ‘throttle’ the streaming service—or intentionally slow down the flow of data from Netflix servers to the end consumer—with the goal of getting these consumers to choose Comcast’s comparatively faster streaming service instead. This throttling would lead to consumers not receiving what they specifically sought out and settling for a comparative service while internet service providers see undue revenue. In this hypothetical, the network owner unfairly tipped the balance on the scales of competition in their favor to the consumer’s detriment.

Another worrisome hypothetical of a relevant net neutrality violation is when ISPs control a consumer’s ability to communicate with the digital world to the providers’ benefit. For example, suppose a consumer wishes to order new shoes from Amazon. AT&T could block this consumer’s access to Amazon by various means, thereby blocking the consumer from making their intended purchase and stopping Amazon from making a sale. Additionally, in this hypothetical, suppose AT&T is also paid by Target to redirect consumers to the Target website whenever this consumer wishes to shop on Amazon. AT&T could then direct the consumer away from their desired online store, which may result in a purchase the consumer did not intend to make from a company they did not intend to buy from. This also denies Amazon the money from the sale they should have been able to make.

These may seem like incredible hypotheticals of net neutrality violations, and indeed these two are intended to be extreme. Regardless,

107. GILROY, *supra* note 12, at 1.

there have been net neutrality violations by companies in the past. While not as egregious as the above violations, they are close enough that they should cause consumers to pause and consider what might happen next time a company decides to violate net neutrality.

In one real-world net neutrality violation example from 2009, Apple was required to remove all Skype apps from its app store by its then exclusive U.S. carrier AT&T.¹⁰⁸ The telecommunications giant was threatened by competition from the free voice-over-internet-protocol app, as it provided a widely popular and free or lower-cost alternative to AT&T's cellular services.¹⁰⁹ Apple was forced to block Skype calls over AT&T's cellular networks in a violation of net neutrality after consumers showed they desired Skype's services by making the app number one on the App Store best-seller list.¹¹⁰ Consumers were unable to reap the benefits of healthy competition because another company filtered specific data from reaching consumers who desired its consumption.

Another real-world example of the precarious nature of net neutrality came in 2011. Cell phone service provider MetroPCS sued the FCC to overturn recently implemented net neutrality regulations because it desired to block all audio and video streams on its customer's phones except for YouTube data streams.¹¹¹ This violated net neutrality rules because it locked MetroPCS customers out of other streaming platforms by 'zero rating' YouTube. This forced MetroPCS customers to support YouTube with no choice in the matter. T-Mobile eventually purchased MetroPCS and dropped the lawsuit in 2013.¹¹²

B. Hypotheticals and Examples of Governmental Net Neutrality Violations

An extreme hypothetical net neutrality violation can come into effect when governments or political parties get involved. To illustrate, imagine a world where the European Union does not want its citizens or residents to discuss, foment, or learn anything about communism or

108. Philip Elmer-Dewitt, *Group Asks FCC to Probe iPhone Skype Restrictions*, FORTUNE (Apr. 3, 2009), <http://fortune.com/2009/04/03/group-asks-fcc-to-probe-iphone-skype-restrictions/>.

109. *Id.*

110. *Id.*

111. Ryan Singel, *Accused of Violating Net Neutrality, MetroPCS Sues FCC*, WIRED (Jan. 25, 2011), <https://www.wired.com/2011/01/metropcs-net-neutrality-challenge/>.

112. Adi Robertson, *T-Mobile Drops Anti-Net Neutrality Lawsuit Filed by MetroPCS, Leaving Verizon on Its Own*, VERGE (May 17, 2013), <https://www.theverge.com/2013/5/17/4341280/tmobile-drops-metropcs-anti-net-neutrality-lawsuit>.

fascism. The European Union could make a deal with European internet service providers to monitor every communication a European citizen makes, report these communications, ensure the communications do not go through, and block any search results the European Parliament deems not worthy of showing. However laudable a lawmaker's intentions may or may not be in this hypothetical, this would constitute a violation of net neutrality that would only hurt constituents, democratic principles and institutions, and actual free-market innovations; violating the right to a fair trial, freedom of expression, and privacy under the European Convention on Human Rights.¹¹³

In 2018, governments from Egypt and Iran engaged in anti-net-neutral practices that also violated human rights.¹¹⁴ These governments "rewrote restrictive media laws to apply to social media users, jailed critics under measures designed to curb false news, and blocked foreign social media and communication services."¹¹⁵ These laws violate net neutrality by either prohibiting their citizens from accessing the 'undesirable' content, or by targeting those users who might disseminate such 'undesirable' content online.

C. Europe's History with Net Neutrality

As it currently stands, the European Union claims to support net neutrality, but that is not the entire truth of the matter. The European Parliament passed a regulation entitled "laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union" that set the rules on open internet access.¹¹⁶ The regulation states that it:

[A]ims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet

113. See Felipe Romero-Moreno, 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright, 33 INT'L REV. L., COMPUTERS & TECH. 187, 1, 14, 17 (2018) (discussing the proposed Directive on Copyright's Article 13 and its violation of social media platforms' and their users' right to a fair trial and freedoms to privacy and expression under Articles 6, 8, and 10, respectively, of the European Convention on Human Rights); see generally Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6, 8, 10, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

114. Adrian Shahbaz, *The Rise of Digital Authoritarianism*, FREEDOM ON THE NET 2018 (Freedom House, Wash. D.C.), Oct. 2018, https://freedomhouse.org/sites/default/files/FOTN_2018_Final%20Booklet_11_1_2018.pdf.

