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Censorship in the EU? New Copyright Reform Raises Concerns Among Citizens.

BY [SHANNON COLLINS](#)/ ON SEPTEMBER 29, 2018



On Wednesday, September 12, 2018 the European Parliament voted in favor of a new copyright directive.^[1] This vote occurred two years after the European Commission put forth their proposal in 2016.^[2] There has been tremendous controversy over this reform that resulted in the issue going viral on social media.^[3] It even sparked its own website and organization promoting awareness of the changes and encouraging citizens to write to their MEPs expressing their opposition.^[4]

There are two articles of the reform in particular that are the primary cause for concern for the critics.^[5] These are Articles 11 and 13. Article 13, entitled "use of protected content by information society service providers storing and giving access to large amounts of works and

other subject-matter uploaded by their users,"^[16] is about shifting liability of copyright infringement onto user-generated content platforms.^[17] Article 11, entitled "protection of press publications concerning digital uses,"^[18] is essentially meant to protect news publications from losing revenue to aggregators such as Google News.^[19]

Article 13 brings up many potential censorship issues.^[10] While the language of the article is quite broad and speaks mostly about the content platforms and societies discussing practices to best squash infringement, many have construed the provision to essentially allow for vast censorship by way of creating systems that screen material for potential infringement before it is even uploaded, and then preventing users from uploading that content.^[11] A common criticism about this article is that it will kill the open internet and squash creativity and collaboration in user-generated content communities.^[12] This content filter so many are discussing is being made into this behemoth that will block all content from being uploaded; even content that is not infringing. In an FAQ on the European Commission website, the Commission reinforced that this upload filter will not be a catch-all net, but will include a collaboration with copyright holders and content platforms to better screen infringements in "effective and proportionate" ways.^[13]

This content filter is being further criticized as a limit on freedom of speech and expression.^[14] Freedom of Speech in the United States is a fundamental value expressly laid out in the Constitution.^[15] The European Union also recognizes a right to freedom of expression.^[16] Unfortunately, many misconstrue and broaden these rights to a fault. This right means that the U.S. Government or the European Union cannot infringe upon the right to freedom of speech or expression. However, private companies such as YouTube and Google do not have that same right guaranteed.^[17] User-generated content websites such as YouTube have Terms of Service that explicitly lay out restrictions on what is and is not permissible to publish on their website.^[18] Generally, these websites can choose to be as restrictive as possible since they are private companies. The issue with Article 13, however, is that the European Commission is the one mandating these new restrictions on these private companies. Therefore, while Google or YouTube may choose to prevent a video from being uploaded and not infringe free speech, having the European Commission looming over as a watching figure muddies the waters of who is truly restricting the speech. This is something that will likely be discussed and negotiated at the "trilogue" between the European Commission, the Council of the EU, and Parliament in Brussels.^[19]

Article 11 affects a smaller, but still significant group of people. This provision concerns news outlets and the use of snippets. Many have branded this Article as a “link tax.”^[20] However, the European Commission assures this is not the case.^[21] Article 11 seeks to give more monetary opportunities for news sources from use of aggregators.^[22] Currently, snippets of news articles consisting of an “understandable sentence” are not subject to copyright. As a result, aggregators can use snippets of news articles without infringing on a news source.^[23] The new copyright reform, while not strictly a tax, does allow news publications to charge these aggregators for snippets of the publication’s articles. This poses interesting situations for US based news sources being used in aggregators in Europe, which would be subject to these new provisions. It could arguably allow for an American news source to impose a copyright on the subject matter of their articles. If an aggregator must pay for a short description of an article under this new Copyright Directive, then it follows that the short description, even if it is merely one sentence, is a derivative work. This flies in the face of US copyright law which holds strongly that you cannot copyright ideas, only expressions of ideas.^[24] This could lead to news publications in the US becoming more antagonistic toward American news aggregators for not giving them as many options for monetization.

Needless to say, this new directive “will send a ripple effect” on the availability of online content in not only Europe, but also throughout the world.^[25] The results, however, will not be known until the bill goes to the Council of the EU and the European Commission.^[26]

Shannon Collins is a 2L at Cardozo Law School who grew up around the world. She has a background in music and entertainment and aims to work in IP in the music or music tech space. In her free time, she enjoys listening to music at perilously loud volumes and adding books and video games to her collections before she even finishes the last one she acquired.

