

Is this post legal (under new EU copyright law)?

Catarina Midoes examines new EU rules on using snippets from news publishers and on copyright infringement liability that might affect circulation of information, revenue distribution, market power and EU business competitiveness

On March 26th 2019, after more than two years of negotiations and 50 amendments by the European Parliament, the [Copyright Directive](#) was approved. There is substantial popular opposition to the law, visible particularly online. The parliamentary vote breakdown likewise reveals the divisiveness of the issue. More interesting than the vote [breakdown between parliamentary groups](#) is how divided votes were on country lines, with – for instance – staunch support from MEPs from France but a majority rejecting the law among MEPs from Germany.

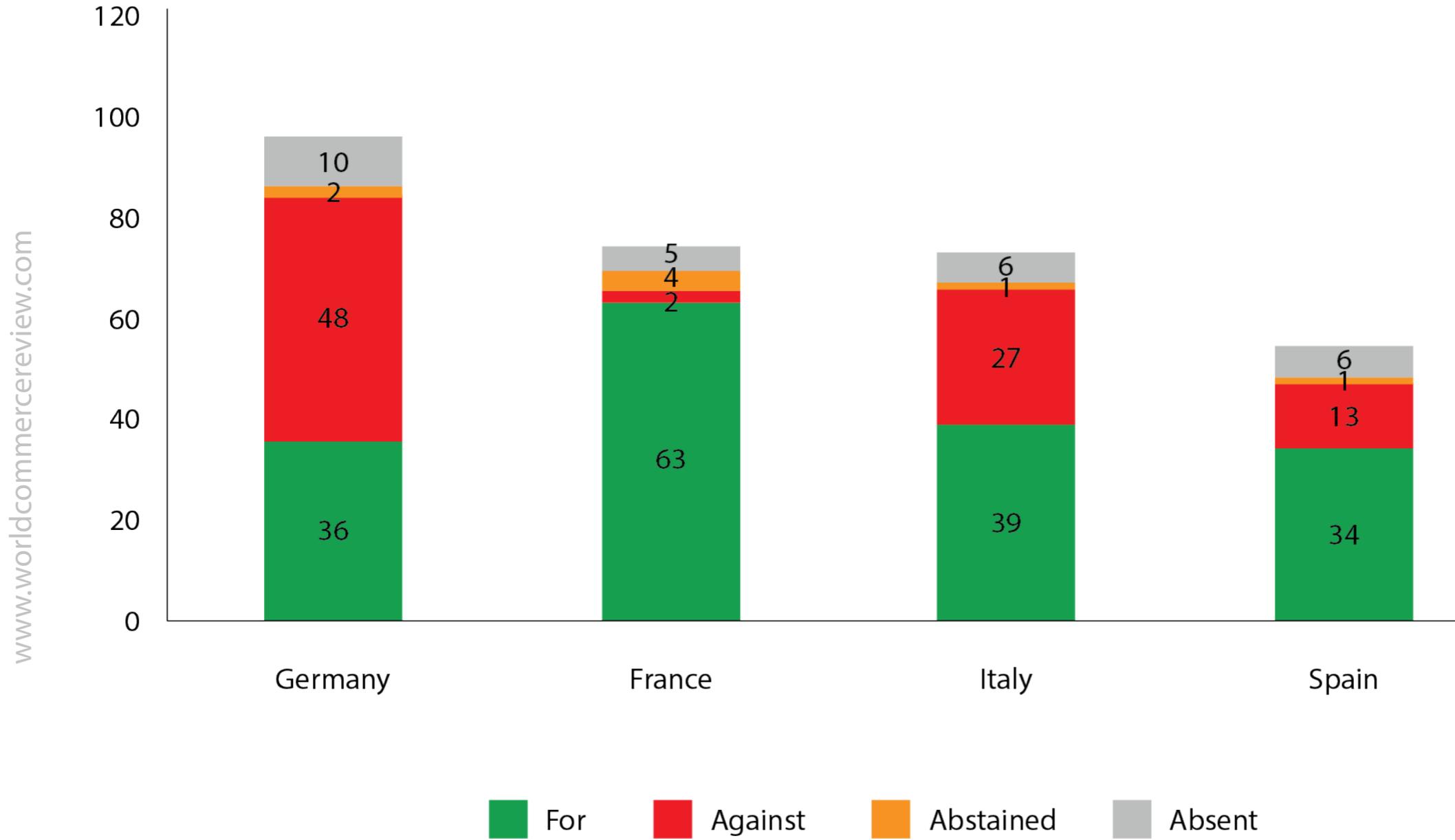
The legislative proposal aims to adapt copy rights to the digital world. It sets out to rebalance revenue distribution between online platforms and news publishers as well as between certain online platforms and copyright holders. The former to protect quality journalism, the latter to promote/protect cultural content creation. In this post, we review how blogs and media consider articles 11 and 13 (now articles 15 and 17), the most contentious points of the directive, respectively contribute to these goals and what their unintended effects might be.

