

## **Global Governance, Creative Expression and Free Speech: Predictions for the 2019 EU Copyright Directive**

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The internet has become a ubiquitous platform that spans the entire globe, and has a wide variety of uses from disseminating news, to consuming media through services like Netflix or Amazon's Kindle E-bookstore. The number of internet users worldwide has grown tremendously in recent years; a recent poll by Pew Research estimates that of 40 countries surveyed worldwide, a median of 67% of adults surveyed in that country are internet users (Poushter, 2016). This number varies from country to country, with more highly developed countries having a greater proportion of internet users. In Europe, a recent report by the European Union's statistics bureau shows that in 2018, over 85% of EU citizens between the ages of 16 and 74 had accessed the internet once in the past 3 months. About 76% accessed the internet daily, and 83% used the internet at least weekly (Eurostat, 2019).

The internet connects users from many different nations and cultures. The global platform has facilitated many societal changes, such as the ways in which social movements are formed and organized (Castells, 2015; Earl et al, 2010), and the way in which users consume and engage with media (Currah, 2006; Shefrin, 2004). In addition, the Internet's unrestricted access to information has prompted some authoritarian governments, such as China, to block access to certain sectors of the internet as a way of attempting to shield its citizens from foreign influences (Zittrain & Edelman, 2003). This important change in global social life has long been an object of interest for sociologists, and the continual changes in the internet and its culture means that it will likely continue to be intriguing.

One area in which the internet has been particularly influential has been in the area of creative expression and artistic exchange. From the growth of fanfiction communities in which users can create and share their own works of art or writing based on a piece of media they enjoy (Thomas, 2011), to the growth of meme culture as a site of cultural production (Knoebel & Lankshear, 2007; Wang & Wang, 2015), exchange of artistic voices has been a key development in internet use.

However, with the growth of digital creative spaces has come some clashes between proponents of creativity online and intellectual property, or copyright, law. A platform in which anyone can instantly upload a piece of art or writing and make a profit off of it has created a culture that copyright law is still struggling to catch up to, particularly when it comes to works based on copyrighted properties (Chatelain, 2012; Lantagne, 2014). Attempts to update intellectual property laws to correspond with these changes have been ongoing, but none have yet been able to achieve their goals.

In 2019, the European Union was the latest to attempt copyright reform, with a law entitled the "Directive on copyright and related rights in the Digital Single Market" (European Parliament, 2019a). The policy passed, and now each member state is now bound to adapt these regulations. This law provides an interesting case study in which to look at the effects of transnational regulations on the internet and freedom of expression. This policy change likely has global implications, even outside of the EU, since the bill also affects content entering the EU from users or sites in other parts of the world.

This paper looks at current literature on globalization, creative expression, and the internet and predicts how the 2019 EU copyright directive will affect creativity and freedom

online. I focus on two controversial provisions of the legislation- Articles 15 and 17, though I discuss Article 17 in more depth. I argue that both provisions will have a net harmful effect on the problem they attempt to solve and will have negative impacts on creative freedom and digital economies, in Europe and around the world. I begin with an overview of the EU legislation and the provisions in question. I then outline current literature and theoretical perspectives on the intersection of globalization, creative expression, and the internet. I conclude with some predictions about the effects of the new law, and policy suggestions for how to move forward with sensible copyright reform that compensates creators justly while also ensuring continued freedom of expression.

## **The New Law: Pros and Cons**

The European Union Directive on Copyright in the Digital Single Market was passed by the EU Parliament in March 2019 (Hamilton, 2019a). Though aimed at tightening copyright restrictions in the digital age, certain provisions of the law have drawn heavy criticism from lawmakers (Reda, 2019), academics (Kretschmer et al, 2019), and technology companies (Asher, 2019b). Two provisions of the law are highly controversial, and expected to do more harm than good when it comes to reforming the internet. Though reforming copyright law in a digital culture that seems to be lightyears ahead of the law is an admirable goal, many feel that passing these provisions will not accomplish that goal.