115. *Id.*

116. Council Regulation 2015/2120, 2015 O.J. (L310) 1 (EU).

access services and related end-users' rights. It aims to protect end-users and simultaneously to guarantee the continued functioning¹¹⁷ of the internet ecosystem as an engine of innovation.

However, this regulation codifies exceptions that allow internet service providers to engage in non-net-neutral practices, such as allowing member states to determine the viability of commercially-driven zero-rating practices, allowing internet service provider-determined "traffic management measures," and permitting internet service providers to group traffic into classes.¹¹⁸ These loopholes have even been brought to the attention of European lawmakers who continuously vote to leave them open.¹¹⁹

In comparison, the United States once had laws in support of net neutrality under the Obama and Bush administrations. However, under the Trump Administration's Federal Communications Commission ("FCC") headed by Commissioner Ajit Pai, this principle has been all but eradicated. In December 2017, the FCC voted to dismantle these regulations, essentially reversing an FCC decision in 2015 for stronger net neutrality regulations. Commissioner Pai argued that repealing the regulations would allow for internet service providers to offer packages at competitive prices for price-conscious consumers.¹²⁰ Accordingly, this stance exemplifies an extreme approach to anti-net-neutrality measures that Europe has not yet achieved. However, the European Union is continuing down its own path to a non-net-neutral regime by approving this proposed directive that requires strict algorithmic content filtration systems under the guise of increased copyright protections.

Even though the United States has taken an anti-net-neutrality approach to internet regulations at the Federal level, state-level action may preserve these consumer-friendly regulations. For example, California has enacted regulations for internet service providers who wish to do business in the state.¹²¹ Specifically, in 2018 California

117. *Id.*

118. Alex Hern, *EU net neutrality laws fatally undermined by loopholes, critics say*, GUARDIAN (Oct. 27, 2015, 09:30), <https://www.theguardian.com/technology/2015/oct/27/eu-net-neutrality-laws-fatally-undermined-by-loopholes-critics-say> (discusses the problems with and limitations to the European Union's net neutrality laws).

119. *Id.*

120. Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html>.

121. S.B. 822, 2017-18 Reg. Sess., (Cal. 2018) (demonstrating language of recently-passed California net-neutrality bill which shows Californians have adopted laws similar to old FCC net-neutrality rules (pre-Trump era)).

passed Senate Bill 822, which has many of the same net-neutrality regulations the FCC had in place in 2015.¹²²

The European Union's Federated system requires member states to enact a directive after the European Parliament and the European Commission have agreed on the directive's language.¹²³ As such, there is no chance for member states to 'pull a California' and reject this proposed Copyright directive. Thus, Europe is likely to follow the United States' lead and become less net neutral.

D. The Copyright Directive for the Digital Single Market is not Net Neutral

Keeping in mind concerns of net neutrality violations by corporations and governments that could result in violations of freedom of privacy, freedom of expression, and a right to a fair trial,¹²⁴ we now turn to how the net neutrality concept applies to the European Union's DSM Copyright Directive. The European Union's government is calling on internet service providers and content hosts to invade consumers' private online activities, become monitors of artistic expressions, and filter user posts with algorithmic assistance. The proposed copyright directive would require large technology firms to violate net neutrality by monitoring uploads and communications between their users and blocking, or otherwise filtering, any attempts to upload copyrighted materials if they want to conduct business in Europe.

Upon first impression, this may seem like a laudable goal because artists and authors should receive protection and due compensation for their work online, as they would through almost any other medium. However, there are plenty of uses of copyrighted materials that do not violate copyright laws but are difficult to legislate and implement exceptions around. These uses come in many forms, including but not limited to copying for private use, educational use, parodic or satirical use, and other fair uses. This could lead to the stifling of creative output to the detriment of European society, as the algorithmic filters that these gate-keepers would inevitably have to turn to are not sophisticated enough to make these fair-use determinations. Even human filters would not easily be able to make such determinations, as these are difficult legal questions that usually require time to litigate before a

122. *Id.*

123. See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, signed Mar. 25, 1957 O.J. (C 326) [hereinafter TFEU].

124. See Felipe Romero-Moreno, *supra* note 113.

determination can be made. The old adage applies: “all great artists borrow from those who came before them.”

III. EXAMINING ARTICLE 13 THROUGH A NET NEUTRALITY LENS

Net neutrality provides an important focal point through which current and proposed copyright laws throughout the world should be examined. However, the purpose of this note is not to critique the institution of copyright laws in general. Current copyright regimes certainly have their merits and place within society, and their examination is reserved for a different discussion. Instead, net neutrality is used here to critically examine the European Union's recommended expansion of copyright laws in the DSM Copyright Directive.

Here, the expansion suggested by the DSM Copyright Directive is scrutinized. Specifically, the proposed expansion of rights against and new legal burdens upon ISPs and online content hosts under Article 13 are criticized under a net neutrality lens. As of May 25, 2018, the Council of the European Union identified “closing the value gap” as a main reason for including Article 13 in the newly proposed Copyright Directive.¹²⁵ They define the value gap as the difference “between the remuneration received by authors and performers and the profits made by internet platforms when they make their works accessible.”¹²⁶ In an attempt to close this value gap, Article 13 eliminates important exemptions to copyright law. It is possible for economies and countries to benefit from net neutrality principles and status-quo copyright regimes, but anti-net-neutral copyright laws like those in the proposed Copyright Directive can be detrimental and should not be adopted.

