



Supplementary Submission on the Australia-European Union Free Trade Agreement

Once again, the Australian Digital Alliance (ADA) appreciates the opportunity to provide comments on the Australia-European Union Free Trade Agreement (AEUFTA).

The ADA has already provided one submission to Australia's negotiating team regarding the AEUFTA, which focused on the draft documents that have so far been publicly released for the treaty - including Australia's negotiating principles and the draft chapters released by the European Union (EU). We now provide this supplementary submission to comment on the possibility of additional provisions being added to the AEUFTA as a result of recent legal changes in the EU.

As you are aware, the EU has recently voted on its Digital Single Market (DSM) Directive, which makes significant changes to the pan-European copyright system.¹ As these changes have been introduced since the most recent release of a draft IP Chapter by the EU, they are not referenced in the current publicly available documents. However, we are conscious that it is possible that the EU may seek to amend its current text to include additional measures from the Directive. When asked during public consultation as part of the recent Australian negotiation round, EU representatives were unable to state whether it was likely that any of the initiatives from the DSM Directive would be included in future texts. We therefore wish to provide feedback on certain initiatives the Directive to Australia's negotiating team prior to the next negotiation round.

The DSM Directive is comprehensive and its effect on the EU copyright system is wide reaching. There are many changes included in the Directive which we support (eg the new text and data mining exception, and broader exceptions for libraries and education). However, there are two initiatives which we would be very concerned to see included in the AEUFTA, namely:

- Article 15 - Press publisher's right
- Article 17 - Platforms liability

Both these measures were extremely controversial during the DSM Directive consultation, and remain controversial now at the implementation stage. They have attracted a level of criticism globally that is almost unprecedented in copyright law, with the EU being sent open letters

¹ See https://ec.europa.eu/commission/priorities/digital-single-market_en

protesting these initiatives by hundreds of copyright experts,² technology pioneers,³ human and digital rights activists,⁴ and even publishers themselves.⁵ They are also extremely uncertain, with their interpretation and impact upon businesses and consumers unlikely to be known for many years.

Detailed comments on each of these initiatives are provided below. However, in summary, we would object strenuously to the inclusion of any language which sought to:

- limit the sharing of news reporting by search engines or referral services in fair circumstances, or require that payment be provided for the sharing of news links or snippets, in contravention of Australia's well-established principle of fair dealing for reporting the news; or
- create strict liability or otherwise increase the liability of platforms for copyright content uploaded by third parties to their services; or which otherwise imposed a direct or implied obligation for online service providers to monitor or filter the content of their users.

Impacts unknown

One of the most important criticisms of these changes in the EU, and a strong reason to resist their inclusion in the AEUFTA, is that both their meaning at law and the impact they will have on businesses and consumers is unknown. It would be extremely premature to commit to local adoption of such controversial initiatives at this early stage in their development.

EU member countries are not required to implement these provisions until 7 June 2021. It will therefore be several years before it is clear how, or even if, the DSM provisions will be implemented at the domestic level, and even longer before their impact on creators, businesses and consumers will be apparent.

The uncertainty surrounding these laws is only enhanced by their controversial nature. For example, we note that the Polish government has issued a challenge to Article 17 of the directive in the Court of Justice of the European Union on the basis that it is "a disproportionate measure that fuels censorship and threatens freedom of expression" and as such "is forbidden by both the Polish Constitution and EU law – the Charter of Fundamental Rights guarantees freedom of expression."⁶

² open letter by 169 academics *Academics Against Press Publishers' Right* (24 April 2018) <https://www.ivir.nl/academics-against-press-publishers-right/>

³ open letter *Article 13 of the EU Copyright Directive Threatens the Internet* signed by 70 internet experts, including Vint Cerf and Tim Berners Lee, at <https://www.eff.org/files/2018/06/13/article13letter.pdf>

⁴ See similarly an open letter signed by 57 human rights and digital rights organisations *Article 13 Open letter – Monitoring and Filtering of Internet Content is Unacceptable* (16 October 2017) <https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194>

⁵ *Open letter to the Austrian Presidency of the European Council and rapporteur Axel Voss MEP on Article 11 and Recital 32 of the proposed Copyright Directive* (29 October, European Innovative Media Publishers) <http://mediapublishers.eu/2018/10/29/open-letter-to-the-austrian-presidency-of-the-european-council-and-rapporteur-axel-voss-mep-on-article-11-and-recital-32-of-the-proposed-copyright-directive/>

⁶ Natalia Mileszyk, *The Copyright Directive challenged in the CJEU by Polish government* (1 June 2019, Communia) <https://www.communia-association.org/2019/06/01/copyright-directive-challenged-cjeu->

If, once implementation has occurred, these initiatives can be demonstrated to have had positive effects for the EU's cultural and economic growth, that will be the time for Australia to consider adopting similar measures. However, it would be high risk for Australia to commit to such untried and potentially harmful systems at this early stage.