The two hotly contested provisions of the law are Articles 15 and 17, formerly known as articles 11 and 13. Article 15 imposes a so-called “link tax” on platforms that aggregate news, requiring these platforms to pay publishers for licenses to display their content, depending on how much of this content they display (European Parliament, 2019a). Proponents of the law argue that this will enable publishers to gain increased revenue from content that generates more web traffic (International Publishers Association, 2019). However, opponents of this provision argue that it will only benefit bigger publishers and shortchange smaller organizations that are not as popular. A statement from the Vice President of Google News (Gingras, 2018), argued that the proposal would force news aggregation services to “pick winners and losers,” since they are unable to license every single publisher in the EU individually. News platforms would be forced to strategically decide who they want to license and who they do not, and diversity of news outlets would be severely hurt as a result. One analysis conducted in Germany found that if this provision were to be implemented, one single large publishing house would take home 64% of the generated revenue, with small organizations receiving less than 1% (Greis, 2019).

The other provision, Article 17, has drawn much more criticism. This provision makes large internet platforms liable for policing copyrighted content hosted on their site, as opposed to the previous system of responding to individual copyright claims on a case by case basis (European Parliament, 2019a). Proponents argue that this system will give rights holders a better chance at securing fair licensing agreements (European Parliament, 2019b). However, the critics of this provision vastly outweigh the proponents. Tech companies argue that they will be forced to impose restrictive filtering on all content uploaded to their platforms, restricting individual users from uploading content that is not necessarily in violation. YouTube’s CEO argued that the provision would impose heavy financial losses for the internet’s “creator economy,” due to the platform being forced to censor content for fear of financial repercussions (Wojcicki, 2019).

Internet users around the world feared that this provision of the legislation would essentially destroy the creation of memes, an overwhelmingly popular facet of internet use (Reynolds, 2019). While the EU has said that memes would be exempt from the law, as they fall under the fair use category of parody (European Parliament, 2019b), others are not sure how this distinction will be enforced. The fair use provision of copyright law makes exceptions for certain types of content based on copyrighted works, but if platforms were forced to use filtration algorithms, these exceptions may not be apparent. When social media platforms have attempted to use filtration algorithms in the past, there have been problems with posts erroneously being flagged or removed, as when Facebook flagged a photo of a 30,000-year-old statue for sexual content (Ma, 2018). Last year, when Tumblr made the decision to remove adult content from the website, many users complained that the filtration algorithm was flagging innocuous content as prohibited (Matsakis, 2018).

Though the attempt to reform copyright law is an admirable goal, these two provisions have been widely forecast to do more harm than good, limiting the very freedom of expression they aim to promote. Though only legally binding in Europe, the law could influence US policy decisions as well, similarly to the effects of Europe's GDPR legislation on US companies (Brandom, 2018). Currently, implementation of these regulations is a long way off; though the directive passed in the European Parliament, each member state now has to decide how to implement the directive into its national laws (Browne, 2019). Poland has also issued a legal challenge to the European Court, arguing that adopting the regulation would lead to censorship that is illegal under the Polish constitution (Reuters, 2019).

## **Scholarly Perspectives on Globalization and the Internet**

The scholarly literature on globalization is vast and disparate. There is little consensus among researchers on what is meant by globalization, and many scholars have attempted to define the term over the years. Some scholars see globalization as moving towards positive outcomes, whereas others see globalization as fueling increased inequality. However, despite disagreements on the precise nature of globalization today, scholars seem to agree that some form of the processes known as globalization exist.

Beck (2000) one of the foremost scholars of globalization, draws a distinction between *globalism* and *globality/globalization* as two distinct terms. He defines globalism as analogous to neoliberalism, defined almost exclusively by what he calls "ideology of rule by the world market (Beck, 100). He argues that globalism reduces all the effects of globalization to one single economic dimension, making things overly simplistic. In contrast, Beck sees globality as the fact that we live in a world society, and there is no such thing as closed, insulated spaces anymore. Different cultures, politics, and ideology are colliding with each other within this world space, and social relationships are no longer totally determined by nation-state politics. Globalization, in contrast, is the process or processes by which nation-states are influenced or undermined by transnational forces.