A. Elimination of Safe-Harbor Protections

One of Article 13's biggest changes proposes the elimination of hosting exemptions, also known as ‘safeguard’ exemptions, for copyright infringement of for-profit online content-hosting providers.¹²⁷

125. Council of the European Union Press Release, Copyright Rules for the Digital Environment: Council Agrees its Position (May 25, 2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/05/25/copyright-rules-for-the-digital-environment-council-agrees-its-position/> [hereinafter Copyright Rules for the Digital Environment].

126. *Id.*

127. Copyright Reform, *supra* note 74.; see also Council Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. (COD 6637/19) (2016), <https://data.consilium.europa.eu/doc/document/ST-6637-2019-INIT/en/pdf>; *Interinstitutional Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COD (2016) 0280 (May 25, 2018) (discusses

Article 13 revives those exemptions for continued protection if online content sharing service providers take effective measures to prevent the availability of unlicensed and claimed copyrighted works, act quickly to remove them, and they show they have implemented effective steps to ensure infringement will not happen again.¹²⁸ This mechanism creates an incentive for these online content hosts and ISPs to stop and prevent users from uploading materials that infringe on others' copyrights altogether through the use of automated content filters. These filters are known to flag and take down legally permitted uses of copyrighted material, including fair use and licensed use, to the principle of net neutrality's detriment.

Article 13's safe-harbor elimination provision exacerbates the potential for net neutrality violations. The Council of the European Union admittedly targets "online service providers whose main purpose (or one of whose main purposes) is to provide access to a large amount of copyright-protected content uploaded by their users for the purpose of making profits from organizing and promoting it."¹²⁹ This safe-harbor elimination creates an unclear goal that will be difficult for network owners to achieve. Determining what a platform's "main purpose" is, what a "large amount of copyright protected content" is, and what "making profits from organizing and promoting" copyright-protected is will be exceedingly difficult and will require further definition from European Union governing bodies. Article 13 creates many ambiguities with little means to decipher them.

B. Content Filter Requirement

While "filling the value gap" and "improving cooperation between rights holders and online platforms" seem like laudable goals on their face, further examination of Article 13 reveals some issues with these goals that should cause concern.¹³⁰ False or wrongful claims of copyright infringement are already a source of controversy on online content hosting providers' platforms thanks to content filters and copyright claim trolls. The DMS Copyright Directive would only exacerbate this problem. For example, it is not unusual for videos of

approved language for Article 13. States that the tripartite negotiations on implementation can now take place. This same Article can be found in the latest version of the directive as Article 17).

128. *Id.*

129. Copyright Rules for the Digital Environment, *supra* note 125.

130. *Id.*

classical music covers (for which the sheet music has been in the public domain for hundreds of years) that are posted to Facebook to be claimed as a copyright infringement and subsequently taken down automatically without input from the poster.¹³¹ This is also a rampant problem on YouTube and similar content hosts, which has had negative subsequent effects on all kinds of original creative content.¹³²

Despite claims from the Council of the European Union that member-state implementation of the proposed Copyright Directive would not and cannot create or compound the current problems associated with automated content filters, companies that currently deal with such filters and who would be responsible for implementing them not only disagree, but wonder how this Directive could function without such automated filters.¹³³ Content filters violate net neutrality because both algorithm and human-based filters stop users from receiving the flow of data they desire, including for lawful uses. History shows this failure of content filters almost always results in net neutrality violations.

C. Historical Inadequacies of Content Filters

In 2015, YouTube's automated content filter flagged and demonetized an original twelve-second video of a cat purring.¹³⁴ YouTube claimed that its filters identified the purring as the musical composition "FOCUS" whose rights are owned and controlled by EMI Music Publishing and PRS.¹³⁵ MEP Julia Reda says that this

131. Cory Doctorow, *The Future is Here Today: You Can't Play Bach on Facebook Because Sony Says They Own His Compositions*, BOING BOING (Sept. 5, 2018), <https://boingboing.net/2018/09/05/mozart-bach-sorta-mach.html>.

132. See Tom Gerken, *YouTube's Copyright Claim System Abused by Extorters*, BBC NEWS (Feb. 14, 2019), <https://www.bbc.com/news/technology-47227937> [hereinafter Gerken, *YouTube's Copyright Claim*]; Ulrich Kaiser, *Can Beethoven send Takedown Requests? A First-Hand Account of One German Professor's Experience with Overly Broad Upload Filters*, WIKIMEDIA FOUND. (Aug. 28, 2018), <https://wikimediafoundation.org/2018/08/27/can-beethoven-send-takedown-requests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters/>; Cory Doctorow, *Music Professor Shows How the EU's Looming Extinction-Level Internet Policy Will Work (Fail)*, BOING BOING, (Sept. 4, 2018), <https://boingboing.net/2018/09/04/ludivico-technique.html>.

133. Chee, *supra* note 94 (discussing the requirement to install upload filters); Reynolds, *supra* note 95 (discussing the implementation of automated content filters and the amended version of the Copyright Directive that disavowed the use of automated filters).

134. Ernesto Van Der Sar, *YouTube Flags Cat Purring as Copyright Infringing Music*, TORRENTFREAK (Feb. 11, 2015) <https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-150211/>.

135. *Id.*

“ridiculous” error, made after years of investing in filters, shows that “[i]t’s extremely hard to get this technology right—if it is possible at all.”¹³⁶ This example shows that content filters are highly likely to erroneously prohibit internet users from legitimately accessing the content they desire. This clear net neutrality violation example is not in isolation.