^[20] See European Commission Press Release Statement/18/5761, Joint Statement by Vice-President Ansip and Commissioner Gabriel on the European Parliament’s Vote to Start Negotiations on Modern Copyright Rules (Sept. 12, 2018), <http://europa.eu/rapid/press-release STATEMENT-18-5761 en.htm>.

^[21] See European Commission Press Release IP/16/3010, State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate (Sept. 14, 2016)

<http://europa.eu/rapid/press-release IP-16-3010 en.htm>.

^[13] See Robert Levine, *European Copyright Reform Protests Draw Small Crowds After Online Avalanche (Column)*, Billboard (Aug. 27, 2018), <https://www.billboard.com/articles/business/8472479/european-copyright-protests-draw-small-crowds-after-online-avalanche-column>.

^[14] *Stand Up for Copyright in the Digital Age*, ChangeCopyright.org, <https://changecopyright.org/en-US/> (last visited Sept. 18, 2018).

^[15] See James Vincent, *EU approves controversial Copyright Directive, including internet "link tax" and "upload filter"*, TheVerge.com (Sept. 12, 2018, 7:12AM), <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved>.

^[16] *Proposal for a Directive of The European Parliament and Of The Council on Copyright in the Digital Single Market*, COM (2016) 0593 final (Sept. 14, 2016),

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>.

^[17] See Natasha Lomas, *What You Need to Know Ahead of the EU Copyright Vote*, TechCrunch, <https://techcrunch.com/2018/09/08/what-you-need-to-know-ahead-of-the-eu-copyright-vote/> (last visited Sept. 18, 2018).

^[18] *Supra* note 6.

^[19] *Supra* note 7.

^[10] See Natasha Lomas, *Wikimedia Warns EU Copyright Reform Threatens the "Vibrant Free Web"*, TechCrunch, <https://techcrunch.com/2018/09/04/wikimedia-warns-eu-copyright-reform-threatens-the-vibrant-free-web/> (last visited Sept. 18, 2018).

^[11] *Id.*

^[12] See Raegan MacDonald and Owen Bennett, *EU Copyright Reform: The Facts*, Mozilla: Open Policy & Advocacy (Sept. 7, 2018), <https://blog.mozilla.org/netpolicy/2018/09/07/eu-copyright-reform-the-facts/>.

^[13] *Frequently Asked Questions on Copyright Reform*, European Commission, (June 22, 2018), <https://ec.europa.eu/digital-single-market/en/faq/frequently-asked-questions-copyright-reform> (last updated Aug. 24, 2018).

^[14] See Natasha Lomas, *European Parliament Gives Thumbs Up to Controversial Copyright Reforms*, TechCrunch (Sept. 12, 2018), <https://techcrunch.com/2018/09/12/european-parliament-gives-thumbs-up-to-controversial-copyright-reforms/>.

^[15] U.S. Const. amend. I

^[16] *Freedom of Expression*, European Commission, https://ec.europa.eu/europeaid/freedom-expression_en (last updated Sept. 18, 2018).

^[17] See Christie Smythe and Peter Blumberg, *Conservatives Can't Force YouTube to be a Free Speech Zone*, Bloomberg (Mar. 27, 2018, 1:29PM), <https://www.bloomberg.com/news/articles/2018-03-27/conservatives-can-t-force-youtube-to-be-a-free-speech-zone>.

^[18] *Terms of Service*, YouTube (May 25, 2018), <https://www.youtube.com/static?gl=CA&template=terms>.

^[19] See Joanna Plucinska, *European Parliament Backs Copyright Reform, Dealing Blow to Tech Giants*, Politico (Sept. 12, 2018, 2:47PM), <https://www.politico.eu/article/european-parliament-axel-voss-backs-copyright-reform-against-tech-giants-google-facebook/>.

^[20] *Supra* note 7.

^[21] *Supra* note 13.

^[22] See Richard Smirke, *European Union Passes Controversial Copyright Reforms: 'A Historic Decision That Will Send Ripple Effect Around The World'*, Billboard (Sept. 12, 2018), <https://www.billboard.com/articles/business/8474745/european-union-passes-copyright-law-reforms-youtube-music-biz-reactions>.

^[23] *Supra* note 13.

^[24] See *Baker v. Selden*, 101 U.S. 99 (1879).

^[25] *Supra* note 22.

^[26] See Joanna Plucinska, *European Parliament Votes to Adopt Copyright Reform*, Politico (Sept. 12, 2018, 1:08PM), <https://www.politico.eu/article/european-parliament-votes-to-adopt-copyright-reform/>.