Copyright Reform in the EU: Grappling with the Google Effect

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Sweeping changes are coming to copyright law in the European Union. Following four years of negotiations, the European Parliament in April 2019 approved the final text of the Digital Single Market Directive (DSMD).1 EU member states now have two years to transpose its provisions intodomestic law. The new directive, which is the most substantial change to EU copyright law in a generation, contains provisions for enhancing cross-border access to content available through digital subscription services, enabling new uses of copyrighted works for education and research, and, most controversially, 'clarifying' the role of online services in the distribution of copyrighted works.

The provisions associated with the last of these goals—Article 15 (the 'link tax') and Article 17 ('upload filters') take aim directly at two services operated by Google: Google News and YouTube. Article 15 is intended to provide remuneration for press publishers when snippets of their articles are displayed by search engines and news aggregators.2 Article 17, which this article takes for its subject, is intended to address the so-called 'value gap'—the music industry's longstanding complaint that YouTube undercompensates music rightholders for streams of user videos containing claimed copyrighted content.3 The text of the DSMD nowhere mentions YouTube, but anyone versed in the political economy of digital copyright knows that Article 17 was purpose-built to make YouTube pay.

The important questions to ask in the wake of Article 17 are who else will pay—and in what ways. This article offers a focused examination of Article 17 as public law created to settle a private score between the music industry and YouTube. In Part I, I explain and critique the 'value gap' as a policy rationale for altering the scope of generally applicable copyright safe harbors. Part II breaks down the terms of the European Commission's original proposal for Article 13 (which later became Article 17) in relation to existing provisions of the E-Commerce Directive (ECD)4 and the Information Society Directive (ISD).5 In Part III, I survey human rights and competition-related criticisms of Article 13's mass licensing and 'technical measures' mandates. Part IV analyzes the adopted text of Article 17 with attention to the nature and adequacy of revisions made to answer the criticisms outlined in Part III.