Another content filter failure is their inability to identify lawful uses of copyrighted materials, such as for educational purposes. In 2016, Harvard Law Professor William Fisher’s video lesson on copyright law was ironically flagged and taken down by YouTube’s automated filters because it contained clips of songs from Jimi Hendrix, Joe Cocker, and other artists.¹³⁷ In another similar example, YouTube flagged NASA’s video footage of the Mars rover Curiosity’s landing for copyright infringement even though NASA was the video’s creator and, per U.S. government policy, the footage belongs in the public domain.¹³⁸ Julia Reda claims that these takedowns show “[f]ilters can’t determine whether a use is covered by an exception. . . .” and that “[p]ublic domain content is at risk. . . .”¹³⁹ These examples show net neutrality violations because internet users were denied access to lawfully consume the material they desired via exceptions to copyright laws that content filters are unable to compute. If this well-funded content filtration system cannot account for lawful uses of copyrighted materials, then users should not expect their rights to access these materials to be preserved.

Filters have also been utilized by national governments across the world in violation of not only net neutrality principles, but of human rights ones, as well. The People’s Republic of China’s sweeping 2018 Cybersecurity Law “. . . require[ed] that local and foreign companies work to ‘immediately stop transmission’ of banned content, and compel[ed] them to ensure that all data about Chinese users is hosted within the country.”¹⁴⁰ Additionally, China’s ‘Great Firewall’ has

136. Julia Reda, *When Filters Fail*, (Sept. 28, 2017), <https://juliareda.eu/2017/09/when-filters-fail/>.

137. Ernesto Van der Sar, *YouTube Copyright Complaint Kills Harvard Professor’s Copyright Lecture*, TORRENTFREAK (Feb. 17, 2016), <https://torrentfreak.com/youtube-copyright-complaint-kills-harvard-professors-copyright-lecture-160217/>.

138. Mike Masnick, *How Google’s ContentID System Fails at Fair Use*, TECHDIRT (Aug. 8, 2012, 2:55 PM), <https://www.techdirt.com/articles/20120808/12301619967/how-googles-contentid-system-fails-fair-use-public-domain.shtml>.

139. Reda, *supra* note 136.

140. Shahbaz, *supra* note 114, at 6.

stopped their citizens from accessing non-government approved websites and apps that they may have otherwise desired to use.¹⁴¹ These measures implemented by the Chinese government are anti-net-neutral because they utilize content filtration systems to explicitly prohibit their citizens from consuming the content they desire and re-route them to government-approved equivalents.¹⁴²

Since content cannot be reasonably and correctly filtered with the use of automated algorithmic filters, an alternative and more accurate 'filter' could be human beings. This approach seems to be what the European Union is envisioning. However, this is unrealistic because the sheer data volume uploaded to content hosts makes it near impossible for humans to keep up.¹⁴³ Even if a human could process this immense amount of data, it would be impossible for them to give adequate and equal consideration to fair use, exempted non-infringing use, licensed use, and other justifications for the uploading of copyrighted material while still being able to address every piece of content in a timely manner.

Creative works build off of ideas and other works created before it and, indeed, human ingenuity and advancements build upon the works that came before the latest development. In music, many songs rely on the use of chord progressions that have been around for hundreds of years. Many songs also sample other copyrighted works that are transformed when incorporated into a new work. In motion pictures and books, common themes and characters are constantly reused in plots. Without the work of countless computer scientists like Alan Turing, we would likely not have the modern computing systems we have today, and without the work of internet pioneers like Tim Berners Lee, we would likely not have the world wide web and even be discussing

141. *Id.*

142. *Id.* at 7.

143. See generally Bree Brouwer, *YouTube Now Gets Over 400 Hours Of Content Uploaded Every Minute*, TUBEFILTER (Jul. 26, 2015), <https://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute/> (Reporting that 400 hours of video per minute were uploaded to YouTube in 2015); Melody Hahm, *Facebook's 3,000 New Human Content Monitors Won't Prevent Violent Content*, YAHOO! FINANCE (May 3, 2017), <https://finance.yahoo.com/news/facebook-3000-new-human-content-monitors-wont-prevent-violent-content-155248258.html> (quoting Mark Zuckerberg, who said 3,000 human content monitors cannot catch every instance of wrongfully uploaded material and that artificial-intelligence-powered filters are the only viable option); CNN Business, *Will memes be illegal? EU's copyright overhaul explained*, CNN (Mar. 29, 2019), <https://edition.cnn.com/2019/03/26/tech/eu-copyright-article-13/index.html> (video explaining that 500 hours of video is uploaded to YouTube every minute).

regulation implementation. All of these examples show that access to and use of prior creative works are essential for the conception of new creative works. Indeed, many intellectual property regimes around the world provide legal exceptions for this sort of access. For a country or federation thereof to enact a law that uses content filters and network owner liability to stop or severely restrict the lawful transfer of data goes beyond the mere promise of exclusivity that is characteristic of intellectual property regimes and violates the important promises of net neutrality.

IV. WHO WINS UNDER THE COPYRIGHT DIRECTIVE FOR THE DIGITAL SINGLE MARKET, WHO LOSES AND WHY DOES THIS MATTER?

Under the European Union's proposed DSM Copyright Directive, there will certainly be winners and losers in the contemporary internet law, copyright law, and antitrust law landscape. The DSM Copyright Directive will expand protections granted under member state copyright regimes. Subsequently, different groups of people will be affected differently. It is important to identify who these winners and losers are because it will shed light on why these groups may or may not value net neutrality principles and in turn whether society should support them. By showing who will benefit, it will help us place a value judgment on whether this proposed Copyright Directive is worthy of support.