Including these initiatives in the AEUFTA would lock Australian on a path which would potentially:

- remove legal rights such as reporting the news that are used by Australian creators hundreds of times a day, and that have been fundamental to Australia's copyright system from its inception;
- hinder our own ongoing modernisation process, which is also dealing expressly with questions regarding free speech and the sharing of information;
- permanently reduce the flexibility and adaptability of our copyright system, in direct contravention of recent recommendations by both the Australian Law Reform Committee⁷ and the Productivity Commission,⁸ and the government's own intention, as stated in its response to the Productivity Commission IP Arrangements report, to "create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes."⁹

We note that the recent review of the Canadian Copyright Act by the Industry, Science and Technology Committee of the Canadian House of Commons came to the conclusion that there is so far a lack of evidence to support adopting either a DSM-style press publishers right or changes to the liability position of platform intermediaries as foreseen in Article 17 of the DSM directive. On press publishers rights the Review Committee made a clear decision to wait to see the implementation and effect of the proposal in the EU, finding that "Canada should learn from the failures and successes of these initiatives to determine whether they serve the interests of Canadians."¹⁰ With respect to intermediary liability it comprehensively debunked the "value gap"

[polish-government/](#). We also note that, any domestic law mandating filters in an attempt to comply with Article 17 could be struck down on the basis of incompatibility with the EU's existing E-Commerce Directive, which explicitly forbids any requirement to proactively monitor for IP enforcement. See this discussed, for example, in Kuczerawy, Aleksandra, "EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime" (December 19, 2018). Bilyana Petkova, Tuomas Ojanen (eds.), *Fundamental Rights Protection Online: The Future Regulation of Intermediaries*, 2019, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=3309099>

⁷ See recommendations of the Australian Law Reform Committee, *Copyright and the Digital Economy (ALRC Report 122)* (13 February 2014) <https://www.alrc.gov.au/publications/copyright-and-digital-economy-alrc-122>. The case for more flexibility in Australian copyright law is particularly discussed at <https://www.alrc.gov.au/publications/executive-summary/flexible-fair-use-exception>

⁸ Productivity Commission, *Intellectual Property Arrangements* (20 December 2016) <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>. The case for more flexibility in Australian copyright law is particularly discussed in Chapter 6.

⁹ *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (August 2017) <https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-government-response.pdf>

¹⁰ *Statutory Review of Copyright*, Report of the Standing Committee on Industry, Science and Technology (June 2019) p.132 <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-132#30>

argument which has been used to argue for the changes in the EU, and again noted that the “we are yet to see, for example, how EU members will implement the Directive and what results different approaches will yield. The Government should take the time to learn from the successes and failures of these initiatives to determine whether they serve the long-term interests of all Canadians.”¹¹

The Australian government should be equally cautious about agreeing to any new treaty language which imposes such uncertain obligations without full knowledge of their effects - particularly as the closed nature of treaty negotiations precludes proper consultation with experts and the public.

Press Publisher’s Right

As you are aware, the DSM directive Article 15 creates an obligation for EU countries to grant news publishers rights to control the use of their publications by online service providers. The intention of this provision, as stated by its advocates, is to provide an additional revenue stream to support news media in the digital era by requiring aggregators to pay fees for the inclusion of content in services such as Google News.¹² However, the measure has been widely criticised by academics, technical and digital rights advocates as both unlikely to meet this goal and likely to have a stifling effect on the sharing of information and public discourse.

