THE EU COPYRIGHT DIRECTIVE AND THE UNITED STATES COPYRIGHT ACT: WHY AN ESTABLISHED APPROACH IS BETTER SUITED TO A NEW DIGITAL REALITY

*Melanie N. Tate**

ABSTRACT

The Council of the European Union has recently adopted a new Copyright Directive meant to solve problems related to illegal use of copyrighted material in the digital age. The Directive has been met with harsh criticism, with many critics arguing that the Directive will have especially harmful effects on small businesses. The criticism has focused on two especially controversial articles of the Directive. One article implements a link tax, requiring payment to news publishers when aggregators use extracts from their works. The other article places requirements on service providers to prevent future uploads of illegal works, essentially amounting to a filtering requirement. Critics argue that smaller companies will not be able to meet the requirements of the Directive, causing many of them to shut down and in turn increasing the influence of larger companies. This Comment provides an in-depth explanation of how the Directive may harm small businesses.

The United States takes a very different approach to handling copyright infringement. There is currently no link tax, and the Copyright Act does not require service providers to take an active role in preventing infringement. However, the United States is very aware of the actions taken in Europe and has contemplated movement in that direction. This Comment argues that the United States approach as it currently exists is superior. First, it avoids placing burdensome requirements on small businesses,

*J.D., Emory University School of Law

unlike the Directive. Second, and more fundamentally, it does not work against the new way that information is shared on the internet, which has benefitted small businesses and independent creators. This Comment concludes that, in responding to copyright infringement in the digital age, the United States should continue following its current approach, and any future changes should not follow the Directive but instead should build upon the current United States approach that aligns with the way information is shared on the internet.

INTRODUCTION

In the age of the internet, it is incredibly simple to take a copyrighted work and illegally upload that material to the internet with the click of a button.[1] The Council of the European Union believed it found a solution to this problem when it adopted the April 2019 Directive on Copyright and Related Rights in the Digital Single Market.[2] This Directive imposes new filtering requirements for uploaded information as well as liability on news aggregators for sharing certain information online.[3] Supporters believe the Directive will lead to fair compensation for content creators and prevent troublesome copyright infringement online.[4] However, many European business leaders argue that the Directive is not a solution and instead allege that the Directive will have harmful effects on businesses.[5] Specifically, they argue that while the Directive's goal was to limit the power of large internet companies, it will in actuality increase the power

1. *See* Pamela Samuelson & Kathryn Hashimoto, *The Enigma of Digitized Property: A Tribute to John Perry Barlow*, 18 DUKE L. & TECH. REV. 103, 117 (2019) ("In the digital age, music, video, and books can be produced and distributed by almost anyone who has access to a computer and an internet connection.").

2. Council Directive 2019/790, 2019 O.J. (L 130) 92 (EU).

3. John A. Polito et al., *Insight: Explaining the New EU Copyright Directive*, BLOOMBERG L. (May 6, 2019, 3:00 AM), https://news.bloomberglaw.com/us-law-week/insight-explaining-the-new-eu-copyright-directive?context=search&index=4.

4. *Id.*

5. Open Letter from EU Bus. to Members of the European Parliament (Mar. 19, 2019) [hereinafter Open Letter from EU Businesses], https://nextcloud.com/media/open_letter_copyright.pdf?x22777.

of these companies at the expense of smaller businesses and startup companies.[6]

Viewed in a broader context, the Directive is attempting to establish modern laws for copyright, an important promoter of creativity, at a time when the way content is shared online is rapidly changing.[7] Technological changes have "ushered in a thriving new creative economy and indeed, a 'golden age' of creativity,"[8] but they have also led to uncertainty in established copyright law.[9]

Copyright gives creators recognition, payment, and control over their original content, thereby rewarding their creativity and incentivizing further investment in creative industries.[10] Under European Union ("EU") copyright laws, creators possess the exclusive right to authorize or prohibit the copying, distribution, and public communication of their works.[11] Creators exercise these rights primarily through licensing, either by granting licenses themselves or through collective management organizations.[12] In the United States, the U.S. Copyright Act provides similar exclusive rights to holders of copyrights.[13] Copyright owners have the exclusive right to reproduce, distribute copies of, and publicly display their works.[14]

While the basic protections of copyright are well-established in the law,[15] implementing them for new digital platforms has

---

6. *Id.*

7. *Digital Single Market Policy Copyright*, EUR. COMM'N, https://ec.europa.eu/digital-single-market/en/copyright (June 2, 2021).

8. Samuelson & Hashimoto, *supra* note 1.

9. Goldman v. Breitbart News Network, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018) (discussing the technology and terminology changes over the last forty-five years to help determine how images shown on one website but stored on a different website's server implicate the owner's exclusive display right).

10. *Digital Single Market Policy Copyright*, *supra* note 7; Lia Shikhiashvili, *The Same Problem, Different Outcome: Online Copyright Infringement and Intermediary Liability Under US and EU Laws* 24 INTELL. PROP. & TECH. L.J. 128, 136 (2019).

11. *Digital Single Market Policy Copyright*, *supra* note 7; Shikhiashvili, *supra* note 10, at 136.

12. *Id.*

13. 17 U.S.C. § 106 (2019).

14. *Id.*

15. *See* Shikhiashvili, *supra* note 10, at 130 (discussing Congress' power, as set forth in the U.S. Constitution, "to promote the progress of science and useful arts, by securing

proven to be a difficult and complicated task.[16] Questions of copyright law have become unclear as changing technology has made possible the sharing of copyrighted images online at "dizzying speed," when just a few decades before the concept of an image going "viral" did not exist.[17] Similarly, a few decades ago a person would have had to wait until a network replayed their favorite television show if they missed the latest episode; now, they can immediately find an illegally copied version online.[18] Copyright holders undoubtedly suffer from this new ability of third parties to easily and instantaneously infringe their rights by illegally sharing copyrighted works online.[19] In response to these new forms of infringement faced by rightsholders—and after intense lobbying from rightsholders' representatives[20]—the EU adopted the Directive.[21]

However, through two especially problematic articles of the Directive, the EU may have created a host of new problems for many of the businesses who will be forced to implement its rules, and it may even harm the creators it was attempting to help. Article 15 of the Directive establishes what is known as a "link tax," giving press publishers a right to authorize and receive compensation for the use of their content by news aggregators.[22] This Article gives press publishers a powerful new right, separate from the rights of the original authors of the material.[23]

---

for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (quoting U.S. CONST. art. I, § 8, cl. 8)).

16. *Id.* (explaining the complexity of the formation and maintenance of applying copyright law to digital platforms).

17. *Goldman*, 302 F. Supp. 3d at 585–86.

18. Megan Smallen, Note, *Copyright Owners Take on the World (Wide Web): A Proposal to Amend the DMCA Notice and Takedown Procedures*, 46 SW. L. REV. 169, 169 (2016).

19. *Id.* at 170.

20. João Pedro Quintais, *The New Copyright in the Digital Single Market Directive: A Critical Look*, EUR. INTELL. PROP. REV. 3 (forthcoming 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770.

21. *See* Samuelson & Hashimoto, *supra* note 1, at 105–06.

22. Council Directive 2019/790, *supra* note 2, pmbl. at 104; Polito et al., *supra* note 3.

23. Giuseppe Colangelo & Valerio Torti, *Copyright, Online News Publishing and Aggregators: A Law and Economics Analysis of the EU Reform*, 27 INT'L J.L. & INFO. TECH. 75, 75 (2019).

Previously, publishers who produced news content only received copyright protection when the creators of the published content transferred their rights to the publishers.[24] With their new, separate right, publishers have another layer of protection that compensates them for their work in producing news content, whereas before they simply received the benefits of a transferred right in the content itself.[25]

While this new right seems beneficial, it will likely have harmful effects on both the news aggregators who must pay publishers and on the publishers themselves. Critics allege that the link tax will force smaller news aggregators to stop certain forms of communication or shut down entirely.[26] Additionally, past examples in Germany and Spain have suggested that press publishers—especially smaller publishers—will also be harmed by the tax.[27] The German and Spanish examples suggest that when news aggregators shut down, people have fewer ways to discover publishers' websites, and thus the publishers lose web traffic.[28]

Concerning user-uploaded infringing content, Article 17 of the Directive breaks from the EU's previous notice-and-takedown approach, which shielded service providers from liability if they quickly took down infringing material after receiving notice of the infringement from rightsholders.[29] The Article obligates some service providers to show that they have made best efforts to prevent future uploads of infringing material, which they will

---

24. *Id.* at 78.

25. *Id.* at 77–78.

26. Open Letter from EU Businesses, *supra* note 5 ("Startups that build services based on aggregated online information would go out of business . . . ."); *see also* Mike Masnick, *EU Moves Forward with Agreement to Fundamentally Change the Internet from Open to Closed*, TECHDIRT (Feb. 14, 2019, 2:10 AM), https://www.techdirt.com/articles/20190213/12071341588/eu-moves-forward-with-agreement-to-fundamentally-change-internet-open-to-closed.shtml (stating that a link tax "potentially makes our posts untenable, since we frequently quote other news sites in order to comment on them").

27. Quintais, *supra* note 20, at 16.

28. *See infra* Section II.A.2.

29. Talin Markarian, *EU's New Copyright Directive: Will the U.S. Follow Suit?*, THE NYU J. OF INTELL. PROP. & ENT. L. BLOG (May 2, 2019), https://blog.jipel.law.nyu.edu/2019/05/eus-new-copyright-directive-will-the-u-s-follow-suit/.

likely only be able to accomplish through implementation of filtering mechanisms.[30] Critics suggest that the filtering article will dangerously experiment "with the core foundation of the Internet's ecosystem" by requiring businesses to implement expensive and error-prone filtering mechanisms that only the largest companies have the resources to implement.[31] Further, the errors made by these mechanisms will cause them to over-block information, which will harm creators by causing their own original content to be incorrectly labeled as infringing and taken down.[32]

The U.S. Copyright Office has considered implementing similar changes to those adopted in Europe,[33] and U.S. courts have been addressing similar issues to those proposed in the Directive.[34] Currently, the U.S. approach set forth in the Copyright Act involves giving notice of copyright-infringing content to internet service providers, after which the service providers must disable access to the infringing content.[35] This notice-and-takedown approach is essentially the opposite of the approach set forth in the Directive, which places obligations on service providers before, not after, infringing content is uploaded.[36] In addition to U.S. statutory provisions, some U.S. courts have also come to conclusions opposite from those in the Directive regarding content licensing, although recent case law demonstrates that there is also support for similar requirements.[37]

This Comment will argue that the United States should refrain from following the new EU approach because it restricts

30. Shikhiashvili, *supra* note 10, at 131.

31. Open Letter from EU Businesses, *supra* note 5.

32. *See* Andrew Tyner, *The EU Copyright Directive: "Fit for the Digital Age" or Finishing It?*, 26 J. INTELL. PROP. L. 275, 285–86 (2020).

33. Polito et al., *supra* note 3 (stating the Copyright Office recently had a session dedicated mostly to discussion of the Directive).

34. *See, e.g.*, Goldman v. Breitbart News Network, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018) (addressing whether embedding a photo constitutes copyright infringement).

35. Shikhiashvili, *supra* note 10, at 134–35.

36. *Id.* at 140.

37. Polito et al., *supra* note 3 (discussing the *Goldman* court's declination of applying current standards in copyright law and potentially opening the door to a link license requirement in the United States).

new forms of internet sharing that have led to an exponential growth in creative works and harms small businesses and independent creators in the process. Part I of this Comment will explain the Directive's new controversial provisions: the link tax and the filtering requirement. Part II will describe the probable effects of implementing the Directive and demonstrate that the Directive will not solve the problems it was intended to fix. This Part will examine criticism from small businesses and academics, who highlight the significant burdens the Directive will impose on small businesses.