A. Winners Under Article 13

Right off the bat, it seems as though copyright holders will generally see extended benefits under the DSM Copyright Directive's Article 13. Under this proposed article, copyright holders are empowered to negotiate licenses with online content hosts directly, as these service providers must seek authorization for the use of their copyrights under threat of liability for copyright infringement.¹⁴⁴ The expansion of these copyright holders' ability to bring suit for copyright infringement is something they would all expectedly applaud. However, further examination shows that not all copyright holders will benefit equally.

144. European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, EUR. PARL. DOC. P8_TA-PROV(2019)0231 122.

1. Famous Artists and their Media Publishers

Artists with large followings and their media publishers will disproportionately benefit from the proposed Copyright Directive. Considering their positions, their support for Article 13 is seemingly for good reason. Article 13 will allow famous copyright holders to directly negotiate with content hosts for greater rates of remuneration, especially if the content does better on the content host's platform. If successful, this will take away from the available pool of remunerative funds that would otherwise be available for less-famous and little-known artists.¹⁴⁵ Famous creatives, including musical artists such as Paul McCartney, Plácido Domingo, and Adele, along with European film leaders like Mike Leigh, Paolo Sorrentino, Margarethe von Trotta, and Agnieszka Holland all back this proposal.¹⁴⁶ Additionally, organizations including the Federation of Screenwriters in Europe, the Society of Audiovisual Authors, the Independent Music Companies Association ("IMPALA"), and the France-based Confédération Internationale des Sociétés d'Auteurs et Compositeurs ("CISAC") also back this proposed directive.¹⁴⁷

What media publishers and large artists fail to realize, however, is that laws affecting net neutrality affect their bottom lines, too. Under Article 13's regime, consumers may be blocked from famous copyrights they wished to consume and redirected towards other famous copyrights or lesser-known copyrighted content alternatives, both of which the consumer did not originally seek out. This means that many media publishers' and large artists' famous copyrighted content will not be lawfully consumed by as many consumers as expected. In the end, this will lead to decreased overall remuneration and diminished negotiating power for higher licensing fees from content platforms to which these media publishers and large artists have become accustomed.

Article 13's implicit requirement for and overreliance upon content filters, whether code-driven or operated by humans, will make winners out of companies with deep-enough coffers to pay for filter code

145. *Id.*

146. Scott Roxborough, *What New EU Copyright Law Will Mean for Media, Tech Companies and Users*, HOLLYWOOD REP. (Sept. 17, 2018, 9:29 AM), <https://www.hollywoodreporter.com/news/eu-copyright-directive-analysis-media-tech-internet-users-1144003>; Nick Vivarelli, *European Parliament Passes Copyright Directive Giving Artists Greater Share of Revenue*, VARIETY (Sept. 12, 2018, 4:05 AM), <https://www.msn.com/en-us/music/news/european-parliament-passes-copyright-directive-giving-artists-greater-share-of-revenue/ar-BBNdYiO> (discusses who the new Copyright Directive will likely affect positively and negatively).

147. *Id.*

development or for the enormous human workforce behind a filtration system to metaphorically hold copyrighted material for ransom. Invariably, it will be large technology firms that have the technological know-how or the availability of funds required for the development of content filtration systems.¹⁴⁸ Those companies that have already developed such filters are now ahead of the game and stand to make a hefty profit from selling their content filters to online content hosting platforms who would rather purchase a final product rather than spend exorbitant amounts of time and money developing their own.¹⁴⁹ These firms will then be able to dictate when copyrighted material may show up in search results, if it is to show up at all. They will also be able to dictate what other alternative content consumers should be redirected to, if any at all. If an alternative result is selected by a consumer, the holder of the original copyright has lost out on any possible remuneration. Ironically, companies like Alphabet and Facebook may actually see some benefit to the DSM Copyright Directive's implementation, albeit one that the European Union Parliament did not intend.¹⁵⁰

B. Losers Under Article 13

1. Content Hosts

Online content hosting platforms will have the most to lose from implementation of Article 13's provisions, as the proposed directive seems to be deliberately targeting this group. Platforms such as YouTube, Wikimedia, Twitch, GitHub, Automattic, Qwant, Patreon, UpCloud, Reddit, Bandcamp, Kickstarter, and more have come out against this directive.¹⁵¹ The opposition is unsurprising, given the legal

148. WIRED UK, *What is Article 13 and will it Kill Memes?*, WIRED Explains, YOUTUBE (Mar. 25, 2019), https://www.youtube.com/watch?time_continue=502&v=MAqJBDh6GY4.

149. *Id.*

150. *Id.*

151. *Save Your Internet*, YOUTUBE, <https://www.youtube.com/saveyourinternet/?noapp=1> (last visited Aug. 29, 2019); Julia Alexander, *YouTube CEO calls EU's proposed copyright regulation financially impossible*, VERGE (Nov. 12, 2018), <https://www.theverge.com/2018/11/12/18087250/youtube-ceo-copyright-directive-article-13-european-union>; Susan Wojcicki, *A Final Update of Our Priorities for 2018*, YOUTUBE CREATOR BLOG, (Oct. 22, 2018), <https://youtube-creators.googleblog.com/2018/10/a-final-update-on-our-priorities-for.html>; Eileen Hershenov, *How the EU copyright proposal will hurt the web and Wikipedia*, WIKIMEDIA FOUND. (June 29, 2018), <https://blog.wikimedia.org/2018/06/29/eu-copyright-proposal-will-hurt-web-wikipedia/>; Emmett Shear, *A letter from our CEO about Article 13*, TWITCH (Dec. 5, 2018), <https://blog.twitch.tv/from-our-ceo-a-letter-to-twitch-creators-about-article-13-16ae8ec41c70>; Abby Volmer, *EU wants to require platforms to filter uploaded content (including code)*, GITHUB (Mar. 14, 2018), <https://github.blog/2018-03-14-eu-proposal-upload-filters-code/>; Paul

ramifications and upending business effects that Article 13 would impose on these internet companies.