The independent academic community in particular is almost unanimous in its criticism of the right.¹³ Some of the most prominent criticisms are:

- By limiting linking, quotation and use of snippets it will stifle free speech and impede the free flow of information, which is vital to democracy.¹⁴ It will also harm the operation of the internet and the very nature of news communication. German publishers interviewed in a report on the initiative for the European Parliament criticised it on the basis that “the architecture of the Internet assumes that links indicate what is behind a link. It is inconceivable that requiring a licence can be good idea” and that the initiative risks “far-reaching changes for the whole Internet ... to the benefit of a relatively small group of market participants.”¹⁵

¹¹ *Statutory Review of Copyright*, Report of the Standing Committee on Industry, Science and Technology (June 2019) p. 177 <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-177#45>

¹² See, for example, Lionel Bently et al, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive* (September 2017, Policy Department for Citizens' Rights and Constitutional Affairs) p.33 [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf)

¹³ See, for example, an open letter by 169 academics *Academics Against Press Publishers’ Right* (24 April 2018) <https://www.ivir.nl/academics-against-press-publishers-right/>; see similarly *Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules: Part E Protection of Press Publications Concerning Digital Uses* (21 February 2017) https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_PART_E_Publishers_2017_02_21_RMh_VM-def-1.pdf

¹⁴ See, for example, Laura Tribe, *Implementing the Link Tax in the worst way possible* (November 6 2018, Open Media) <https://openmedia.org/en/implementing-link-tax-worst-way-possible>.

¹⁵ See, for example, Lionel Bently et al, *Strengthening the Position of Press*

- The increase in transaction costs and decrease in discoverability will drive people to known services and force platforms to select material only from easily licensed source. This will further cement the dominance of the major media conglomerates and exacerbating existing media market concentration.¹⁶
- Similarly, the system will favour those aggregators with the resources to negotiate and execute licences with the large media players, increasing the dominance of the major global online platforms and reducing the ability for competitors to emerge.¹⁷
- It will harm players in the news market other than the major publishers, including journalists, photographers, citizen journalists, and the growing number of freelancers, who rely on references from aggregators and who would see their bargaining position weakened with respect to large publishers and platforms.¹⁸ A coalition of small publishers from across Europe has written an open letter criticising the proposal for limiting their ability to negotiate with search engines;¹⁹
- It could exacerbate the problem of “fake news” by creating barriers to the sharing of verified news sources, pushing readers towards less reliable sources;²⁰
- Past experience suggests it will not provide the promised benefits for news publishers - it does not alter the fundamental market problems faced by news institutions of increased competition for consumer attention and advertising revenue. The Spanish and German systems on which it is based failed to provide any notable increase in revenue for local

Publishers and Authors and Performers in the Copyright Directive (September 2017, Policy Department for Citizens' Rights and Constitutional Affairs) p.34

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf)

¹⁶ See, for example, Lionel Bently et al, *Strengthening the Position of Press*

Publishers and Authors and Performers in the Copyright Directive (September 2017, Policy Department for Citizens' Rights and Constitutional Affairs) p.35

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

See similar in an open letter by 169 academics *Academics Against Press Publishers' Right* (24 April 2018) <https://www.ivir.nl/academics-against-press-publishers-right/>

¹⁷ See, for example, Lionel Bently et al, *Strengthening the Position of Press*

Publishers and Authors and Performers in the Copyright Directive (September 2017, Policy Department for Citizens' Rights and Constitutional Affairs) p.35

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

See similar in an open letter by 169 academics *Academics Against Press Publishers' Right* (24 April 2018) <https://www.ivir.nl/academics-against-press-publishers-right/>

¹⁸ See, for example, Lionel Bently et al, *Strengthening the Position of Press*

Publishers and Authors and Performers in the Copyright Directive (September 2017, Policy Department for Citizens' Rights and Constitutional Affairs) p.35

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

See similar in an open letter by 169 academics *Academics Against Press Publishers' Right* (24 April 2018) <https://www.ivir.nl/academics-against-press-publishers-right/>

¹⁹ *Open letter to the Austrian Presidency of the European Council and rapporteur Axel Voss MEP on Article 11 and Recital 32 of the proposed Copyright Directive* (29 October, European Innovative Media Publishers) <http://mediapublishers.eu/2018/10/29/open-letter-to-the-austrian-presidency-of-the-european-council-and-rapporteur-axel-voss-mep-on-article-11-and-recital-32-of-the-proposed-copyright-directive/>