Part III will discuss the counterparts of the link tax and filtering requirement articles in the United States, which are found in the Copyright Act and conflicting case law. Part IV will contrast the U.S. law to the Directive and argue that the current U.S. approach is the better approach in light of the recent success of the creative industries. Specifically, this Part will argue that the Directive prevents new forms of sharing, particularly to the detriment of small businesses and independent creators, while current U.S. law does not. Ultimately, this Comment will conclude that any changes to U.S. copyright law should not fundamentally deviate from the characteristics of current U.S. law that protect new forms of sharing on the internet and thus protect small businesses and independent creators. Instead, any changes to U.S. law should continue to promote sharing and, if new laws place requirements on news aggregators or service providers, these requirements should especially consider the interests of small businesses.

I. THE NEW APPROACH OF THE EU COPYRIGHT DIRECTIVE

On April 15, 2019, the Council of the European Union voted to adopt a new Directive, which member countries will be required to implement within two years.[38] Two provisions in the directive are especially controversial: Article 15 (formerly Article 11), imposing a so-called "link tax," and Article 17 (formerly Article 13), imposing a "filtering requirement."[39] A link tax would make news aggregators liable in many circumstances for linking

38. *Id.*

39. *Id.*

and displaying certain information without a license,[40] while Article 17 would require efforts to prevent unauthorized uploads that essentially amount to a filtering requirement.[41] While the reasoning behind the Directive may be sound, problems with intended safeguards will likely arise when the new rules are actually applied.[42] This becomes especially relevant when considering how the Directive will influence small businesses, as they are the ones most in need of safeguards from these requirements.[43]

A. *Reasons for the Directive*

The Directive was meant to respond to a need for "future-proof" legislation in a time when "[r]apid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited."[44] In the context of the dissemination of news, this time of rapid development has seen the emergence of new online services whose business models depend at least in part on reusing press publications.[45] Publishers often have difficulty licensing the use of their publications to these new service providers and thus often have difficulty recovering their investments.[46] The cause of this inefficiency in licensing is the lack of recognition of publishers as copyright holders.[47] Under EU law before the Directive, publishers were not considered rightsholders, and thus enforcement of their content depended on content creators transferring their rights to the publishers.[48] If the content

---

40. *Id.*

41. Shikhiashvili, *supra* note 10, at 142.

42. *See* Tyner, *supra* note 32, at 283 (discussing how a lack of clarity in the Directive's language likely will make application of a potential exception unclear and inconsistent).

43. *See* Open Letter from EU Businesses, *supra* note 5 ("Article 13 requires filtering of massive amounts of data, requiring technology only the Internet giants have the resources to build. . . . European companies like ours will be hindered in their ability to compete or will have to abandon certain markets completely.").

44. Council Directive 2019/790, *supra* note 2, pmbl. at 92.

45. *Id.* pmbl. at 103.

46. *Id.* pmbl. at 103–04.

47. *Id.* pmbl. at 104.

48. Colangelo & Torti, *supra* note 23, at 78.

creators did not transfer their rights, publishers could not license their publications.[49]

Moving from the realm of news aggregators to content-sharing providers, the creators of the Directive were especially concerned with a "value gap" problem.[50] This value gap arises when service providers allow users to upload copyrighted content without the content owners' permission.[51] This prevents rightsholders from being able to determine whether, and under what conditions, their content is used; further, it prevents them from receiving remuneration for its use.[52] The gap between the value that the service providers obtain from the use of the content and the revenue returns given to the creators is the value gap.[53]

The value gap problem is particularly relevant in the music industry, in which large companies like YouTube and Facebook allow users to listen to copyrighted music while providing extremely low revenues to rightsholders in return.[54] For example, YouTube pays content owners less than $1 per user, while Spotify—a subscription service that, unlike YouTube, actually has a license to play the music—pays owners at a rate of around $20 per user.[55] Popular musicians were some of the most vocal proponents of the Directive,[56] and the European Union Commission found the value gap to be "a fundamental reason for its proposed reform of copyright law."[57] With companies like YouTube and Facebook at the center of the discussion, the debate surrounding the Directive's controversial articles has been considered "a battle between Google and the creative community,

49. *Id.*

50. Giuseppe Colangelo & Mariateresa Maggiolino, *ISPs' Copyright Liability in the EU Digital Single Market Strategy*, 26 INT'L J.L. & INFO. TECH. 142, 159 (2018).

51. *Id.* at 149.

52. *Id.*

53. Quintais, *supra* note 20, at 17.

54. Tyner, *supra* note 32, at 277–78.

55. *Id.* at 278.

56. *Id.* at 277. These well-known musicians included Paul McCartney and James Blunt. *Id.*

57. Colangelo & Maggiolino, *supra* note 50, at 159.

as an effort to push back against what is seen as the 'evil empire' dominance of American internet giants."[58]

To protect creators' rights, the Directive requires service providers to take a more active role in preventing copyright infringement, an idea that is also becoming increasingly popular at the international level.[59] Service providers will now have to receive authorization from rightsholders before using certain copyrighted works, and, if they fail to do this, they will be liable unless they meet the more stringent requirements regarding prevention of illegal uploads.[60]

Overall, in the context of content sharing by service providers and dissemination of news, an apparent lack of protection for rightsholders exists. Many creators and their representatives have praised the Directive as the answer to this lack of protection.[61] They believe the Directive places a fair value on creativity and protects creators who have recently experienced difficulty receiving compensation.[62] Representatives of the music industry see the Directive as a way to improve the way creators and investors in this industry are financially rewarded, and they view its changes as necessary to maintain growth in the industry.[63] These changes that supporters claim will "ensure a 'well-functioning marketplace for copyright'"[64] exist most notably in two far-reaching measures set forth in the Directive: the link tax and the filtering requirement.[65]

---

58. Patrick H.J. Hughes, *Q&A: Copyright Expert Christopher Beall on the European Union Copyright Directive*, WESTLAW INTELL. PROP. DAILY BRIEFING, Sept. 13, 2018, 2018 WL 4355206.

59. Natalia E. Curto, EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level? 3 (Aug. 7, 2019) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.3434061.

60. *Id.* at 5.

61. Edward Pearcey, *Artist Groups Attack UK Govt's Decision to Ignore Article 13*, WORLD INTELL. PROP. REV. (Jan. 28, 2020), https://www.worldipreview.com/news/artist-groups-attack-uk-govt-s-decision-to-ignore-article-13-19246?.

62. *Id.*

63. *Id.*

64. *Id.*

65. Council Directive 2019/790, *supra* note 2, arts. 15, 17. Article 15 is known as the "link tax" while Article 17 is known as the "filtering requirement," discussed in Sections I.B. and I.C., respectively, of this paper.

B. *Link Tax*

Article 15 (formerly Article 11) of the Directive provides for the payment of new fees that have been described as a "link tax."[66] This Article demonstrates an attempt to prevent copyright infringement in relation to news aggregation by giving publishers new rights and imposing liability in a broad context.[67] Article 15 gives publishers of press publications a completely new intellectual property right when information society service providers use their press publications.[68] Under Article 15, news aggregators will be liable for linking and displaying information from press publications without a license if that information includes anything more than "individual words or very short extracts of a press publication."[69] The type of information covered could include literary works, photographs, or videos.[70]

In practical terms, Article 15 requires news aggregators to pay fees to news outlets for the news that they share on their sites.[71] This Article will have a significant effect in the current reality, where a large amount of the news that users consume is spread electronically.[72] While there is an exception for "individual words or very short extracts," this language may not be particularly effective in limiting liability.[73] For example, Julia Reda, a Member of the European Parliament ("MEP"), has argued that snippets that accompany links often will not fall under the exception, although there will not be a precise definition of what is included until courts begin interpreting the Directive's

---

66. Tyner, *supra* note 32, at 276 (describing "link tax"—but also note that in this source Article 15 is referred to as Article 11, which was the original heading, later changed to Article 15); Polito et al., *supra* note 3 (noting that Article 15 was formerly Article 11).

67. Letter from Marco Ricofli et al., Academics against Press Publishers' Right: 169 European Academics warn against it (Apr. 24, 2018) (open letter), https://www.ivir.nl/publicaties/download/Academics_Against_Press_Publishers_Right.pdf.

68. Council Directive 2019/790, *supra* note 2, art. 15(1).

69. *Id.*; Polito et al., *supra* note 3.

70. Polito et al., *supra* note 3.

71. Tyner, *supra* note 32, at 279.

72. *Id.*

73. Council Directive 2019/790, *supra* note 2, art. 15(1); *see* Julia Reda, *The Text of Article 13 and the EU Copyright Directive has just been Finalised*, JULIA REDA (Feb. 13, 2019), https://juliareda.eu/2019/02/eu-copyright-final-text/.

language.[74] Until the language is interpreted, "hyperlinking (with snippets) will be mired in legal uncertainty."[75]

While the challenges imposed by Article 15 will certainly be felt by companies like Google and Facebook whose websites are commonly used to broadcast news, it will also harm smaller platforms.[76] The Directive states that Article 15 will not apply to "private or non-commercial uses of press publications by individual users."[77] However, this exception may actually be very narrow, as most sites on the internet have some commercial purpose.[78] For example, blogs or YouTube pages may earn advertising revenue even though they do not have a primarily commercial purpose, and therefore, they may have to pay the link tax if they share news on their platforms.[79] Because the language in the Directive could apply to many different types of news aggregators, it is a threat to both large and small entities.[80]

Beyond blogs or YouTube pages, past examples demonstrate that the Directive is also a threat to traditional small news aggregators.[81] When Spain implemented a similar tax in 2014, many small news aggregators could not afford to pay the tax and were forced to shut down.[82] However, it is not just news aggregators that could be negatively affected by the link tax; opponents of the Directive have argued that the press publishers whom the Directive intends to benefit could also be harmed.[83] Looking again to the recent example in Spain, the reduced number of news aggregators leads to news publishers losing site traffic.[84] The effects were felt especially by small news publishers, who lost even more traffic when news aggregators chose not to

---

74. Reda, *The Text of Article 13 and the EU Copyright Directive has just been Finalised*, *supra* note 73.

75. *Id.*

76. Tyner, *supra* note 32, at 283.

77. Council Directive 2019/790, *supra* note 2, art. 15(1).

78. Tyner, *supra* note 32, at 283.

79. *Id.*

80. *Id.*

81. *See id.* at 282.

82. *Id.*

83. *Id.*

84. *Id.*

pay for their news.[85] Despite its lofty goal, the implementation of Article 15 will likely present many problems, especially for small news aggregators and publishers.