The main points of contention these and many other online content hosting platforms have with Article 13 is the curb on legitimate free speech (despite the Directive's claim to protect it).¹⁵² The limitation on free speech could be caused by the elimination of safe harbor provisions and the content filter requirements.¹⁵³ This would force these businesses to either scrap their current business models and create new means of operation that comply with the new law while staying faithful to the service for which they have become relied upon for, or to buy expensive content filters from the few companies that make them. Both of these options are too expensive and time consuming for many of these platforms to reasonably implement.

It is also unclear to many of these online content hosting platforms how exactly they should police their sites for infringing materials. A human force is clearly inadequate, yet algorithm-based content filters are prohibited by the DSM Copyright Directive.¹⁵⁴ Content filters seem to be implicitly required, but they are also too imprecise to determine when fair use principles should apply, as discussed above.

Additionally, the DSM Directive inadequately addresses the issues that would affect small to mid-sized online content hosting platforms. Article 17(6) does call for an exception to liability for online content hosting platforms that are younger than three years, make less than ten million Euros per year, and do not exceed five million unique monthly visitors.¹⁵⁵ However, this exception is so limited that it would hardly apply to any online content hosting platforms. The smaller platforms that would meet this exception's requirements, such as Patreon and DeviantArt, would still eventually be forced to implement expensive content filters or face copyright infringement claims if and when they grow out of this exception.

Sieminski, *We're Against Bots, Filtering, and the EU's New Copyright Directive.*, WORDPRESS: TRANSPARENCY BLOG (Jun. 12, 2018), <https://transparency.automattic.com/2018/06/12/were-against-bots-filtering-and-the-eus-new-copyright-directive/>; Guillaume Champeau, *Protecting copyright with robots: a risk for fundamental rights and freedoms*, QWANT (Jun. 19, 2018), <https://blog.qwant.com/protecting-copyright-with-robots-a-risk-for-fundamental-rights-and-freedoms/>; Weston Dombroski, *Patreon Stands With Our EU Creators! #DeleteArt13 #SaveYourInternet*, PATREON (Jun. 11, 2018), <https://patreonhq.com/patreon-stands-with-our-eu-creators-deleteart13-saveyourinternet-903978e94673>.

152. EUR. PARL. DOC. P8_TA-PROV(2019)0231, *supra* note 144, at 126.

153. *Id.*

154. *Id.* at 127.

155. EUR. PARL. DOC. P8_TA-PROV(2019)0231, *supra* note 144, at 125.

Combining the premise of free speech and the encouragement of innovation and creativity that many large and small content hosts alike are built on with the cost and liability-inducing proposals in Article 13 creates a Catch-22 for these platforms. It is unclear how they can be expected to carry on with their business models, or make reasonable and affordable changes to them, while still complying with the law. This is especially troublesome when these online content hosting platforms regularly deal with falsified copyright infringement claims because costs and liabilities may only be exacerbated when content filters are mandated.¹⁵⁶

While it may be hard to sympathize with the prospect of increased copyright infringement scrutinization over some of these largely successful and profitable online content hosting platforms,¹⁵⁷ it is important to note that any change to their business model would fundamentally change the way many of the creators operate to keep these platforms running.

2. Small to Medium-Sized Content Creators

Article 13 has the chance of decimating a legitimate industry, including many European creators, by stopping small to mid-sized creators from engaging in what is often their part-time or full-time job. Both legitimate and illegitimate claims of copyright infringement are bound to flare up under mandated content filtration systems, which will constrain creators' speech and innovation, much to the detriment of their consumers' desires. Indeed, these artists and creators currently receive automated copyright infringement notices on their own creative works and are often unable to reap the benefits of their work.¹⁵⁸

Additionally, as discussed above, famous copyright holders' ability to negotiate greater remuneration amounts with content platforms is troublesome for small to medium-sized creators. If famous copyright holders can take a larger slice of the remuneration-pie, little is left to compensate small to medium-sized creators for their work. Their incentives to create are destroyed, thereby nipping potentially-great

156. Gerken, *YouTube's Copyright Claim*, *supra* note 132 (discussing how YouTube and other content hosts already face this issue and have few means of addressing it).

157. *See, e.g.*, Roxborough, *supra* note 146 (discussing how the European Union wants a different copyright regime from the United States by recapturing control of the internet from Silicon Valley firms).

158. Tom Gerken, *YouTuber in Row Over Copyright Infringement of His Own Song*, BBC NEWS (Jul. 5, 2018), <https://www.bbc.com/news/technology-44726296> [hereinafter Gerken, *YouTuber in Row*].

careers in the bud, and leaving less choice for consumers to enjoy overall.

C. Why Does Identifying Winners and Losers Matter?

Identifying winners and losers illuminates a few scenarios which may totally or partially play out upon the DSM Copyright Directive's pan-Europe implementation: (1) dominant technology firms will dictate what content appears in search results and when it appears, (2) user generated copyrighted content will be extremely difficult to access and consume, and/or (3) a resurgence of piracy will afflict the internet once again.