Article 11

Article 11 strengthens licensing rights of press publishers. It is designed to entitle news publishers to remuneration for the use of small extracts of news pieces online, targeting news aggregators such as Google News. Article 11 aims to increase the financial independence of news publishers. Several stakeholders have pointed out it might lead to increased market concentration in large news companies (activist [Cory Doctorow](#), [Michał Kanownik](#), board member of Digital Europe, or a [letter of more than 150 academics](#)).

Online platforms might only seek licenses from the largest news publishers and thus the sharing of news from smaller sources might be blocked. Despite worries about a reduction in competition, increased concentration can contribute to financial independence, which can finance expensive overseas reporting (according to a lobbying effort document shown by [CorporateEU](#)).

Figure 1. MEP votes by country



Source: Bruegel, using data from votewatch.eu

The academics' letter considers it will not give quality journalism "enough funds to flourish." Simultaneously, it worries about the reduced power of journalists, since strengthened rights, and thus additional revenues, belong to news publishers, not to content creators. On the positive side, increased bargaining power towards employees might increase profits to publishers, which in turn can contribute to financial independence. An amendment, (article 15(a)), stipulates that member states shall provide that authors receive an appropriate share of any additional revenues, a point highlighted in the European Parliament [press release](#).

It is contested whether this will lead to increased revenues: similar schemes were unsuccessfully tried in Spain and Germany. In Spain, Google News shut down operations as a result (CorporateEU). Yet, press publisher associations – namely the [European Newspapers Publishers' Association](#) (ENPA), the [European Magazine Media Association](#) and [European Publishers' Council](#) – argue that an EU-wide legislation will be more effective in negotiations with large platforms.

An [editorial in *El País*](#) welcomes the importance given to copyright and its intention to help publishers face industrial transformation. It however criticises how it fosters conflict, instead of cooperation, between platforms and publishers, and hints at how it reduces flexibility in developing business models. Others likewise express a free-market concern about the proposal mandating business models and stifling innovation, namely [Richard Gringas](#), VP of News at Google writing at *Euractiv*.

Yet, business models might not be necessarily mandated, as, according to *ISP Review*, the UK IPO office signaled the news publishers' licensing rights will be waivable, and right holders will decide whether to enforce them or not – thus, current business models will not necessarily change.

The academics' letter – as well as Reda, from the German Pirate Party, speaking to *Forbes* – argue that fake news might get a boost, *“as disreputable outlets would be less likely to comply with the law and charge for snippets.”*

But there may be unintended effects, like barriers to freedom of speech. It could become more difficult to access, share or comment on information (see, for instance, the academics' letter, groups of internet activists at <https://savetheinternet.info/>). Compared to current law, there is no 'creativity threshold': regardless of how novel the news piece is, its use will be subject to licensing (a point raised by Julia Reda). The EP press release highlights specific provisions were put in place to ensure freedom of expression, specifically the exemption for the *“use of individual words or very short extracts of a press publication”* (the *“snippet”*).

Article 13 shifts the liability of the use of copyright-infringing material from the uploader to the platform, like YouTube. The goal is to ensure that ad-supported platforms compensate artists

EU copyright rapporteur Axel Voss considers the “*snippet*” to be more protected than ever. The European Parliament press release highlights that hyperlinks to news articles can be shared freely. Detractors, however, point out it is not clear what a “*very short extract*” is and whether a hyperlink embedded in an extract would be allowed (see [Mark Jackson at ISP Review](#)). Regarding commenting on news, article 5 of [Directive 2001/29/EC](#) includes exceptions for use for review and critique, yet these are optional and down to the member states.

Which platforms are protected by the exceptions in the law is not unanimous. Activist [Cory Doctorow](#) considers that neither Wikipedia nor personal blogs are protected, but Julia Reda assumes personal blogs shall be protected – through pointing out that individual users mostly share and comment on news on commercial sites. The article exempts “*private or non-commercial uses of press publications by individual users*”(emphasis added). According to [Wikimedia](#) (behind Wikipedia), many excerpts in Wikipedia articles will enter a “*legal gray zone*.”

Article 13

Article 13 shifts the liability of the use of copyright-infringing material from the uploader to the platform, like YouTube. The goal is to ensure that ad-supported platforms compensate artists.