C. *Filtering Requirement*

The second controversial provision is Article 17, which indirectly imposes new filtering requirements on service providers that allow user-uploaded content on their websites.[86] Article 17 places increased obligations on service providers to prevent future uploads when their users upload copyrighted works.[87] The Article begins by establishing that uploads by users will be considered acts of communication by the service provider.[88] To communicate these works, service providers must first obtain authorization from the rightsholders, which may take the form of a licensing agreement.[89]

If a work is uploaded without authorization, the service provider will be liable unless it can demonstrate that it has met three requirements.[90] First, the service provider must have "made best efforts to obtain an authorisation."[91] Second, the service provider must have made best efforts to ensure the unavailability of works for which rightsholders have given providers the necessary information.[92] Third, the service provider must have expeditiously removed or disabled access to copyrighted works after receiving notice of their use and made best efforts to prevent future uploads of the works.[93] This requirement to block future uploads has been labeled a "notice-and-stay-down" requirement, in contrast to a "notice-and-takedown" approach that only requires removal after notice.[94] Service providers that are less than three years old and have an annual turnover of less than ten

85. *Id.*
86. Shikhiashvili, *supra* note 10, at 138.
87. Polito et al., *supra* note 3.
88. Council Directive 2019/790, *supra* note 2, art. 17(1).
89. *Id.*
90. *Id.* art. 17(4).
91. *Id.* art. 17(4)(a).
92. *Id.* art. 17(4)(b).
93. *Id.* art. 17(4)(c).
94. Polito et al., *supra* note 3.

million euros will only have to meet the authorization requirement and show that they expeditiously removed the works.[95] However, once the number of their unique monthly visitors exceeds five million, they will also have to show that they made best efforts to prevent future uploads.[96]

With regard to these filtering requirements, the Article states that its application "shall not lead to any general monitoring obligation."[97] Further, the Article states that the type, audience, and size of the service, as well as the availability and cost of "suitable and effective means" will be considered in determining whether the provider met the requirements.[98] The Article also provides exceptions for works such as quotations, criticism, and parodies.[99] While these exceptions and qualifications on their face seem like they would lead to effective implementation, critics have argued that, regardless of the Article's statement that monitoring obligations will not be required, filtering will still be necessary in order to meet the requirements of the Article.[100] Filtering requirements could be especially difficult to implement for small businesses, who may not have the resources to handle the added expense of filtering technology.[101]

Additionally, the necessity of filtering could be complicated by the exceptions to the Article's requirements, as including these exceptions could prevent strong filtering.[102] For example, the exception for certain types of works would be difficult to implement, since existing content recognition technologies currently cannot accommodate "dynamic and context-specific

---

95. Council Directive 2019/790, *supra* note 2, art. 17(6).

96. *Id.*

97. *Id.* art. 17(8).

98. *Id.* art. 17(5)(b).

99. *Id.* art. 17(7)(b); *see* 17 U.S.C. § 107 (2019). The U.S. Copyright Act also includes exceptions for certain uses of works: these "fair use" provisions of the Act state that when a copyrighted work is reproduced "for purposes [including] criticism, comment, [or] news reporting," that use does not constitute copyright infringement. 17 U.S.C. § 107.

100. *E.g.*, Curto, *supra* note 59, at 9 (arguing that while filtering requirements are not mandatory, providers "will still be forced to implement filtering measures" in order to ensure that works are unavailable and to prevent future uploads); *e.g.*, Shikhiashvili, *supra* note 10, at 131 (arguing that in preventing future uploads, the necessity of a filtering and monitoring "mechanism is inevitable in order to avoid penalties").

101. Open letter from EU Businesses, *supra* note 5.

102. Polito et al., *supra* note 3.

exceptions."[103] While the language of Article 17 shows an attempt to balance the interests of creators and service providers,[104] it appears that it contains a requirement that may be impossible to implement without problematic filtering mechanisms.[105]

The filtering requirement and link tax articles were adopted with the intention of helping creators, including news publishers and music artists, who have had difficulty getting users to pay for reproducing their works as people change the way they share information on the internet.[106] However, these Articles may end up hurting the exact rightsholders they intended to protect.[107] Additionally, they have created problems for a new category of stakeholders: small business.[108]

II. EFFECTS OF THE DIRECTIVE ON SMALL BUSINESSES

The Directive has been harshly criticized,[109] with a large amount of this criticism concentrating on the unintended effects the Directive will have on smaller businesses that were not the focus of the Directive to begin with.[110] Critics argue that, while the Directive intends to protect creators, it fails to "strike a fair

103. Quintais, *supra* note 20, at 19–20.

104. *See* Council Directive 2019/790, *supra* note 2, art. 17(5)(b) (considering the type, audience, and size of the service, as well as the availability and cost of "suitable and effective means" when determining if the requirements are met).

105. Curto, *supra* note 59, at 7 (arguing that while filtering requirements are not mandatory, providers "will still be forced to implement filtering measures" in order to ensure that works are unavailable and to prevent future uploads); *see also* Open Letter from EU Businesses, *supra* note 5 (arguing that filtering requirements will cause European companies to "be hindered in their ability to compete").

106. Council Directive 2019/790, *supra* note 2, pmbl. at 92, 103–04 (discussing how publishers have difficulty licensing their publications); *see* Tyner, *supra* note 32, at 277–78 (discussing how rightsholders get extremely low revenues for use of their music).

107. *See* Tyner, *supra* note 32, at 282 (discussing how the link tax could hurt news aggregators); *see also* Shikhiashvili, *supra* note 10, at 144 (discussing how the main objectives and intentions of Article 17 do not align with its potential future consequences).

108. *See* Open letter from EU Businesses, *supra* note 5 (stating that the Directive "lacks meaningful safeguards for small and medium enterprises").

109. Curto, *supra* note 59, at 1.

110. *See* Ricofli et al., *supra* note 67 (discussing the effects on non-institutional creators such as photographers, citizen journalists, and freelancers); *see also* Open letter from EU Businesses, *supra* note 5 (stating that the Directive "lacks meaningful safeguards for small and medium enterprises").

balance between creators and all other parts of society."[111] Additionally, critics characterize the Directive as an "industry policy tool, shaped more by effective lobbying than evidence and expertise."[112] This Part will discuss the specific ways the Directive could hurt small businesses. It will examine scholars' and stakeholders' general predictions of how the link tax and filtering requirements will function when applied in the EU. To exemplify the reasoning behind these predictions, this Part will examine specific examples of how these requirements have functioned—or, more accurately, how they have malfunctioned—when applied o a smaller scale in the past.

A. *Effects of the Link Tax*

Critics of the Directive tend to highlight the probable harm of the link tax to smaller businesses and the corresponding increased power of big businesses, and they often point to the negative consequences of similar legislation in Germany and Spain to support their arguments.[113] Recently, Germany and Spain both gave new rights to publishers in an attempt to stop news aggregators who used snippets of the publishers' works from taking their readers,[114] which, in theory, could occur when readers were satisfied with the snippet and thus did not visit the original source.[115] The result was that press publishers actually lost website traffic and revenue, with small businesses especially suffering these negative effects.[116]

1. Criticism from Businesses and Academics

It is unnecessary to speculate about how some European businesses feel about the Directive, as they have strongly expressed their views in an open letter to members of the

111. Open letter from EU Businesses, *supra* note 5.

112. Quintais, *supra* note 20, at 1.

113. *See, e.g.*, Open letter from EU Businesses, *supra* note 5 (arguing that many European businesses will no longer be able to compete with companies like Google and stating that the cases of Spain and Germany call into question arguments for the Directive's benefits).

114. Hughes, *supra* note 58.

115. Colangelo & Torti, *supra* note 23, at 80.

116. *Id.* at 80–81.

European Parliament.[117] Over 200 businesses have signed the letter, which specifically takes issue with the link tax and filtering requirements.[118] Regarding the general effects of these articles, the businesses argue that their implementation would "harm the European economy and seriously undermine the ability of European business to compete with big internet giants like Google."[119] Moreover, the Directive "lacks meaningful safeguards for small and medium enterprises."[120]

Regarding the link tax, the businesses argue that the additional press publishers' rights will make it more difficult to meet legal requirements when starting new projects.[121] They further allege that entrepreneurs will be more hesitant when deciding whether to launch new projects at all.[122] Additionally, startups whose services are based on the aggregation of information online would be forced to close down.[123] The businesses also give an example demonstrating how far the rule could go, stating that if a company simply publishes a press summary of one of its media appearances, it would be violating press publishers' rights under Article 15.[124] In addition to these allegations about how the link tax would influence companies and individuals, the businesses allege that its implementation will have a global effect, leading Europe to "lose any chance to play a significant role on the world stage," as companies will either choose not to form in Europe or move out of Europe.[125] Finally, the businesses point to the cases of Spain and Germany, whose experiences implementing similar laws call into question whether the Directive's expected benefits would ever become a reality.[126]

---

117. Open letter from EU Businesses, *supra* note 5 (urging the European Parliament to vote against Articles 11 and 13).

118. *Id.* (stating Article 11, which implements the link tax, has "negative impact[s that] would be very real" and explaining most companies are not capable of following Article 13, which implements the filtering requirements).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

Several small companies have also given individual feedback on the Directive.[127] An online service called TechDirt, whose site is a source for online technology news and commentary, has expressed similar concerns to those of the EU businesses.[128] TechDirt argues that a link tax would threaten its ability to continue with its style of posts, stating that a link tax "potentially makes our posts untenable, since we frequently quote other news sites in order to comment on them."[129] It further alleges that the link tax, along with the filtering requirement, will lead to a complicated licensing system that allows a few key gatekeepers to have significant control over use of the internet.[130] TechDirt does not just give general predictions for the industry, but it also gives a prediction as to the future of the website itself: it may have to stop publishing in the EU.[131] Even if it were still able to publish, the Directive "will require [TechDirt] to spend a large sum of money on lawyers to determine what [its] liability risk is—to the point that it might just not be worth it at all."[132] TechDirt's situation reflects that of many other small businesses who—unlike larger companies such as Google and Facebook—will be unable to afford the Directive's new fees, and, therefore, may not be able to continue in the EU.[133]

In addition to the reaction of businesses who have a stake in the issue, 169 academics in the EU have given their more objective opinion on Article 15 in an open letter.[134] They argue that the "very broad rights of ownership in news" will make it more expensive to use the news content produced by publishers.[135] Requiring permission to use this content in an expansive range of circumstances will likely increase transaction

---

127. *See* Samuelson & Hashimoto, *supra* note 1, at 111; *see also AFS Statement on the Conclusion of the Trilogues on the Copyright Directive*, ALLIED FOR STARTUPS (Feb. 14, 2019), https://alliedforstartups.org/2019/02/14/feb13-statement-on-conclusion-of-copyright-trilogues/ (finding European startups "among the losers of the deal").

128. Samuelson & Hashimoto, *supra* note 1, at 111; Masnick, *supra* note 26.

129. Masnick, *supra* note 26.

130. *Id.*

131. *Id.*

132. *Id.*

133. Samuelson & Hashimoto, *supra* note 1, at 110–11.

134. Ricofli et al., *supra* note 67.

135. *Id.*

costs.[136] This in turn will have a harmful effect on creators and news producers:

> [T]he proposal would be likely to harm journalists, photographers, citizen journalists and many other non-institutional creators and producers of news, especially the growing number of freelancers.
>
> The people most likely to benefit would be the big established news institutions. If they should benefit, this is likely to exacerbate existing power asymmetries in media markets that already suffer from worrying levels of concentration in many Member States. That said, it is not clear that even these big news institutions would benefit. Similar rights introduced in Germany and Spain were not effective.[137]

Overall, the academics emphasize the theme of harm to smaller players and point to the cases in Germany and Spain as support for their claims.[138]

2. Examples of Germany and Spain

The repercussions of similar legislation in Germany and Spain demonstrate not only that a link tax will harm small news aggregators, but also that harm to news aggregators will have a corresponding negative effect on the publishers that the tax is meant to protect.[139] The European view, which motivated the Spanish and German attempts, was concerned with reduced readership of news publishers' sites.[140] This view maintained that the use of snippets of news articles by third-party aggregators took away readership from the original publishers of the information.[141] This loss of readership can occur through a substitution effect, under which "users are satisfied with the

136. *Id.*

137. *Id.* (emphasis original).

138. *See id.*

139. Tyner, *supra* note 32, at 282–83; Hughes, *supra* note 58.

140. Hughes, *supra* note 58.

141. *Id.*

limited information available on the aggregator's site and do not click through to the original source."[142]

In 2013, Germany attempted to aid press publishers by amending its Copyright Act to give press publishers an exclusive right to control the public commercial use of their content.[143] The amendment applies to the commercial use of news content by search engine providers and news aggregators.[144] It covers the use of fragments of news content, meaning press publishers have the exclusive right over the use of these fragments.[145] However, it does not apply to very small excerpts of text.[146] Because the amendment only covers commercial use, any private, non-commercial use by third parties is not prohibited.[147]

In 2014, Spain also implemented reforms containing a link tax similar to that in the Directive.[148] This so-called "Google tax" in the Spanish legislation gives a new inalienable right to publishers to receive compensation.[149] This right is triggered when a service provider uses "insignificant fragments" of content previously published by a news publisher without the news publisher's consent.[150] This right applies to use of content for "information, public opinion and entertainment purposes," and it does not apply to the use of images.[151] The Spanish tax differs from its German counterpart in a significant way by not permitting waiver of the right.[152] Without a waiver, press publishers in Spain cannot refuse payment of the fee, and thus they cannot negotiate to determine fair compensation that would also allow suitable availability of their content.[153]

142. Colangelo & Torti, *supra* note 23, at 80.

143. *Id.* at 79.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Tyner, *supra* note 32, at 283.