One key aspect of globalization is that, as Beck identifies, it is seen as irreversible. Though some recent political decisions have arguably been motivated by the desire to reverse course on globalization, such as the recent Brexit decision by the United Kingdom (Elliott, 2016), the effects of globalization are likely here to stay. Beck cites multiple reasons for this, including the abundance of international trade, the growth of transnational political bodies such

as the European Union, and the increasing growth in information and communication technology (ICT).

Robinson (2007) sums up points of commonality among globalization scholarship. He argues that the speed of worldwide social change has increased in the 21<sup>st</sup> century, and that this change is related to the increased connectivity of people worldwide. Lastly, he argues that globalization is multidimensional, and that the different effects of globalization are all interrelated. He describes several dominant theoretical perspectives in the globalization debate: world systems theory (Chirot & Hall, 1982), theories of transnationalism (Vertovec, 1999) and theories of global capitalism (Robinson, 2004). Two theoretical perspectives of globalization that are most relevant to this work are also discussed: theories of a “networked society,” which seems almost directly in reference to the internet, and theories of a global culture.

Theories of global culture emphasize the flow of belief systems, ideologies, and cultural products across national boundaries. There is a debate within this literature between theories of homogenization, which argues that the global flow of culture is converging into one single cultural system, and heterogenization, which state there are still distinct cultural differences. The hybridization perspective exists as well, which argue for a mixture of global convergence and cultural distinction (Robinson, 2007). Perhaps one of the most famous global theories of culture is Ritzer’s McDonaldization theory (Ritzer, 1993), which describes the process by which fast food restaurants and other Western cultural products have rapidly spread around the world.

Appadurai’s (1990) thesis on cultural flows is another prominent theory of global culture. Appadurai argued for global flows of culture spurred on by the ability to rapidly exchange information. He emphasizes the disjunctive and chaotic nature of these global flows, and argues that they have created an intersection of homogeneity and heterogeneity that characterizes contemporary global culture (Heyman & Campbell, 2009). The concept of cultural flows is useful when discussing the role of the internet and technology in globalization. The use of the internet enables the products of one culture to be viewed by users of completely different cultures all over the world, enabling the transfer of cultural products and cultural information in ways that never used to be available.

Castells posits the idea of the network society in a number of his works. Rather than seeing the growth of global capitalistic change as explaining the rise of globalization, he sees technological development as playing a key role (Castells, 1996). He argues that the rise in information technology and the use of these tools by capitalist enterprises has created a new sort of “information capitalism.” This has resulted in the growth of a new economy that is both global in scale and fueled by networks of connected actors around the world. Castells also writes about how power relationships are defined within these global networks (Castells, 2011), arguing that those who hold power in a global network society are those who “program” the networks and those who can strategically switch between them. Castells’ theories seem to directly make an analogy between the processes of globalization and technological innovations, such as the Internet.

Castells also writes about the relationship between communication, mass media, and power in the global network society (Castells, 2007). He argues that the growth of the communication realm as an emerging public space has resulted in a new site where power relationships are challenged. Cultural battles being fought in these public spaces of mass communication, of which the internet is one, are becoming an important site in which to question legitimacy. His main thesis asserts that with the rise of globalization and global communication

networks, the nation state is no longer the dominant unit which defines a public space, and national legitimacy is being questioned.

Thus, the processes of globalization remain an important object of study, particularly as they relate to the growth of technology and the internet. Though there is a lack of consensus within the literature as to how globalization operates, it is clear that the global connectedness of individuals and organizations has been one of the driving forces of global cohesion and global exchange. Attempts to regulate the internet, while necessary, must be measured in their approach so as not to upset global connectedness and free exchange of information among world citizens.