According to [Axel Voss](#) – and to unions and associations of authors and artists from, for instance, the [UK](#) and [France](#) – the law will force internet giants to pay their fair share. The same opinion is voiced by the [French minister of culture](#) and [Annalisa Girardi at Forbes](#). Despite welcoming the stated goal of ensuring fair compensation to artists, some believe it will not transpire due to the fundamental problem that copyright-holders are often intermediaries for artists rather than the artists themselves. Per [EEF](#), even if copyright-holders receive more revenue they will not necessarily pass it on to creators. Cory Doctorow also points out that representation by large rights-holders is a mischaracterisation, since every internet user is a potential right-holder.

A positive aspect mentioned by Cory Doctorow as well as by [Eleonora Rosati](#) writing for *Slate*, is additional user protection. Currently, it is the user who is liable for copyright infringement.

However, once the new directive enters force, liability will fall on the platform. Yet article 13 is opposed on the basis of freedom of speech, as it might lead to the use of “*automated content filters*”, so-called ‘upload filters’ (see Wikimedia or <https://savetheinternet.info/> as examples). Such filters would be required to block content violating copyrights at the moment of uploading. However, by doing so, they can effectively prevent certain content from even being seen.

This could lead to ‘overblocking’ of non-infringing material; in other words, the upload filter might wrongly designate material as infringing. An amendment declares that the article “*shall not lead to any general monitoring obligation*”, such as an upload filter. Opposition on this basis is thus, according to Axel Voss, unwarranted.

Cory Doctorow colourfully disagrees: “*if I pass a law requiring you to produce a large African mammal with four legs, a trunk, and tusks, we definitely have an elephant in the room.*” The [speech delivered](#) by the French minister of culture the day after the law passed, according to [Mike Masnick at Tech Dirt](#), hints at content filters.

Proponents of the law argue that the explicit incorporated protections for criticism, review and comedy adequately address this concern. A protection has also been put against overblocking. Yet, it is not clear how enforceable these protections will be, nor how member states will be able to monitor the use of filters by online platforms. It is down to member states, after all, to ensure that platforms allow users an exception for quotation, criticism, review or comedy purposes.

Exceptions have been put forward to protect online encyclopaediae (such as Wikipedia) and code-sharing platforms (such as GitHub), as highlighted in the European Parliament press release, which likewise mentions lighter obligations for small firms. Axel Voss mentions how the text shelters start-ups in particular, protecting tomorrow's leading companies and encouraging technological development.

Indeed, another less explicit goal of the legislation – verbalised by [German companies](#), but also by op-eds in the [European Parliament magazine](#) and Corporate Europe – is to help EU companies face US giants. Yet some say the law will have virtually no effect on tech giants, which are for the most part close to compliance (see [The Conversation](#), [EFF](#) or [Google](#)), yet will levy a potentially insurmountable burden on the EU's small and medium-sized enterprises (SMEs). A detailed account of potential negative effects on SMEs is provided by [OptIn4Privacy](#).

According to, for instance, Cory Doctorow, the fact that it is time-limited (three years) is a nod to SMEs, but ultimately dooms them. Opposition and negotiation by the German government were to a great extent based on wanting an SME exception, while France's negotiators opposed any exemption (according to [Eurointelligence](#) on March 27).

CorporateEurope argue that there has been intense lobbying on the copyright directive. In an [EP press release](#), Axel Voss mentioned *"the very strong lobbying campaign by the Internet giants"* – a view supported by headlines on *"The fierce lobby of Gafa against copyright"* or *"Google funds website that spams for its causes"*, and articles about Google spending 30 million euros on copyright lobbying. The strongest lobbying, CorporateEurope argues, nonetheless came from publishers, creative industries and collecting societies; of the top 20 lobbyists by meetings, 17 belonged to these groups (only two were tech interests and only one a consumer organisation). Moreover, they raise the point on the comparatively weaker voice from users and non-profit advocacy groups, a point raised in the past by academics regarding other copyright law initiatives (see [Vetulani-Cęgiel, A \(2015\)](#)).

Others are less concerned about the balance of voices (at [The Verge](#)), however, and argue that if everyone's unhappy, it means a proposal is successful. Some (such as Eleonora Rosati at *Slate*) moreover highlight how the EU copyright law will play out in practice in case-by-case court decisions, and thus it is certainly too early to declare the 'death of the internet', as users and advocacy groups have. At the *Financial Times*, [Mehreen Khan](#) points out the law is seen as balanced, namely by Andrus Ansip, the EU Commissioner in charge of digital policy. ■

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