149. *Spanish Copyright Act Reform Enters into Force*, BLOOMBERG L. NEWS (Feb. 23, 2015, 9:24 AM), https://news.bloomberglaw.com/ip-law/spanish-copyright-act-reform-enters-into-force?context=search&index=0.

150. *Id.*

151. *Id.*

152. Colangelo & Torti, *supra* note 23, at 79.

153. *Id.* at 79–80.

Ultimately, these reforms in Germany and Spain significantly reduced news aggregation, which harmed news publishers rather than helped them.[154] In Spain, many news aggregators shut down after the reform, including Google News, who chose to stop operations in the country.[155] Google News made this choice voluntarily, but for smaller news outlets, whether to continue operating and pay the new fees or shut down entirely was not always a choice.[156] Unlike larger platforms, smaller platforms simply could not afford to pay the new fees.[157]

The harm to news aggregators correspondingly harmed publishers—especially smaller news outlets—in multiple ways.[158] First, news aggregators avoided paying fees by choosing not to use content from smaller publishers, which reduced those publishers' web traffic.[159] Second, aggregators shutting down in Spain and Germany meant that publishers did not receive the intended benefits of their new rights, since without aggregation they were not entitled to any compensation.[160] Third, news aggregators shutting down meant that publishers' web traffic was further reduced.[161] In Spain, for example, "[b]ecause aggregators shut down, publishers lost between ten and fifteen percent of web traffic."[162]

The theory underlying the reduction in web traffic resulting from aggregators shutting down is called the "Market Expansion Effect."[163] The Market Expansion Effect states that news aggregation can actually increase traffic to the original publishers' sites, since aggregation services "allow consumers to

---

154. Hughes, *supra* note 58 (expressing publishers did not benefit from the new right due to a lack of third-party aggregation).

155. Tyner, *supra* note 32, at 282.

156. *Id.* (stating smaller news aggregators, unable to pay the link tax, closed down entirely).

157. *Id.*

158. *See id.* (discussing harm to smaller publishers when aggregators chose not to use their content and harms to publishers when they lost web traffic because aggregators shut down).

159. *Id.*

160. Hughes, *supra* note 58.

161. Tyner, *supra* note 32, at 282.

162. *Id.*

163. *Id.*

discover news outlets' content that they otherwise would not know, and reduce search times, allowing readers to consume more news."[164] Under this theory, aggregation can be particularly beneficial to less popular sites that may not have received attention without aggregation.[165] For both large and small sites, reduced traffic has a direct impact on publishers' economic interest, since there is a positive correlation between web traffic and revenues.[166]

Data taken from Germany and Spain after the copyright reforms demonstrates that the Market Expansion Effect is exactly what occurred in these countries.[167] The data further indicates that the theory that aggregation took away readership from the original publishers—a view that motivated these reforms in the first place[168]—was not occurring in these countries.[169] On the contrary, it appears that the interests of news publishers and news aggregators are actually in line.[170] The conclusion to be drawn from the German and Spanish link taxes is that instead of benefitting press publishers, they harmed these publishers, especially start-ups and small businesses.[171]

Using this conclusion to predict the outcome of the Directive, it appears that the likely harm to news aggregators will lead publishers to "lose an avenue of access to their websites, which as a whole would reduce the very profits [the link tax] is attempting to protect."[172] Considering the failure in Germany and Spain, it is very unlikely that the Directive's link tax will lead to positive results for publishers.[173]

---

164. Colangelo & Torti, *supra* note 23, at 80.

165. Tyner, *supra* note 32, at 282–83.

166. Colangelo & Torti, *supra* note 23, at 80.

167. *Id.*

168. Hughes, *supra* note 58.

169. Colangelo & Torti, *supra* note 23, at 6 ("[E]mpirical results show no evidence of a substitution effect . . . .").

170. Hughes, *supra* note 57 (stating that "news publishers received no benefit from the publisher's right").

171. Quintais, *supra* note 20, at 16.

172. Tyner, *supra* note 32, at 283.

173. Colangelo & Torti, *supra* note 23, at 80–81 (stating that the failure in Germany and Spain could carry over into the rest of Europe).

B. *Effects of the Filtering Requirement*

The link tax is not the only article of the Directive that would harm small businesses, as the filtering requirements indirectly required by Article 17 will be too expensive for most companies to implement.[174] This will hinder competition as small companies struggle to meet these burdensome requirements while larger, wealthier companies can comply with them.[175] YouTube's implementation of filtering mechanisms reveals the substantial cost and resources required to develop and operate this technology.[176] Additionally, YouTube's technology demonstrates the more general problem with filtering mechanisms: they often do not work.[177]

1. Criticism from Businesses

The same businesses who spoke out against the link tax in their open letter to members of the European Parliament also expressed their objections to the filtering requirement.[178] They accuse the filtering article of "dangerously experimenting with the core foundation of the Internet's ecosystem."[179] Any requirement for filtering will cause difficulty for most businesses, who "are neither equipped nor capable of implementing the automatic content filtering mechanisms."[180] Further, these mechanisms "are expensive and prone to error."[181] Difficulties will also arise from holding service providers directly liable for the content of their users' uploads, as this direct liability "forces these businesses to make billions of legal decisions about the legality of [their] content."[182]

---

174. Shikhiashvili, *supra* note 10, at 142 (stating companies will use filters to avoid penalties).

175. *Id.* at 144 (stating that firms with more money will be able to meet the requirements while smaller firms with less money will not).

176. Tyner, *supra* note 32, at 286.

177. *Id.* at 286 (listing examples of the failure of YouTube's filtering).

178. Open letter from EU Businesses, *supra* note 5.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

In addition to these direct impositions on businesses, the filtering requirements will also have a significant effect on global competition.[183] The businesses note that the Directive was targeted at large U.S. companies like Google and Facebook, with the intention of limiting their power.[184] However, the Directive may actually increase large companies' power by requiring the use of filtering technology that "only the Internet giants have the resources to build."[185] Because only the largest companies will be able to comply, other European companies will have no choice but to transfer their data to the larger companies, "jeopardizing the independence of the European tech industry."[186] Ultimately, the businesses predict in their letter that European businesses "will be hindered in their ability to compete or will have to abandon certain markets completely."[187] Additionally, they predict that the Directive will cause fewer companies to be founded in Europe in the first place, and companies currently headquartered in Europe to find new headquarters elsewhere.[188]

In addition to criticism from the businesses' open letter, TechDirt, the small technology website that claimed it may have to shut down because of the link tax, also criticized the filtering requirement.[189] It stated that the filtering article "makes a commenting system untenable, as [it] simply cannot setup [sic] a filter that will block people from uploading copyright-covered content."[190] TechDirt also objected to the initial requirement in the article that service providers obtain authorization, possibly through licensing.[191] It argued that licensing will cause a particular harm to independent artists and creators, who will no longer be able to use service providers as an avenue to interact directly with their fans.[192] Instead of direct interaction, licensed

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. Masnick, *supra* note 26.
190. *Id.*
191. *Id.*
192. *Id.*

intermediaries will now be in the middle of these transactions.[193] Not only will creators lose this connection with their fan base, but they will also lose revenue, as these intermediaries will likely demand a portion of the creators' profits.[194] TechDirt characterized this new arrangement as "a return to the pre-internet days, where if you wanted to become a professional creator, your only options were to sign away all your rights to giant conglomerate record labels/studios/publishers."[195]

Even if service providers want to avoid untenable requirements by obtaining these problematic licenses, this would likely be impossible.[196] TechDirt cites to criticism of the Article by MEP Julia Reda, who describes the requirement of making best efforts to obtain authorization as requiring the purchase of "licenses for anything that users may possibly upload—that is: all copyrighted content in the world. An impossible feat."[197] In other words, because users can upload anything they choose at a moment's notice and with no control from service providers, the service providers would have to obtain authorization for all copyrighted content in order to cover everything that a user might upload.[198] Without being able to avoid liability solely through authorization, service providers will be forced to filter their content.[199]

However, filtering simply will not be possible for some service providers, as the expense of filtering mechanisms means that "only platforms with deep pockets" will be capable of implementing them.[200] Further, even if some smaller service providers are excluded from these requirements under the Article, "this simply means they are not allowed to scale up and compete with the big US platforms."[201] However, even for

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Curto, *supra* note 59, at 18.

200. Shikhiashvili, *supra* note 10, at 144 (quoting #SAVEYOURINTERNET, https://saveyourinternet.eu/ (last visited June 9, 2021)).

201. *Id.* (quoting #SAVEYOURINTERNET, https://saveyourinternet.eu/ (last visited June 9, 2021)).

companies that can afford filtering mechanisms, filtering as a solution still presents a major problem: filtering mechanisms often do not work.[202]

2. The Inadequacy of YouTube's Filtering Mechanism

YouTube's content recognition technology demonstrates that even technology made by a company with substantial resources is still largely unsuccessful in accurately identifying infringing material.[203] YouTube's technology "is known for over-blocking fair use and non-protected content."[204] For example, a video with a copyrighted poster in the background may be flagged as infringing and blocked by the technology.[205] This over-blocking may discourage creators from posting their own original content out of fear that it may be blocked, which would lead to a decline in creative expression.[206]

In several different instances, YouTube's upload filters have blocked perfectly legal content.[207] One instance involved NASA uploading a recording of the Mars landing.[208] This video was not infringing, first, because NASA was uploading its own video, and second, because the video was content created by a government agency, and thus part of the public domain.[209] The video was flagged as infringing, however, because it had previously been aired by TV stations that had automatically registered all of their previously aired content with YouTube's filtering system.[210] Therefore, to the filtering system, it appeared that the video violated the TV stations' rights, when in reality the stations had

202. Tyner, *supra* note 32, at 285 (listing examples of the failure of YouTube's filtering).

203. *See id.* at 285–87 (discussing the cost of and problems with YouTube's filtering mechanism).

204. *Id.* at 285.

205. *Id.*

206. *Id.* at 286.

207. Julia Reda, *When Filters Fail: These Cases Show We Can't Trust Algorithms to Clean up the Internet*, JULIA REDA (Sept. 28, 2017), https://juliareda.eu/2017/09/when-filters-fail/.

208. *Id.*

209. *Id.*

210. *Id.*

previously needed permission from NASA to air the recording in the first place.[211]

Another example involved a recording of a Harvard Law School lecture discussing copyright.[212] The filtering system had a problem with short extracts of pop songs that the professor had used.[213] While the upload was legal because it was for an educational use, YouTube's filter took down the video.[214] In addition to the important uploads involving lectures and milestone historical recordings, an example of a short everyday video demonstrates just how off-base YouTube's filtering system can be.[215] In a twelve second video of a cat purring, YouTube's filtering system somehow claimed to identify copyrighted music.[216] In commenting on this example, MEP Julia Reda stated, "[t]hat such a ridiculous error was made after years of investment into filtering technology shows: It's extremely hard to get this technology right—if it is possible at all."[217]

The investment Google (YouTube's owner) put into YouTube's filtering system was significant: Google spent over $60 million.[218] Not only did this significant investment fail to produce an accurate filtering system,[219] but it is also not feasible for most smaller websites to spend so many millions developing their own filtering systems.[220] If smaller websites are forced to shut down because they do not have the resources to filter their content, the larger websites with the resources to filter would gain an even more dominant presence in the market.[221] With fewer companies dominating the market, these companies will have control over

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* (explaining other videos YouTube's filtering mechanism removed in error, including an original YouTube video that was later used in a TV show and one musician's videos that were taken down because they contained his own copyrighted music).