## **The Internet and Regulation of Free Expression**

### *The Internet and Creative Works*

The growth of the internet has created the ability for any given user to upload anything they want, instantaneously creating a new piece of information or cultural product. This has led to some problems, such as the rise of so-called “fake news” in recent years (Allcott & Gentzkow, 2017), but has also led to the growth of entire new industries and subcultures. For example, the internet has served as a connective tool for fan communities, or “fandoms” to publish original works of writing known as “fanfiction” (Thomas, 2011). The growth of online video gaming has created a growing industry of “live streaming,” in which users broadcast themselves playing a video game and provide commentary to a live audience (Taylor, 2018). These industries contain both an international community of creators and an international audience, transcending national boundaries. The use of the internet as a tool of expression enables the transmission of cultural products across the globe.

The production of art and literature online has become a crucial way artistic works are disseminated. A recent analysis has demonstrated the ways artistic forms have transcended cultural boundaries in online spaces by looking at the influence of K-pop (Korean pop music) in Spanish-speaking countries (Meza & Park, 2014). The creation of works of art and writing have become an important way in which individuals engage with media and other users in important acts of community building (Thomas, 2011). The creation of internet memes has also become an important part of expression online, serving a variety of unifying functions. At the same time, the ability to engage in creative expression online has enabled the creation of subcultural spaces, particularly political subcultures (Kahn & Kellner, 2004).

The use of the internet as a cultural production space serves a number of positive functions. “Cyber-activism” has become a widely studied phenomenon within the social movements literature (McCaughey & Ayers, 2013; Illia, 2003), and the use of digital cultural products has played a role in collective identity formation. Many viral memes have helped promote positive causes, including a 2010 viral video campaign against suicide (Gal, Shifman & Kampf, 2015), and the more recent “Ice Bucket Challenge” campaign to benefit ALS research. Other scholars have argued that memes serve an important function as units of cultural transmission (Wang & Wang, 2015). Rintel (2013) discusses the “crisis meme” and argues that despite the potential clashes with copyright law, the crisis meme is an important tool for the public to come together with an unfiltered voice in response to challenges or traumatic events. Rintel argues that the value of crisis memes merits an increase in fair use exceptions to intellectual property law, and commends efforts such as the Creative Commons project (a forum

allowing for an unrestricted license of images or works uploaded to that platform) to facilitate the exchange of memes.

Creative expression by internet users has clashed with copyright laws for many years, as the law struggles to catch up to an industry that is years ahead. Currently, intellectual property law in the US (and similar legislation internationally) provide for “fair use” exceptions to copyright. These provisions allow for the appropriation of copyrighted material to create derivative works, or original works based on established intellectual property. However, the distinction between what counts as fair use and what does not is murky, and no clear ruling has been established (Chatelain, 2012). Thus, some copyright holders have attempted to restrict creators from using a copyrighted property in a way that others would consider justified under fair use doctrine. Chatelain, writing on US law, argues that the US Supreme Court should issue a clear ruling on fair use in the name of fostering increased creative expression.

It is this precise vagueness that is the problem with Article 17 of the EU copyright directive. By making internet platforms liable for policing copyright violations of its users, the EU is in effect putting a giant band aid over a wound that requires much more nuanced processes to heal. Shifting liability for policing copyright violations onto web platforms will not fix the ambiguity in fair use definitions. It will only serve to stifle progress as websites are forced to implement problematic filtration algorithms and censor uploaded content.

Attempts to reform copyright law must consider the reality that derivative works and creative expression have a positive effect on the market value of copyrighted works. Lantagne (2015) has argued that decisions about what counts as fair use and what does not are often based on personal interpretations of specific courts, rather than a legal standard. In addition, she emphasizes the economic value of derivative works, arguing that these products can add value to the original intellectual property, rather than detract from it as many fear. Lastly, she argues that the motivation for inconsistencies in fair use rulings come from the belief that derivative works and creativity among fans has little aesthetic value according to mainstream culture. However, the production of fan works of art or writing can produce economic value, and the creation of other cultural products online, such as memes, can produce positive benefits for those who create and are exposed to them.

