EU parliament passes controversial copyright overhaul [updated]

An EU flag at the European Parliament.

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Update: The European Parliament approved the new European copyright directive on Tuesday by a vote of 348 to 274. Our original story on the legislation follows.

On Tuesday, the European Parliament will vote on an overhaul of the EU's copyright system. The body will vote on a compromise announced last month that has received the backing of key European governments. An earlier version of the proposal was approved by the European Parliament last September.

The legislation is controversial, with two provisions receiving the bulk of the criticism. Article 11 aims to help news organizations collect more licensing fees from news aggregators like Facebook and Google News. Article 13 aims to help copyright holders to collect licensing fees from user-generated content platforms like YouTube and Facebook.

Both provisions are maddeningly vague—laying out broad goals without providing much detail about how those goals can be

achieved. This is partly because the EU's lawmaking system occurs in two stages. First, EU-wide institutions pass a broad directive indicating how the law should be changed. Then each of the EU's member nations translates the directive into specific laws. This process leaves EU-wide legislators significant latitude to declare general policy goals and leave the details to individual countries.

Still, if the legislation's goals are incoherent or contradictory, then something is going to have to give. And critics warn that the package could wind up damaging the Internet's openness by forcing the adoption of upload filters and new limits on linking to news stories.

Article 13: "They may end up opting for filters"

User-generated content platforms face a basic tradeoff: stronger enforcement of copyright inevitably means some curtailment of legitimate users' freedom. Over the years, Ars has covered many cases of YouTube's copyright filters accidentally blocking public domain content or curtailing fair-use rights. At the same time, copyright holders are understandably frustrated that they have to spend so much time policing online sites for infringing copies of their content.

How does Article 13 deal with this dilemma? It basically just declares that the bad outcomes feared by critics shouldn't happen and leaves it up to member countries and technology companies to figure out how to reconcile these competing goals.

"Cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights," a recent draft of the legislation states, rather optimistically.

Critics of Article 13 have argued that the legislation would force technology companies to adopt upload filers and potentially run roughshod over fair use and other user freedoms. Supporters of the legislation have countered that the legislation doesn't explicitly require anyone to adopt filtering technology.

"There is no requirement for upload filters," states a Q&A drafted by the legislation's supporters. "However, if large platforms do not come up with any innovative solutions, they may end up opting for filters."

"The criticism that these sometimes filter out legitimate content may at times be valid," the document concedes. "But it should be directed toward the platforms designing and implementing them, not to the legislator who is setting out a goal to be achieved."

Article 11: "Link tax"

Some news organizations have been frustrated to see Google and Facebook raking in billions of dollars of ad revenue while the Internet erodes the economic foundation of traditional news organizations. The organizations believe that Google and Facebook have profited from aggregating their work, and they want the technology giants to share some of those profits with the news industry.

But Google and Facebook are simply summarizing and linking to content available elsewhere on the Web—activities that are squarely within the law in both the United States and Europe. Lots of other websites and Internet users do these things on a regular basis. So if the law tries to force Google and Facebook to pay news sites for the right to link to or summarize their articles, that could undermine everyone else's right to do the same thing.

For this reason, critics of Article 11 have dubbed it a "link

tax.” They warn that it would lead to a future in which you couldn’t link to a news article without paying for the privilege of doing so.

To allay those fears, the authors of Article 11 have added language stating that the news organizations’ new rights “shall not apply to acts of hyperlinking” and also “shall not apply in respect of uses of individual words or very short extracts of a press publication.”

So then what does it apply to? I asked Danny O’Brien, a critic of the law at the Electronic Frontier Foundation, about this last September.

“What they’re trying to do is prevent automatic scraping,” he said. Google News scrapes news sites and then provides users with a Google-generated front page featuring titles and links to articles on various news sites. The goal of the legislation, O’Brien suggested, is to prevent Google from using the title of an article in Google News links. The hope is that this will convince Google to start paying European news organizations for the right to link to their news stories.

“The principle behind it is incoherent”

The legislation doesn’t accomplish this goal by directly regulating scraping of news sites—and neither does it do so by explicitly banning the use of headlines in hyperlinks. Instead, the legislation gives news organizations a broad, vague right to “the online use of their press publications by information society service providers” (aka technology companies like Google and Facebook).

So the practical implications of Article 11 are a real head-scratcher. European nations could require technology companies

to get the permission of a news organization before linking to one of its articles. Officially, this would only apply to tech companies themselves. But it’s unclear what would happen if a user of a technology platform tried to post a link to a news article?

Alternatively, member countries could give news organizations such a narrow right that it would have little practical impact—Facebook and Google might be able to comply by slightly altering how they format links to news articles. Or maybe different countries will implement Article 11 in different ways, creating a hodgepodge of rules for linking to news articles in different European countries.

“I’m sorry if I sound incoherent,” O’Brien said after trying to explain Article 11 to me. “It’s because the principle behind it is incoherent.”

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