218. Tyner, *supra* note 32, at 278, 286.

219. Reda, *When Filters Fail: These Cases Show We Can't Trust Algorithms to Clean up the Internet*, *supra* note 207 (listing out errors in YouTube's filtering system).

220. Tyner, *supra* note 32, at 286.

221. *Id.*

what is shared and what it will cost, possibly inhibiting certain creators' ability to share their content.[222] Creators' content will be available on fewer platforms, decreasing their audience.[223]

In addition to the millions of dollars that Google invested in developing YouTube's technology,[224] this technology also requires considerable human capital to operate.[225] It takes "thousands upon thousands of employees to implement" YouTube and other Google-owned platforms' filtering mechanisms.[226] This high cost will solidify the dominance of YouTube and other large companies, as new competitors will not be able to take on the costs that filtering requires and, consequently, will be unable to rise to the level of the internet giants.[227]

Even though it is theoretically possible to have less stringent filtering, especially because the Directive does not expressly call for filtering, it is likely that the filters other companies choose to implement will be very similar to those of YouTube.[228] First, it is expected that service providers will need some kind of filtering mechanism to ensure compliance with the Directive.[229] Second, service providers will probably use algorithmic filters as opposed to human review, since it would be too difficult for humans to review such a large amount of content.[230] Third, to avoid liability, these algorithms will be need to be set up to preventatively take down material that may or may not be copyrighted.[231] MEP Reda explains the reasoning behind this problem: "Should a court ever find their licensing or filtering efforts not fierce enough, sites are directly liable for infringements as if they had committed them

222. *Id.* at 286–87.

223. *Id.* at 287.

224. *Id.* at 286.

225. *See* Hughes, *supra* note 58 (discussing the significant number of employees Google requires to implement its filtering systems).

226. *Id.*

227. *Id.*

228. *See* Curto, *supra* note 59, at 9–10 (stating that service providers will probably introduce algorithmic filters that preventatively take down material that may not be copyrighted); *see also* Reda, *When Filters Fail: These Cases Show We Can't Trust Algorithms to Clean up the Internet*, *supra* note 207 (discussing examples of YouTube's automatic filtering incorrectly identifying infringing material).

229. Curto, *supra* note 59, at 9.

230. *Id.*

231. *Id.* at 9–10.

themselves. This massive threat will lead platforms to over-comply with these rules to stay on the safe side."[232]

On the other side of the filtering debate, supporters of filtering argue that YouTube's already-established filtering system demonstrates that this technology is a feasible solution for all businesses.[233] One scholar has argued that, because YouTube already uses its technology to recognize infringement, it is reasonable to make all service providers use this technology to detect infringement.[234] She claims that modern developments of this technology and its current use by some service providers undermine earlier findings that service providers "should not participate in infringement detection because they lack the technology to police the Internet."[235]

However, just because this technology exists does not mean that it is a viable solution, since more than one critic has discussed the failures of this exact technology in order to demonstrate why it should not be implemented.[236] Additionally, one of the harshest criticisms of filtering technology is that it is not a feasible solution for all businesses.[237] Ultimately, YouTube's experience with filtering mechanisms demonstrates that these mechanisms are expensive, often make errors, and could decrease competition because of their high cost.[238] The problems with YouTube's filtering mechanisms exemplify the predictions that the European businesses made with regard to the implementation of filtering requirements across the EU.[239]

---

232. Reda, *The Text of Article 13 and the EU Copyright Directive has just been Finalised*, *supra* note 73.

233. *See* Smallen, *supra* note 18, at 192–93.

234. *Id.* at 194.

235. *Id.* at 192–93.

236. *See, e.g.*, Tyner, *supra* note 32, at 285–87 (discussing various critiques of content recognition technology).

237. *See, e.g.*, Open Letter from EU Businesses, *supra* note 5 ("Most companies are neither equipped nor capable of implementing the automatic content filtering mechanisms this requires, which are expensive and prone to error.").

238. Tyner, *supra* note 32, at 286.

239. *See* Open Letter from EU Businesses, *supra* note 5 (arguing that filtering mechanisms are "expensive and prone to error" and that filtering requirements will hinder European companies' ability to compete).

When considering the extensive effects of the two controversial provisions of the Directive, critics argue that both the link tax and filtering articles will place substantial burdens on small businesses.[240] Spain and Germany's implementation of link taxes and YouTube's filtering mechanism are not examples that show the success of link taxes and filtering, but instead suggest that link taxes and filtering requirements are not viable solutions.[241] A different approach without these burdensome requirements exists in the United States,[242] and it is far more likely to yield positive results.

III. COUNTERPARTS TO THE DIRECTIVE IN THE UNITED STATES

In contrast to the Directive's severe copyright protections, the U.S. approach is more concerned with protecting service providers.[243] While the United States does not currently have a link tax,[244] the idea that news aggregators should be liable when using rightsholders' works has been embraced by some courts.[245] Even so, courts are currently split on how far this liability should extend.[246] The recent case of *Goldman v. Breitbart*, however, has gone as far as suggesting that a link license, which would be similar to a link tax, should become part of U.S. law.[247] Additionally, while the current version of the U.S. Copyright Act does not have filtering requirements, the Copyright Office is

---

240. *E.g.*, *id.* (asserting that the EU regulations will jeopardize small and medium size businesses).

241. *See id.* (stating that Spain and Germany's experiences implementing a press publishers' right raise serious doubts about the benefits of the link tax Article); *see also* Tyner, *supra* note 32, at 286 (discussing YouTube's filtering mechanism to demonstrate how content recognition technology is problematic).

242. Curto, *supra* note 59, at 10–12 (outlining the U.S. approach to copyright liability for internet service providers).

243. Shikhiashvili, *supra* note 10, at 136 (discussing legislators' desire to safeguard internet service providers from heavy liabilities).

244. Polito et al., *supra* note 3.

245. Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018).

246. *E.g.*, *id.* (holding that news aggregators and blogs are liable for posting an image not stored on their servers); *e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160–61 (9th Cir. 2007) (holding that whether a service provider was liable for showing an image was dependent on whether the image was stored on the provider's server).

247. Polito et al., *supra* note 3.

seriously considering similar requirements.[248] This Part analyzes cases that advocate for and against a link license. Then, it discusses how the safe harbor provisions of the Copyright Act protect service providers while opposing filtering requirements.

A. *Split on Liability in the United States*

Currently, U.S. courts are split on whether embedding copyrighted material is enough to constitute copyright infringement when the information is not also stored on the alleged infringer's servers.[249] Courts interpret the issue in the context of the Copyright Act.[250] More specifically, courts consider Section 101, which defines what it means to display a copyrighted work, and Section 106(5), which gives copyright owners the exclusive right to display their work.[251] The leading test requires that information be stored on a website's servers, but a new case has challenged this view and may lead websites to re-evaluate their use of embedded content.[252]

1. Adoption of Server Test in *Perfect 10 v. Amazon.com*

The case *Perfect 10 v. Amazon.com* sets forth a test that has had a significant impact in shaping the modern internet.[253] This test states that a website must store a work on its servers in order

248. *Id.* ("The Copyright Office noted in 2016 that '[t]he most frequently discussed potential legislative change [in public roundtables has been] adoption of a notice-and-stay-down requirement.").

249. *E.g.*, *Goldman*, 302 F. Supp. 3d at 586 (holding that news aggregators and blogs are liable for posting an image not stored on their servers); *e.g.*, *Perfect 10*, 508 F.3d at 1160–61 (holding that whether a service provider was liable for showing an image was dependent on whether the image was stored on the provider's server).

250. *Goldman*, 302 F. Supp. 3d at 588–89; *Perfect 10*, 508 F.3d at 1160.

251. *See Goldman*, 302 F. Supp. 3d at 588–89; *see also Perfect 10*, 508 F.3d at 1160.

252. Jeffrey Neuburger, *New York Court Rebuffs Ninth Circuit's Copyright "Server Test," Finds Embedded Tweet Displaying Copyrighted Image to Be Infringement*, PROSKAUER: NEW MEDIA & TECH. L. BLOG (Mar. 2, 2018), https://newmedialaw.proskauer.com/2018/03/02/new-york-court-rebuffs-ninth-circuits-copyright-server-test-finds-embedded-tweet-displaying-copyrighted-image-to-be-infringement/ (discussing the ruling in *Goldman* and its impact on copyright infringement liabilities for internet service providers).

253. Polito et al., *supra* note 3.

to be liable for copyright infringement.[254] Hyperlinking a work is not enough.[255]

The *Perfect 10* case dealt with the display of images in a Google Image Search.[256] When a user enters a query on Google, the results appear as a webpage containing thumbnails, which Google stores on its servers.[257] Once a user clicks on a thumbnail, they will see the thumbnail as well as the address of the website that stores the full-size image.[258] By clicking on the address, the user's browser then downloads the full-size image from the website and displays it in a window that also contains Google's text, which appears to frame and comment on the image.[259] Google does not store the full-size image but merely provides instructions for accessing the third-party website.[260] However, because of the way the image is displayed, the window "appears to be filled with a single integrated presentation of the full-size image."[261]

The Ninth Circuit addressed the issue of whether displaying either the stored thumbnails or the downloaded full-sized images violated the owner's display right under the Copyright Act.[262] The *Perfect 10* court looked to the language of the Copyright Act to reach its conclusion.[263] The court discussed Section 106(5) of the Copyright Act, which gives the owner of a copyright the "exclusive right 'to display the copyrighted work publicly.'"[264] After stating that the definition of "display" in the Act is "to show a copy of [the copyrighted work], either directly or by means of . . . any other device or process," the court gave the Act's definition of "copies."[265] It noted that the Act defines "copies" as "material objects . . . in

254. *Id.*
255. *Id.*
256. *Perfect 10*, 508 F.3d at 1154.
257. *Id.* at 1155.
258. *Id.*
259. *Id.* at 1155–56.
260. *Id.* at 1156.
261. *Id.*
262. *Id.* at 1159–62.
263. *Id.* at 1160.
264. *Id.* (quoting 17 U.S.C. § 106(5)).
265. *Id.* (quoting 17 U.S.C. § 101).

which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated."[266]

In applying these definitions, the court found that an image stored on a server was "fixed" under the Act, and thus the stored image met the definition of "copy."[267] When Google communicated that image to the user, it was displaying the image.[268] On the other hand, Google's communication of the images that it did not have stored on its server was not considered a display because Google had no "material objects . . . in which a work is fixed," and thus did not have any copies to display.[269] Google simply provided instructions for viewing the image, which the court did not find equivalent to showing a copy.[270] Therefore, the court held that Google's communication of the stored images was copyright infringement, while its communication of the images not stored on its servers was not copyright infringement.[271] In Ninth Circuit cases dealing with search engines, this "Server Test" adopted by the court "is settled law."[272] Viewing this case in a broader context, it represents an attempt to limit liability for those who share information, as opposed to the Directive, which is increasing liability for news aggregators and service providers.[273] A more recent U.S. case, however, has moved in a different direction and increased liability for news aggregators.[274]

2. Argument for Link License in *Goldman v. Breitbart*

In *Goldman v. Breitbart*, the Southern District of New York declined to follow the leading Server Test and instead found liability even when the news aggregator did not host the

266. *Id.* (quoting 17 U.S.C. § 101).

267. *Id.*

268. *Id.* (asserting that a prima facie case of infringement was proven against Google because its communication of images amounted to displaying).

269. *Id.* at 1160–61 (quoting 17 U.S.C. § 101).