The attempt to make tech companies liable for copyright violations would stifle this creativity and likely make users less willing to engage in this type of creative expression. Though the European Parliament has stressed that memes are immune from the law, enforcement of this provision is tough to implement, especially if tech companies implement upload filters. In addition, the market value of derivative works, and in turn, the market value of the IP they are based on, would be severely impacted by a misguided reform such as this.

To return to gaming, for instance, the rise of livestreaming has resulted in a tremendous advertising boom for the game industry (Johnson & Woodcock, 2019). Streamers will often play new games and offer their thoughts, giving consumers who are thinking of buying the game a built-in recommendation channel. Given the vast number of hours that viewers on Twitch spend watching streams, this is likely a significant boost in free advertising for game companies. Game developers will often send free, reduced price, or early access copies of new video games to streamers, so that they can get exposure for their game through that streamer’s community of viewers. With the advent of Article 17, streamers would have to prove that they own a license to that game in order for their content to be broadcast to the EU, cutting off the EU audience from thousands of creators for which it would be financially or bureaucratically impossible to obtain a

license. This would in turn harm the EU audience who have less content to view, the developers of games which see their popularity decline, and the livelihood of creators, who would lose a chunk of their income.

While copyright and fair use laws need to change, the requirements set forth in Article 17 would force technology companies to be incredibly restrictive in the content they allow on their site out of fear of financial penalty. Some, including the nation of Poland, feel that this requirement amounts to censorship (Reuters, 2019), and it would certainly be harmful to those who engage in producing derivative works. There is also the potential for content that is not in violation of copyright to be caught in the crossfire and blocked due to rigorous enforcement or a problematic detection algorithm, and this could serve as a deterrent against engaging in creative expression entirely.

### *The Internet and News*

The internet has also drastically changed the news media landscape. The lack of gatekeeping online and the low production costs of producing news has led to the growth of many smaller blogs and news outlets in addition to sources run by big corporations and major publishing houses. More users today are using the internet as their primary source of news, as opposed to other sources such as cable or print news (Geiger, 2019). Whereas most news sites are still owned by larger corporations (Curran et al, 2013), the growth of the news industry in general has led to an increasing amount of worldwide news sources online.

The use of news aggregation sites is another relatively new way of consuming news, and is the focal point of Article 15 of this new copyright directive. News aggregation sites like Google News scan the internet for news content and compile it for users to read. They generally rank news content using algorithms, and do not have a relationship with the organizations whose content they are displaying. Those in the media industry have voiced concerns about news aggregation sites; in 2009 Rupert Murdoch drew heavy criticism for his plan to lock his news sites behind a paywall (Bunz, 2009). However, scholarly literature has little to say about the actual effects of news aggregation sites. As mentioned previously, one analysis of German news has posited that if a link tax were implemented, smaller news organizations would receive almost no new revenue, while one large publishing house would take home 64% of profits (Greis, 2019).

Even before the EU legislation, the use of news aggregation sites was controversial. One analysis from 2012 attempted to study the efficacy of these platforms, and whether the fears of the media industry were based in fact. Athey, Mobius, and Pal (2017) studied the introduction of the “local news” feature to Google News in France in 2009, looking at the effects on traffic to news sites (one of media’s prime fears about these platforms). Their analysis showed that the use of Google News had a significant boost in web traffic to local news sites, suggesting that these platforms are beneficial to driving news diversity. They also saw an increase in the number of local outlets from which users were consuming news, which may be beneficial in subverting the dominance of large media conglomerates. The authors wisely note, however, that these results were short term benefits, and do not comment on the longer-term threats that news aggregation sites may pose, such as rednering a newspaper’s “curation” function obsolete. Another analysis found that the use of news aggregation sites did not contribute to the so-called “filter bubble

hypothesis” of insulated viewpoints, but that there was an overrepresentation of news sites and an under-representation of others (Haim, Graefe, & Brosius, 2018).