1. Disproportionate Control of Content Filters

In the first scenario, dominant technology firms will create and control the few automated content filters that will be widely available since it would be too costly and time consuming for a smaller or less-experienced firm to create one. Because of this, these dominant technology firms are incentivized to create non-net-neutral 'packages' that provide different capabilities at different price points for content hosts to consider. For example, at an expensive price-point, a dominant technology firm could offer a content filter that allows consumers to either get exactly what they searched for (provided the content exists on the platform) or provide results that the filter purchaser expressly desires. At a lower price point, a dominant technology firm could offer a content filter that provides consumers with results promoted by the dominant technology firm, without any input from the content host. Regardless, this will result in net neutrality violations to the detriment of consumers.

This concentration of power over content filters may also incentivize collusive price-fixing behavior between dominant technology firms. Since these companies will know that the average consumer has nowhere else to turn to search for their desired copyrighted works, these dominant technology firms will be able to charge copyright holders higher prices in exchange for inclusion within search results. However, this is unlikely because such a move would contradict the anti-trust principles that guide the European Union's internal market functions.¹⁵⁹

159. See generally TFEU, *supra* note, 123 at art. 101, 102.

2. User-Generated Content Becomes a Thing of the Past

The second potential scenario created by Article 13's implementation, wherein user generated copyrighted content will be extremely hard to consume, should also cause concern for net neutrality advocates and small artist supporters alike. Under this scenario, the business model of many well-established content hosts would no longer be viable. This is because Article 13 would allow for lawsuits against these content hosts whenever a user successfully uploads another's copyright-protected content to their platforms, and because small to midsize creators would be disincentivized from creating.

To partially deal with this situation, these content hosts would have to either buy (what are likely to be) expensive content filters, or ban all content uploads from non-verified accounts. This less-expensive second option would destroy small, unknown, or fledgling authors from across the creative spectrum from sharing their creative content and exacerbate the problem. Accordingly, this would help entrench currently-famous authors' positions as they would face little competition for copyright consumption. The internet would then become less creatively diverse and only populated by a limited amount of creative content.

3. Resurgence of Piracy

The third potential scenario, in which piracy becomes a significant problem on the internet once again, should make net neutrality advocates nervous as well. If content filters are required to do business in Europe and companies cannot rely on safe-harbor provisions, then copyright protected content, in general, will become scarcer or more expensive to access. If a consumer is unable to find the content they desire at what they deem to be a reasonable price-point, they may turn to piracy to satisfy their content-driven desires. This would only serve to benefit torrenting websites and peer-to-peer networks, as they would see a resurgence in users. All copyright owners would therefore be harmed, as they would receive less remuneration and less control over their works.

In the end, consumers will be most negatively affected by implementation of Article 13's anti-net-neutrality principles. Consumers will be directed away from the content they originally sought out to consume and could be redirected to similar content they did not wish to consume. Online content hosts will be legally required to favor or block particular content from consumption, or be forced into purchasing or

developing their own expensive and anti-net-neutral content filters. In turn, ISPs would possibly even be legally required to favor or block particular content hosts altogether. In all, Article 13's provisions would give internet consumers less choice in what content they may consume and when they may consume it. This expansion of copyright law is a block on not only net neutrality, but also on consumer rights. In the end, Big Tech may still prevail at the request and lobbying of famous artists and their media publishers, contrary to the European Union's desires.

V. ARE THE POTENTIAL EFFECTS OF EUROPE'S DSM COPYRIGHT DIRECTIVE REALLY WORTH IT?

Balancing the concerns of authors, artists, publishers, and other creative and tech institutions in the internet age with the rights of consumers is certainly a difficult dilemma, but it is not a new one. If this Directive was not adopted by member states and the debate ended there, how would copyright holders have coped in this digital age? When this Directive is enacted by member states, how would European Union citizens, and by extension, consumers affected around the digital globe, maintain their freedoms to make the consumer choices they desire without substantial input from online content hosting platforms, internet service providers, and governments that might not even be their own? Luckily, a few snapshots of what might come-to-be in a world where the DSM Copyright Directive exists.

A. Content Filters

As mentioned above, YouTube is facing issues with a litany of falsified copyright infringement claims on their copyright-infringement-detecting ContentID system.¹⁶⁰ This ContentID system utilizes both algorithmic detection procedures and human flagging to identify potentially copyright infringing content in a similar fashion to Article 13's requirements. Neither algorithmic or human filtration on its own, nor in combination, has proven to be trustworthy because each method's shortcomings are abused in a way that has drawn mass-scrutiny. Human flagger system abuse foments black-mail and extortion,¹⁶¹ which are rampant problems with little means of redress. Entire creator-backed channels have been taken down and livelihoods have been destroyed

160. Gerken, *YouTuber in Row*, *supra* note 158.

161. ObbyRaidz, *YOUTUBE COPYRIGHT SYSTEM IS CORRUPT (I WAS EXTORTED) W/ INTERVIEWS*, YOUTUBE (Jan. 31, 2019), https://www.youtube.com/watch?v=iNOYV3qC_GE.

thanks to the human-flagger system. However, the algorithmic detection portion of this system does not do much better.