270. *Id.* at 1161.

271. *Id.* at 1160–61.

272. Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 590–91 (S.D.N.Y. 2018).

273. *See supra* Part I.

274. Neuburger, *supra* note 252 (discussing the ruling in *Goldman* and its divergence from the earlier-established Server Test).

copyrighted work on its server.[275] *Goldman* dealt with a common occurrence in digital news in which Twitter posts are embedded within a website's content.[276] In *Goldman*, news outlets and blogs embedded a creator's copyrighted photo into their articles discussing the person in the photo.[277] By embedding the photo, the web pages did not download the photo to their own servers, but instead provided a hyperlink to the third-party server that hosted the image.[278] However, the photo was immediately displayed to the reader full-sized, without requiring the user to click on the hyperlink or a thumbnail to view the full version of the image.[279] This presented a similar situation to *Perfect 10*, in which thumbnails were displayed as well as the full-size image once the user clicked on the thumbnail.[280] The issue of the case was how the owner's exclusive display right under the Copyright Act was triggered when an image was shown on one website but stored on another.[281]

Like the *Perfect 10* court, the *Goldman* court discussed Section 106(5) of the Copyright Act, giving the owner of copyright the exclusive right to "display the copyrighted work publicly."[282] However, in determining whether the action in the case constituted a display, the *Goldman* court emphasized language in Section 101 of the Copyright Act defining display as to "show a copy of [the copyrighted work], either directly or by means of a film, slide, television image, or *any other device or process*."[283] The court acknowledged that it was interpreting the Copyright Act in the context of rapidly changing technology, and it noted the legislature's intention in adopting the Act to "broadly encompass new, and not yet understood, technologies."[284] Further, the authors of the Act "intend[ed] to include '[*e*]*ach and every method*

275. Polito et al., *supra* note 3.

276. *Goldman*, 302 F. Supp. 3d at 586.

277. *Id.*

278. *Id.* at 587.

279. *Id.*

280. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1155 (9th Cir. 2007).

281. *Goldman*, 302 F. Supp. 3d at 586.

282. *Id.* at 588 (quoting 17 U.S.C. § 106(5)).

283. *Id.* at 588–89 (quoting 17 U.S.C. § 101).

284. *Id.* at 589.

by which he images . . . comprising a . . . display are picked up and conveyed.'"[285]

The court also considered the intent behind the broad language of the Act when coming to its conclusion.[286] It rejected an argument by the news outlets and blogs, who based their argument on *Perfect 10* and its Server Test.[287] The Server Test asserts that images stored on a service provider's server are infringing upon a copyright, while those stored on a third-party server are not.[288] The news outlets and blogs in *Goldman* argued that they "simply provided 'instructions' for the user to navigate to a third-party server on which the photo resided."[289] The *Goldman* court disagreed with the news outlets' argument that this was not a display under the Copyright Act.[290] Instead, the court agreed with the owner's argument, which claimed that the Server Test would have a "devastating" effect on the licensing industries by eliminating any incentive a website may have to pay licensing fees.[291] In support of its holding, the court employed the language of the Copyright Act that states that display includes transmission by "any device or process."[292] The Act does not have any language suggesting that possession is required for an image to be displayed.[293]

The court also distinguished *Perfect 10.* First, the Court found that the case dealt with a search engine, as opposed to a news outlet or blog. Second, it found that the user had to click on an image before it was displayed.[294] Finally, the court quickly dismissed the argument advanced by the news outlets that "not adopting the Server Test here would 'radically change linking practices, and thereby transform the Internet as we know it.'"[295]

---

285. *Id.* (quoting H.R. REP. NO. 94-1476, at 64 (1976)).

286. *Id.* at 593.

287. *Id.* at 591, 595 (summarizing why the Ninth Circuit overruled the lower court holding in *Perfect 10*).

288. *Id.* at 590.

289. *Id.* at 593.

290. *Id.* at 594.

291. *Id.* at 593.

292. *Id.* (quoting 17 U.S.C. § 101).

293. *Id.*

294. *Id.* at 595.

295. *Id.* at 596.

The court gave a vague response to this argument, stating that its holding should not lead to numerous viable claims because defendants could assert other defenses to liability, such as fair use or innocent infringement.[296] Overall, the court found the language of the Act to be purposefully broad such that embedding an image could constitute copyright infringement, and any licensing issues were not significant enough to the court to dissuade it from its holding.[297] Viewing this case in the global context in which the EU is shifting towards more licensing requirements, it is clear that at least one U.S. court also believes that increased licensing requirements are necessary as linking practices change.[298]

B. *United States Safe Harbor Provisions*

While the *Goldman* court argued for licensing in a broader set of circumstances more closely aligned with those in the Directive,[299] the U.S. Copyright Act firmly establishes that no pre-infringement filtering is required, which is no longer the case in the EU under the Directive.[300] The Copyright Act includes safe harbor provisions that are specifically designed to protect service providers.[301] In contrast, the Directive imposes direct liability on service providers for user-uploaded content that is infringing.[302] There have been frequent discussions in the United States concerning whether U.S. laws should impose similar requirements to those in the Directive that require service providers to block future uploads.[303] However, current Copyright

296. *Id.*

297. *Id.* at 593.

298. *See* Polito et al., *supra* note 3.

299. *See id.* (demonstrating that *Goldman* stands for the proposition that the United States needs greater licensure requirements for links which aligns with the recent EU Copyright Directive).

300. *See id.* ("While the US safe harbors under 17 U.S.C. § 512 still limit liability for ISPs that expeditiously remove content after receiving a notice from a rightsholder, a 'notice-and-takedown' approach will no longer qualify an 'online content-sharing service provider'. . . for a safe harbor in the EU.").

301. Shikhiashvili, *supra* note 10, at 130–31.

302. *Id.* at 131.

303. Polito et al., *supra* note 3 (explaining how the interplay of two court decisions has spurred discussion of the issue in the United States).

Act safe harbors that protect service providers may still be the most beneficial when considering all parties involved.[304]

In creating the current U.S approach that protects service providers, legislators endeavored to provide rights to copyright owners while still encouraging distribution of new creations.[305] There was, of course, the intention to prevent the unlawful distribution of copyrighted works, but legislators also wanted to encourage service providers' continued investment in the internet.[306] The safe harbor provisions in Section 512 of the Copyright Act limit liability for service providers under certain circumstances.[307] Under Section 512, a service provider's liability can be limited by four safe harbors: transitory communications, system caching, storage by users, and search engines.[308] Section 512(a), which deals with transitory communications, establishes when a service provider will not be liable for transmitting material through a network that it operates.[309] Under this subsection, the service provider is "merely act[ing] as a data conduit, transmitting digital information from one point on a network to another at someone else's request."[310]

The next three safe harbor provisions—system caching, storage by users, and search engines—all include an additional notice requirement[311] described as a "notice-and-takedown" approach.[312] These provisions require the designation by the service provider of a copyright agent to receive copyright infringement notices.[313] Sections 512(c) and 512(d) have particularly detailed notice provisions, only allowing the service

---

304. *See infra* Part IV (demonstrating the benefits of the Copyright Act and its effects on content creators).

305. *Id.* at 130–31 (explaining certain protections for internet services under the safe harbors that have been enacted by the legislature).

306. Smallen, *supra* note 18, at 171.

307. *Id.* at 172.

308. *Id.* at 172–73.

309. 17 U.S.C. § 512(a) (2019).

310. Smallen, *supra* note 18, at 172 (quoting *The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary*, U.S. COPYRIGHT OFF. (Dec. 1998), http://www.copyright.gov/legislation/dmca.pdf).

311. Shikhiashvili, *supra* note 10, at 134.

312. Polito et al., *supra* note 3.

313. Shikhiashvili, *supra* note 10, at 134.

provider to avoid liability if it meets certain requirements with regard to the notice.[314] First, the service provider must not have actual knowledge or red flags that the material is infringing, and, if it obtains such knowledge, it must act "expeditiously to remove, or disable access to the material."[315] Second, the service provider must not have received any financial benefit that is "directly attributable to the infringing activity," if it also had the "right and ability to control such activity."[316] Third, the service provider must respond "expeditiously to remove, or disable access to, the [infringing] material" upon notification of the possible infringement.[317]

Section 512 further protects service providers by explicitly stating that affirmative monitoring is not required to avoid liability.[318] Section 512(m) states, "[n]othing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity."[319]

Case law has further strengthened the safe harbor protections.[320] In *Viacom v. YouTube*, the copyright owners claimed that YouTube was liable for "tens of thousands of videos on YouTube" that had been unlawfully taken from their copyrighted works.[321] However, when YouTube received notice of the infringement, it swiftly removed the videos.[322] The district court had to decide whether a general awareness based on widespread infringement constituted "actual knowledge" of infringement or "facts or circumstances from which infringing activity is apparent."[323] The court held that general knowledge was not sufficient, and instead found the safe harbor provisions required "knowledge of specific and identifiable infringements of

314. Smallen, *supra* note 18, at 174.

315. *Id.* at 173; 17 U.S.C. § 512(c)–(d).

316. Smallen, *supra* note 18, at 173; 17 U.S.C. § 512(c)–(d).

317. Smallen, *supra* note 18, at 173; 17 U.S.C. § 512(c)–(d).

318. Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom II*), 676 F.3d 19, 35 (2d Cir. 2012).

319. 17 U.S.C. § 512(m) (2019).

320. Shikhiashvili, *supra* note 10, at 134 (demonstrating several cases where courts have strengthened safe harbor protections).

321. Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom I*), 718 F. Supp. 2d 514, 518.

322. *Id.* at 519.

323. *Id.* (quoting 17 U.S.C. § 512(c)(1)(A)(i)–(ii)).

particular individual items."[324] Finding that YouTube qualified for the safe harbor provisions, the court granted summary judgment.[325]

On appeal, the Second Circuit agreed that a service provider must have "knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement" before it can be held liable.[326] In coming to this conclusion, the court noted that the burden of determining whether certain materials are infringing is not placed on the service provider.[327] However, the court vacated the lower court's summary judgment order, instead holding that a jury could find that YouTube had knowledge or awareness of specific instances under the red flag provision.[328] The court reasoned that, while YouTube's knowledge that a substantial percentage of its material was copyrighted was insufficient to find liability, emails discussing specific clips and their illegality could show that YouTube had knowledge of specific instances of infringement corresponding with the owner's videos.[329]

The Second Circuit also held that the doctrine of willful blindness could apply in some circumstances to show knowledge or awareness, but the doctrine would be limited by Section 512(m).[330] The court stressed that Section 512(m) is clear in its denial of a monitoring requirement.[331] Therefore, Section 512(m) "is incompatible with a broad common law duty to monitor or otherwise seek out infringing activity based on general awareness that infringement may be occurring."[332] Overall, the safe harbor provisions and case law interpreting them reflect a strong intention to protect service providers,[333] but this protection does

324. *Id.* at 523.
325. *Id.* at 529.
326. *Viacom II*, 676 F.3d at 41.
327. *Id.* at 32.
328. *Id.* at 41.
329. *Id.* at 33–34.
330. *Id.* at 35.
331. *Id.*
332. *Id.*
333. Shikhiashvili, *supra* note 10, at 133.

not extend to situations in which the service provider makes active choices that contribute to the infringement.[334]

The United States currently does not impose liability in situations where the Directive now does.[335] The United States does not have a link tax, while the Directive does.[336] Further, the United States does not impose any obligations on service providers to monitor content before it is uploaded,[337] while the Directive takes an opposite approach and essentially imposes a filtering requirement by providing that service providers must make efforts to prevent unauthorized uploads of certain works before they occur.[338]

Although there are still significant differences in the way the United States and the EU handle these issues, the *Goldman* court argued for licenses for linking beyond what the leading test required.[339] This holding suggests a move toward finding liability for linking in increased circumstances, which is effectively what the Directive does as well, just at a larger scale.[340] Regarding the filtering requirement, although courts like *Viacom* have strengthened safe harbor protections,[341] the United States is very much aware of the Directive's approach and, in fact, the Copyright Office has noted that "[t]he most frequently discussed potential legislative change [in public roundtables has been] adoption of a notice-and-stay-down requirement."[342] The next Part will analyze the current state of the creative economy to demonstrate that the U.S. approach not only still has merit even

334. *See Viacom II*, 676 F.3d at 35 (holding that liability could apply when there is willful blindness).