Thus, there is a mixed-bag of empirical evidence as to the effects of news aggregation sites, and in my view, there is not enough evidence to conclude that a sweeping “link tax” implementation would have a positive effect on news consumption. In fact, the empirical results may indicate the opposite; the benefits of news aggregators may outweigh the potential long-term effects on large media outlets. Further empirical investigation is warranted to examine the long-term impacts, but I believe that, based on what we know of the short term, a link tax will harm more than it will help. The potential spiral effects of the European Union policy on US legislation will only exacerbate potential negative consequences.

## **Conclusions**

In this paper I have used current scholarly perspectives on global creative expression, information exchange, and the internet to understand what the 2019 EU copyright directive will mean for a free and open internet. I have shown that scholarship in this area is lacking in some respects, and there are areas which require further examination to make fully informed predictions about what will happen. Based on the knowledge currently available to us, I believe that this directive will do serious harm to the free and open internet, and will not do much to protect copyright owners. To be clear, I do not suggest that attempts to reform intellectual property laws should be abandoned. The goal to compensate creators fairly is an admirable one, but reforms should take care not to restrict freedom of expression among internet users. Articles 15 and 17 in their current form do not do this; these two provisions are likely to hurt overall artistic and cultural expression online, and they will not help copyright holders in the way they intend.

Article 15’s attempt to impose a link tax on news aggregation sites will force these sites to be more strategic about what content they choose to display, meaning they will only choose to pay large news outlets which they think will gain more traffic. This means that smaller, local news outlets will likely suffer, as Google News and other sites will be less likely to want to pay them to use their content (Google News has already said this provision will force them to “pick winners and losers” (Gringas, 2019). Since we know that local news outlets see a boost in web traffic due to these aggregation sites, the imposition of a link tax will benefit large organizations at the expense of smaller ones. The original version of the legislation was vague about how much of an article would need to be shared before the link tax would need to be paid, and though the legislation has been re-drafted to say that sharing hyperlinks or news “snippets” are exempt (Hamilton, 2019), there is still some ambiguity that needs to be resolved.

Article 17’s stipulation that websites are required to police copyright infringement poses an overbearing threat to creative expression online. Tech companies will likely be forced to impose a filtration algorithm on all the content that gets uploaded, and some sites may even be restricted from the EU entirely due to an inability to completely conform to the requirements. Filtration algorithms have been compared to censorship, and will likely result in an overall reduction of creative content on the internet. Tech companies will be forced to be overzealous in their policing of copyright violations, blocking many works that would be granted fair use exceptions under existing laws. This in turn will hurt both the digital economy (creators who make their income selling their art or publishing their writing online), and the market value of

the intellectual property that this law was designed to protect (Lantagne, 2015). Intellectual properties may see a decline in popularity due to the restriction of derivative works. This far-reaching provision will have consequences on a global scale; because content entering the EU from outside is also bound by this requirement, creative works from around the world are subject to restriction or outright bans due to non-compliance. This harms both users in the EU who are restricted in the variety of creative works they are exposed to, and users outside of the EU who see a diminishing audience for their creative pieces.

The internet as a site of valuable cultural production in the 21<sup>st</sup> century cannot be overstated. While reforms designed to update the law are warranted, the European Union Directive on Copyright and Related Rights in the Digital Market, and Articles 15 and 17 specifically, do not acknowledge the reality of digital culture. It is likely to harm freedoms of speech and expression online much more than it helps copyright holders, and it is imperative that the member states take these criticisms under consideration when deciding how to implement this directive. While only time will tell this legislation's effects, and further research is warranted in order to understand the full scope of consequences, it is clear at this point that serious concerns need to be addressed in relation to this law. Policymakers would be wise to take under consideration the current scholarly literature on the global internet as a site of free artistic expression and a free press when considering ratification of this law and subsequent policies. In addition, policymakers in the United States and other countries outside of the European Union should exercise caution when deciding whether to implement these or similar directives in their home states.

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