YouTube's algorithm-based ContentID system is similar to the content filters that the DSM Copyright Directive calls to implement. This algorithmic filter automatically determines whether a video contains copyright infringing material.¹⁶² If the filter concludes that another's copyrighted material is included in a video, the video may be taken down and 'strikes' may be levied against the uploader, which can eventually close their channel.¹⁶³ However, in this situation, the identified copyright holder may choose to leave the video up and redirect the advertising revenue to themselves, instead.¹⁶⁴ While these filters do not necessarily direct consumers away from the content they wished to consume, it may do so, or it may redirect advertising revenue away from where the consumer desired. This violates net neutrality principles.

This system's flaws are readily apparent. If the DSM Copyright Directive is ratified by member states, similar systems will become widespread and commonplace on internet traffic that stems from or goes through the European Union. This may lead to ubiquitous acts of blackmail, extortion, and general erroneous infringement claims that hurt European and worldwide consumers. If Google's \$100 million, ten-plus-year-old ContentID system cannot control these phenomena, then the European Union and consumers cannot expect better results from any other online content hosting provider's system.¹⁶⁵ This flawed filtration system may even become the go-to filter as no other comparable systems exist to date.

The final wording of Article 13, as approved by the European Union Parliament, shows that the European Union has attempted to solve this issue. Drafters have suggested that courts should grant passes to small online content hosting platforms that cannot afford to develop an algorithmic filtration system for the first three years in which they are in business if they make less than ten million Euros, and if they have less than five million unique monthly visitors.¹⁶⁶ This does not propose

162. Gerken, *YouTuber in Row*, *supra* note 158.

163. *Id.*

164. *Id.*

165. Paul Sawers, *YouTube: We've Invested \$100 Million in Content ID and Paid Over \$3 Billion to Rightsholders*, VENTURE BEAT (Nov. 7, 2018), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/>.

166. Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Article 17(6), *supra* note 2 at 125 (final wording of Article 13 as

an effective solution, however. In comparison to Google's ten-year-long ContentID system development, three years is too short to create a comparatively effective system. Additionally, if and when a small online content hosting platform eventually graduates into the 'major leagues,' their efforts will be rewarded with a litany of lawsuits from the copyright holders who have waited for the company to reach a size worth suing. This could place these companies in danger of bankruptcy, which would ultimately disincentivize their original creation. This language therefore encourages these small online content-hosting platforms to find ways to skirt the law in ways that are yet unknown, remain small, or not be created in the first place. Thus, neither copyright nor net neutrality principles will be encouraged.

B. Elimination of Safe-Harbor Provisions for Content Hosts

The DSM Copyright Directive's safe-harbor provision elimination for online content hosting platforms and ISPs should worry every advocate for net-neutrality, free speech, and common-sense copyright law. If these network owners can face legal consequences via contributory copyright infringement for content uploaded by their users and customers, they have a large incentive to become cyberspace's draconian secret censorship-police. This would effectively end the free and open internet that much of the world has known since its inception.

This provision, in lockstep with the DSM Copyright Directive's implied requirement for automated content filters, would result in a highly censored internet. This is what has spawned the "meme ban" moniker for Article 13,¹⁶⁷ as it would stop most uses of copyright protected images that viral memes rely upon. Considering the amount of copyrighted material that is posted to the internet on a daily basis, whether infringing or not, the DSM Directive may create a scenario where network owners can be dragged into abundantly numerous lawsuits for contributory copyright infringement. Since content filters are not easily adaptable to non-infringing uses of copyrighted material, it would be easy to imagine that these network owners would place a general blanket-ban on the uploading of copyrighted materials in order for them to enjoy the greatest amount of legal protections.

approved by the EU Parliament. Referred to as Article 17 in the latest proposal.); *see also* Timothy B. Lee, *European Governments Approve Controversial New Copyright Law*, ARS TECHNICA (Feb. 21, 2019), <https://arstechnica.com/tech-policy/2019/02/european-governments-approve-controversial-new-copyright-law/>.

167. Reynolds, *supra* note 95.

What we are likely to see result from the elimination of safe harbor provisions is an internet segmented into different packages that ISPs and content hosts can offer to consumers. Different packages at corresponding price points would allow access to greater levels or different kinds of copyrighted materials. These network owners will then be able to easily monitor uploads and downloads of copyrighted materials, discriminate against violators, and ensure that all inclusions of copyrighted materials are approved by their owners. Approval must come before consumption through faulty automated upload and download filters, regardless of lawful use. This may seem like a sound protection of copyrights, but it is actually a net neutrality proponent's worst nightmare, made possible by an unsound expansion of the rights granted by the proposed directive.

CONCLUSION

Expanding copyright protections under the DSM Copyright Directive is not worth the likely impacts to the internet as it is now known. This should cause concern for net neutrality supporters because net neutrality stands for the principle that network owners should enable access to all content and applications regardless of the source, and without favoring or blocking particular products or websites.¹⁶⁸ With a segmented internet, most consumers would not have access to all content and applications without regard to the source unless they have the requisite funds. Such a segmented internet would make it less useful as a tool to connect humanity's knowledge, but the copyright holders may exert a little more control over their intellectual property. On balance, the DSM Copyright Directive is not a worthy endeavor.

If a net neutral internet is too at odds with copyright laws for some, perhaps it is time to revisit the underlying concepts of copyright protections and update them to the twenty-first century instead of relying on an expansion of a twentieth century regulatory approach that could cripple the internet. Countries and federations should strive to keep the status quo that the early internet has enshrined: unfettered access to the largest network of human knowledge that still provides some protections to copyright holders without destroying the tool most important to keeping humanity informed, connected, and democratized. A net neutral internet is an economically viable one that protects human rights. The DSM Copyright Directive is posed to destroy this.

168. GILROY, *supra* note 12.