335. *See* Polito et al., *supra* note 3 (stating that U.S. law conflicts with the Directive and discussing their differences).

336. *Id.*

337. *Viacom II*, 676 F.3d at 35 (stating that there is no condition that a service provider monitor content).

338. Shikhiashvili, *supra* note 10, at 131.

339. Polito et al., *supra* note 3.

340. *See id.* ("In the United States, there is currently no 'link tax,' but a recent decision in *Goldman v. Breitbart* posited a need for a link license under US law." (citation omitted)).

341. Shikhiashvili, *supra* note 10, at 135, 136.

342. Polito et al., *supra* note 3 (alteration in original).

in a new technological environment, but is also a better approach than the one set forth in the Directive.

IV. SOLUTIONS FOR THE DIGITAL AGE

As the United States and other countries look for new ways to protect copyright holders in the digital age, it is important to consider that new technological transformation has actually led to substantial success for creative sectors of the economy.[343] The Directive, however, would limit new types of sharing that have become popular in the digital age[344] to the detriment of small businesses.[345] On the other hand, the U.S. approach supports the creative industries and avoids harming small businesses.[346] Therefore, the United States should embrace its current approach rather than changing its legislation to reflect the Directive's approach, as it has considered.

A. *State of the Creative Economy*

Technological change allowing for easier sharing of information has not destroyed the conventional copyright industries, as some legacy industries had feared it would.[347] Instead, it has "ushered in a thriving new creative economy and indeed, a 'golden age' of creativity, bringing new products to market and enabling new revenue opportunities."[348] New technology has made it easier and less expensive to create, distribute, and promote content, and it has provided more

---

343. Samuelson & Hashimoto, *supra* note 1, at 118.

344. *See* Shikhiashvili, *supra* note 10, at 144 (stating that critics argue that the Directive "will end up restricting how content is shared online" (quoting James Vincent, *Europe's Controversial Overhaul of Online Copyright Receives Final Approval*, THE VERGE (Mar. 26, 2019, 8:00 AM), https://www.theverge.com/2019/3/26/18280726/europe-copyright-directive)).

345. *See* Tyner, *supra* note 32, at 282, 287 (discussing how the Spanish link tax caused small news aggregators to shut down, which in turn led to less site traffic for publishers, and also discussing how filtering mechanisms will cause creators' content to be available on fewer platforms).

346. *See* Shikhiashvili, *supra* note 10, at 136, 138, 144 (discussing the principles and benefits of the U.S. safe harbor system as opposed to the Copyright Directive, including avoiding high costs and growth enablement of creative industries).

347. Samuelson & Hashimoto, *supra* note 1, at 116–17.

348. *Id.* at 117.

avenues for creators to connect with their fans.[349] It has also increased the means by which creators can get revenues from their work.[350] New technology has benefited the entertainment industries overall, with the entertainment industry growing from $449 billion to $745 billion from 1998 to 2010, and entertainment and media revenues expected to experience continued growth in the coming years.[351]

More independent creators have also received particular benefits from new technology.[352] These creators are able to connect with their fans and earn revenue directly without the need for gatekeepers like publishers or record labels.[353] Millions of Americans have earned billions of dollars using the internet to commercialize their content, and both the number of creators and amount of revenue have grown in recent years.[354] In the music industry, for example, more artists have released music, and their fans have more ways to listen to it.[355] The creation of video entertainment, including everything from films to user-generated content, has also increased.[356] Across the entertainment industry, the internet has allowed a new wave of independent creators to contribute.[357]

Even though "conventional copyright industries have been thriving as never before," these industries are the ones that lobbied for the stricter requirements under the Directive.[358] The intense lobbying of those in the entertainment industries, especially publishers and music industry representatives, ultimately defeated the protests of those who were against the link tax and filtering requirements.[359] Notably, some of the most vocal supporters of the Directive were large content providers and well-known creators, including Paul McCartney and James

349. *Id.* at 117, 119.
350. *Id.* at 117.
351. *Id.*
352. *Id.* at 119.
353. *Id.*
354. *Id.* at 119–20.
355. *Id.* at 118.
356. *Id.*
357. *Id.* at 119.
358. *Id.* at 110, 116.
359. Quintais, *supra* note 20, at 3.

Blunt.[360] They claimed that the Directive would solve a supposed value gap problem, which is centered on the music industry and the actions of large companies like Spotify and Facebook.[361] This lobbying was effective to the point of overcoming empirical research that contradicted the lobbyists' views.[362]

Some creators opposed the Directive, however.[363] For example, one campaign consisted of creators who opposed the filtering article, and it highlighted possible negative effects of the Article on independent creators and small and medium businesses.[364] The campaign noted that filtering could cause creators' content to be taken down without the creators' consent and reduce the content that users could consume.[365] It argued that solutions to infringement "should be designed to protect the best interests of *all* creators—including independent creators and businesses—and not only the interests of large media businesses."[366]

Assessing the problems with the Directive suggests that a solution that does not impede new ways of sharing information would most likely be to protect all creators, as well as service providers and news aggregators.[367] Much of the harm to independent creators, smaller service providers, and news aggregators would seem to occur when the Directive prevents the sharing of information.[368] For example, the link tax creates an additional burden upon the sharing of information, requiring that news aggregators pay press publishers for use of anything more

---

360. Tyner, *supra* note 32, at 277.

361. *Id.* For a more detailed discussion of the value gap, see *supra* Section I.A.

362. Quintais, *supra* note 20, at 3.

363. *See FAQ,* CREATE.REFRESH, https://createrefresh.eu/faq/ (last visited Nov. 20, 2019) (discussing why Create.Refresh opposes Article 13 of the EU Copyright Reform and inviting others to join their opposition).

364. *Id.*

365. *Id.*

366. *Id.*

367. *See* Martin Banks, *Intense Lobbying Continues Ahead of EU Copyright Vote,* THE PARLIAMENT MAG. (Sept. 10, 2018), https://www.theparliamentmagazine.eu/articles/news/intense-lobbying-continues-ahead-eu-copyright-vote (discussing opinions of creators who argue that solutions should not stand in the way of progress and should "embrace and improve the internet, rather than attempt to block and hinder it.").

368. Ricofli et al., *supra* note 67, at 1.

than "individual words or very short extracts" of their work,[369] which will likely include many of the snippets that are displayed with links.[370] This new burden will "impede the free flow of information"[371] and is likely to reduce news aggregation on the internet at a time when a significant amount of news is viewed electronically on newer platforms like Facebook or Twitter.[372] This reduction in aggregation will consequently harm publishers, especially smaller publishers.[373] The link tax could also prevent companies like TechDirt from sharing information by creating posts that comment on other news sites.[374]

Harm would also occur through suppression of sharing under the filtering article. Potential over-blocking from filtering technology may discourage creators from uploading their work at all.[375] Additionally, the requirement that service providers obtain authorization before using copyrighted material will likely keep creators from interacting directly with their fans.[376] Rather than reflecting the benefits of the open communication system the internet provides, this requirement reflects a move backward to a time before the internet when creators were forced to go through intermediaries.[377] Creators have argued for a solution that involves service providers working with creators to build upon current systems, as opposed to "standing in the way of progress."[378]

369. Council Directive 2019/790, *supra* note 2, art. 15(1).

370. Reda, *The Text of Article 13 and the EU Copyright Directive has just been Finalised*, *supra* note 73.

371. Ricofli et al., *supra* note 67, at 1.

372. Tyner, *supra* note 32, at 281–82.

373. *Id.* at 283.

374. Masnick, *supra* note 26.

375. Tyner, *supra* note 32, at 285–86.

376. Masnick, *supra* note 26.

377. *Id.*

378. Banks, *supra* note 367; *see also FAQ*, CREATE.REFRESH, *supra* note 363 ("The legislation needs to evolve alongside with technology . . . .").

B. *The United States Should Follow its Current Approach that Promotes Creative Success*

While the Directive may have been meant as a solution for the digital age,[379] the U.S. approach is better designed to protect creators without hindering the progression of information sharing on the internet. First and foremost, it avoids the substantial harms to small businesses that the Directive will likely cause.[380] Second and more fundamentally, the U.S. approach better supports the new ways of sharing content that have led to creative success. U.S. copyright law effectively protects content creators without imposing the heavy burdens on small businesses that are created by the Directive's link tax and filtering requirement. Therefore, the U.S. approach is superior, and future changes to this approach should build upon its methods rather than fundamentally change them to follow the Directive.

1. United States Alternatives to the Directive's Link Tax

Regarding embedding copyrighted material and a possible link tax, the leading Server Test used by United States courts finds liability in fewer situations than both the *Goldman* case and the Directive. Under the Server Test, a work must be stored on a website's servers in order for the court to find liability.[381] In contrast, the *Goldman* court concluded that infringement can occur when a website embeds a work even without hosting the work on its servers.[382] While *Goldman* did not go as far as requiring a link tax, its holding suggests a move closer to the Directive in the United States.[383] Unlike U.S. case law, the Directive does not include language that distinguishes based on

---

379. *See* Council Directive 2019/790, *supra* note 2, pmbl. at 92 ("This Directive provides for rules to adapt certain exceptions and limitations to copyright and related rights to digital and cross-border environments . . . .").

380. *See* Shikhiashvili, *supra* note 10, at 144 (stating that the problems that could result from the implementation of the Directive, such as upload filters and limiting open communication, lead to a conclusion that it should not be followed in the United States); *see also supra* Part II.

381. Polito et al., *supra* note 3.

382. Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018).

383. Polito et al., *supra* note 3.

whether content is or is not embedded on a server.[384] Instead, it simply gives press publishers rights "for the online use of their press publications."[385] Overall, comparing U.S. case law to the Directive shows a scale in which the leading Server Test is the least burdensome and the Directive places the most requirements on those who share information.

A move toward the increased liability in *Goldman* could have similar effects in the United States as the Directive will likely have in the EU. The *Goldman* holding could suppress the free flow of content on the internet and shift the way online publishing currently operates.[386] News aggregators may react by changing their diligence procedures before posting, or they may choose not to display images at all when embedding content.[387] News aggregators rethinking before displaying content could significantly alter online publishing, as it is common for websites to embed content, and many websites even base their business models on embedding outside content.[388] Further, the Market Expansion Theory suggests that websites choosing not to display content could decrease traffic to the original source.[389] Analyzing the potential effects of *Goldman* suggests that the prediction of the news outlets in *Goldman* that "not adopting the Server Test here would 'radically change linking practices, and thereby transform the Internet as we know it'"[390] is likely correct. Because both *Goldman* and the Directive may stifle new, popular ways of sharing on the internet, the leading Server Test should continue to be followed in the United States.

2. The Copyright Act's Protections for Service Providers

To further encourage new, successful forms of sharing on the internet, the United States should continue to follow its Copyright Act, which does not impose pre-upload monitoring

384. Council Directive 2019/790, *supra* note 2, art. 15(1).

385. *Id.*

386. Neuburger, *supra* note 252.

387. *Id.*

388. *Id.*

389. *See* text accompanying note 164.

390. Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018).

requirements.[391] Allowing service providers to operate without filters would support websites with commenting systems,[392] who will likely have trouble meeting the filtering requirements of the EU Directive.[393] Additionally, the current U.S. approach would encourage a culture in which creators can freely upload their work,[394] which they may be discouraged from doing under the Directive when they suspect that over-blocking filters will block their non-copyrighted work.[395]

Along with allowing for the type of information sharing popular in the digital age, the purpose of the Copyright Act is also applicable in the new digital environment. The safe harbors of the Act were specifically designed to protect service providers with the intention of encouraging the distribution of new creations.[396] The Act was meant to protect rightsholders while still encouraging copyright owners to upload their works, and it was careful not to halt the internet's growth in its efforts to protect rightsholders.[397] Additionally, the Act protected service providers from infringement claims so that they would continue to invest in the internet—an important consideration when the Act was enacted in 1998, only a few years after the first web-page was created.[398]

---

391. Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom II*), 676 F.3d 19, 35 (2d Cir. 2012) (stating that § 512(m) of the DMCA "is incompatible with a broad common law duty to monitor . . . infringing activity"); *see also* Shikhiashvili, *supra* note 10, at 138 (stating that scholars have argued that the Copyright Act's "safe harbors have enabled the spectacular growth of ecommerce, online communities, and whole new genres of communication and expression").

392. *See* Shikhiashvili, *supra* note 10, at 138 (stating that scholars have argued that the Copyright Act's "safe harbors have enabled the spectacular growth of . . . whole new genres of communication and expression" (quoting Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 560 (2017)).

393. *See* Masnick, *supra* note 26 (stating that "[the filtering article] makes a commenting system untenable, as we simply cannot set up a filter that will block people from uploading copyright-covered content").

394. *See* Shikhiashvili, *supra* note 10, at 138 (stating that some scholars see the Act's safe harbors as "essential to the openness and dynamism of the internet" (quoting Sag, *supra* note 392, at 560)).

395. Tyner, *supra* note 32, at 286.

396. Shikhiashvili, *supra* note 10, at 136 (enumerating the concerns addressed by legislators in the drafting of the DMCA's safe harbor system).

397. Smallen, *supra* note 18, at 171.

398. *Id.* at 170–71; Shikhiashvili, *supra* note 10, at 133.

Even though the U.S. safe harbors protect service providers, they do not give them unchecked freedom.[399] The notice provisions of Sections 512(c) and 512(d) allow service providers to avoid liability only if they do not have actual knowledge of the infringement or are not aware of facts and circumstances making it apparent; do not receive a financial benefit from the infringement; and act expeditiously to remove the material after receiving knowledge, awareness, or notification.[400] Further, even the *Viacom* case, which strengthened the safe harbor provisions,[401] did not find that the defendant service providers could avoid liability.[402] Instead, the court found that evidence showing possible knowledge or awareness of the infringing videos may keep the service provider from being protected by the safe harbors.[403] Additionally, the court found that, while there is no monitoring requirement in the Copyright Act, the Willful Blindness doctrine can be applied to determine if a service provider had awareness or knowledge, meaning that service providers cannot avoid liability by "looking the other way."[404]

While the Act may have been created for a completely different online environment,[405] there are still important considerations that require protecting service providers in order to sustain the internet today. Specifically, the United States should not create requirements that will overburden smaller service providers, since burdensome requirements in the EU are likely to change the balance of power between large and small companies.[406] Because the Directive will require filtering mechanisms that only large companies have the resources to comply with, other companies will be unable to compete and will

---

399. *See* 17 U.S.C. § 512(c)–(d) (2019) (requiring service providers with actual or constructive knowledge of infringement to act expeditiously to remove any infringing content).

400. *Id.*

401. Shikhiashvili, *supra* note 10, at 136 (delineating that the *Viacom II* court held there was no affirmative duty for service providers to actively monitor user infringement).

402. Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom II*), 676 F.3d 19, 41 (2d Cir. 2012).

403. *Id.* at 34.

404. *Id.* at 34–35 (quoting Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 109 (2d Cir. 2010)).

405. Smallen, *supra* note 18, at 177.

406. *See* Open letter from EU Businesses, *supra* note 5.

have to transfer their data to larger companies, threatening the tech industry's independence.[407] In light of these probable effects in the EU, the Copyright Act's concern with protecting service providers is still appropriate, as disregarding potential effects on service providers as the EU has done could harm smaller businesses and change the power structure of internet companies.[408]

Ultimately, while the Copyright Act was originally created for a different digital environment,[409] its ideas are still relevant and appropriate in dealing with copyright infringement today. The U.S. Copyright Office has devoted time in its roundtables to discussions of the Directive and possible notice-and-stay-down requirements in the United States.[410] While the United States is likely to wait and see the effects of the Directive in the EU before jumping to change its own legislation,[411] it should focus its discussions of legislative changes on solutions that build upon the many benefits of the current U.S. approach, rather than abandoning it to follow the Directive's approach. Both the Copyright Act's safe harbors and the Server Test promote popular forms of sharing on the internet,[412] and, therefore, they should be followed rather than the Directive.

3. Future Changes to United States Copyright Law

If the United States decides that major changes are necessary in order to give rightsholders sufficient protection and chooses to implement a type of link license or place an increased burden on service providers, it should do so in a way that builds upon the current positive attributes of U.S. law and is especially mindful of the interests of small businesses. First, a potential link tax should incentivize the use of smaller publishers' works in order to prevent a similar situation to the one in Spain, where news aggregators avoided fees by choosing not to use smaller

407. *Id.*

408. *See id.*

409. Smallen, *supra* note 18, at 177.

410. Polito et al., *supra* note 3.

411. *Id.*

412. *See supra* notes 386–388, 391–92, 398 and accompanying text.

publishers' content.[413] A potential link tax should also apply only to the largest news aggregators, like Google News,[414] who would be able to afford paying the tax. This would avoid forcing smaller news aggregators to shut down when they could not afford the fees, as they were forced to in Spain,[415] and would target the kinds of companies that the Directive intended to keep in check.[416] Additionally, a link tax that applies only to the internet giants would continue to allow information to flow freely on all other aggregators' sites, since they would not have to change their linking practices to avoid liability.[417]

While a link tax could theoretically be shaped to avoid many of the problems of the Directive's link tax, the United States could not successfully impose a monitoring obligation on service providers until filtering technology improves. As YouTube's filtering struggles demonstrate, even companies with abundant resources cannot create a filtering mechanism that is effective.[418] As it exists currently, filtering technology suppresses creativity by blocking legal content, and it comes at a price that small companies cannot afford.[419] Therefore, the United States cannot currently move in this direction without suppressing information sharing and harming small businesses. If filtering technology improves and the U.S. Copyright Office believes it is the best solution for preventing copyright infringement in the future, use of this technology should only be required for companies that can afford to implement it.

As the United States watches the results of the Directive in the coming years and contemplates changes to its own laws, it will be joined by another major nation watching from the outside: the United Kingdom ("UK").[420] On January 21, 2020, Universities

413. Tyner, *supra* note 32, at 282.

414. *See id.*

415. *Id.*

416. Open letter from EU Businesses, *supra* note 5.

417. *See generally* Tyner, *supra* note 32, at 283.

418. *See supra* Section II.B.2.

419. *Id.*

420. *See* Chris Skidmore, Answer to Written Question on EU Copyright Action, U.K. PARLIAMENT (Jan. 21, 2020), https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371 (stating that the UK has no plans to implement the EU Copyright Directive).

and Science Minister Chris Skidmore announced that the UK will not be implementing the EU's Directive.[421] He stated that the UK will no longer be required to implement it after leaving the EU, and the Government has no plans to implement it independently.[422]

While the UK still "support[s] the overall aims" of the . . . Directive,[423] it will follow its own direction and apparently does not see the necessity in the Directive's severe requirements.[424] If legislators in the United States consider the UK's decision, they will see leaders of another nation opting not to follow the somewhat "radical" Directive that breaks from how most of the world currently deals with copyright law.[425] Although the exact reasoning behind the UK's decision is unclear,[426] the fact that the UK chose not to follow the Directive should make U.S. legislators even more skeptical of the Directive's rationale, and they should be especially reluctant to change U.S. laws to follow it.

CONCLUSION

The EU Copyright Directive has many potentially harmful effects that the United States would do well to avoid.[427] The link

421. *Id.*; Will Bedingfield, *Here's Why the UK is (Finally) Dumping Article 13 for Good*, WIRED (Jan. 28, 2020), https://www.wired.co.uk/article/uk-Article-13-copyright-brexit. The UK's decision is rather surprising, considering that it initially supported the law. *Id.* While the reasoning behind the decision is unclear, one commentator has suggested that the UK may have supported the Directive as it was being developed while in fact believing that it would damage the EU's economy. *Id.*

422. Skidmore, *supra* note 420.

423. James Vincent, *The UK Won't Implement EU's Controversial Copyright Directive After Brexit*, THE VERGE (Jan. 27, 2020), https://www.theverge.com/2020/1/27/21083295/eu-copyright-directive-uk-brexit-no-implementation.

424. Jon Fingas, *UK Won't Implement EU's Contentious Digital Copyright Law*, ENGADGET (Jan. 26, 2020), https://www.engadget.com/2020/01/26/uk-will-not-implement-eu-copyright-directive/.

425. *See* Bedingfield, *supra* note 421 ("The UK is staying with the rest of the herd in terms of regulation, rather than adopting a directive which is quite radical and very different from what the rest of the world has.").

426. *Id.*

427. Shikhiashvili, *supra* note 10, at 144 (conveying the critical argument that "the law is vague and poorly thought-out and will end up restricting how content is shared online, stifling innovation and free speech" (quoting Vincent, *Europe's Controversial Overhaul of Online Copyright Receives Final Approval*, *supra* note 344)).

tax will hinder smaller companies' ability to compete with larger companies, cause many smaller companies to shut down, and even reduce web traffic for the press publishers the link tax is meant to protect.[428] The filtering article is also likely to reduce competition and cause smaller companies to shut down, as well as require the implementation of expensive and inaccurate filtering mechanisms.[429]

In addition to these practical effects suggesting that the Directive should not be adopted in the United States, the Directive contains a more fundamental flaw in its methodology: it stifles sharing[430] at the precise time when technological advances allowing for easier information sharing have led to a "'golden age' of creativity."[431] Rather than advancing alongside technology, the Directive will restrict the culture of open communication that has developed on the internet.[432] Further, the EU moved in this direction without a thorough consideration of whether this was in fact a reasonable restriction, since intense lobbying by rightsholders often drowned out conflicting empirical evidence and expert recommendations.[433]

In contrast to the Directive, many consider the safe harbors of the U.S. Copyright Act to support openness and freedom of expression on the internet.[434] In addition, court-created rules such as the Server Test establish limited liability for information sharing.[435] However, the U.S. Copyright Office has been considering similar requirements to those of the Directive's filtering article,[436] and case law has suggested a move away from the Server Test in favor of increased liability.[437]

The United States should not fundamentally alter its current approach in favor of changes mirroring those of the Directive. The

428. *See supra* Section II.A.

429. *See supra* Section II.B.

430. *See supra* Section IV.A.

431. Samuelson & Hashimoto, *supra* note 1, at 117.

432. *FAQ*, CREATE.REFRESH, *supra* note 363.

433. Quintais, *supra* note 20, at 3, 22.

434. Shikhiashvili, *supra* note 10, at 138; Samuelson & Hashimoto, *supra* note 1, at 112.

435. *See supra* Section III.A.1.

436. Polito et al., *supra* note 3.

437. *See supra* Section III.A.2.

U.S. approach does not hinder sharing that has led to the success of the creative economy, and it avoids the harms to small businesses which the Directive will likely cause and which often result from restrictions on sharing.[438] Potential changes to the Copyright Act should not include a filtering requirement until technology improves, and, if a link tax is included in the Act, the tax should incentivize the use of small publishers' works and only apply to the largest news aggregators. The Copyright Act will surely evolve in the future, but in doing so it should not go against progress to the detriment of small businesses and independent creators.

438. *See supra* Section IV.B.