²⁰ See discussed in Julia Reda “Fake news” is the newest, fakest justification for the EU link tax (26 April 2018, Julia Reda) <https://juliareda.eu/2018/04/fake-news-link-tax/>. See similarly open letter by 169 academics *Academics Against Press Publishers' Right* (24 April 2018) p.3 <https://www.ivir.nl/academics-against-press-publishers-right/>

publishers.²¹ Indeed a study commissioned by the Spanish Association of Publishers of Periodical Publications found that the initiative cost its industry Euro10 Million in revenue.²² One lead Spanish newspaper, *El País*, has openly advocated against the adoption of the measure because of the negative impact of the Spanish law on its services.²³

News publishers in both the EU and Australia already have extensive rights to control the use of their material, and to seek remuneration where it is reused commercially and in unfair ways. However, it is important that consumers, independent creators and those wishing to innovate online media services also retain their rights to share, quote and link to news as part of the public conversation which is so central to democratic principles. Australia should resist any language in the AEUFTA that seeks to limit this ability, particularly where there is no evidence of actual benefit for local news publishers.

Platform Liability

The potential effects of Article 17 on free speech are, if anything, even more concerning than Article 15. This initiative threatens to impose mandatory filtering on all social media platforms, placing enormous power in algorithms and risking eliminating users' fair dealing rights in the online space.

As you are aware, Article 17 makes platforms hosting user generated content directly liable for all material uploaded by their clients, even where the platform is unaware of the content. It also creates a positive obligation for platforms to use any "effective and proportionate" measures available to prevent the upload of unlicensed material. Although advocates for the Article claim platforms are free to come up with "innovative" solutions,²⁴ it is widely accepted that platforms will need to filter all uploaded content to meet their obligations under the new provision and ensure their services remain legal.²⁵

²¹ See an assessment of both systems in Lionel Bently et al, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive* (September 2017, Policy Department for Citizens' Rights and Constitutional Affairs) at 3.4, with discussion of revenues at 3.4.2
[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf)

²² See NERA Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)* (9 July 2015) [https://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20\(VERSION%20FINAL\).pdf](https://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20(VERSION%20FINAL).pdf). The original version is in Spanish, but includes an Executive Summary in English.

²³ *El País*, *Op Ed: A Digital Agreement* (24 March 2017, *El País*), https://elpais.com/elpais/2017/03/24/inenglish/1490355715_551697.html. Original Spanish version available at https://elpais.com/elpais/2017/03/23/opinion/1490295040_130405.html

²⁴ A Q&A press release by the European Parliament states "if large platforms do not come up with any innovative solutions, they may end up opting for filters" - see *Questions and Answers on issues about the digital copyright directive* (27 March 2019, European Parliament News) <http://www.europarl.europa.eu/news/en/press-room/20190111IPR23225/questions-and-answers-on-issues-about-the-digital-copyright-directive>

²⁵ See, for example, William New, *Concern Grows Over Spread of EU Copyright Filtering Rules* (infojustice, June 18, 2019), <http://infojustice.org/archives/41212> <http://infojustice.org/archives/41212>

Again, experts from the fields of copyright, technology, economics, human rights and even libraries, as well as digital rights activists, have expressed strong concerns about the effect this will have on free speech and public discourse online. Criticisms of the provision include:

- Its requirement to filter material before it is even published is out of line with international standards on freedom of expression²⁶ and amounts to wholesale censorship of the internet.²⁷ We note that the Canadian review highlighted this as a particular concern with the EU measures, noting “the Committee finds it questionable, for example, that an [online service provider’s] content management policies would require taking down or de-monetizing content uploaded on a platform before giving its uploader the opportunity to respond to allegations of copyright infringement.”²⁸
- Its basic premise that all content can be licensed is flawed. Those advocating for the changes act as though the internet were a two party system – a single large rights holder dealing with a single large platform. But this is not the case – only a small portion of the huge swathes of material being uploaded to platforms every day is managed by known licensing entities. Platforms would have to track down and reach agreements with millions of copyright owners to cover all content uploaded by third parties to their services. This is an impossible task.²⁹ Even where platforms have licences with the major collecting societies, record labels, film and television companies, and news organisations, an even larger portion of the material will have been created by individual creators and members of the public who are not covered by a licence.
- It will increase the strength of existing dominant platforms. Filters and rights management technologies are extremely difficult and costly to develop and apply, with YouTube and Facebook spending hundreds of millions of dollars on the development of

²⁶ See, for example, this statement by Mr. David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for United Nations Human Rights Council, *EU must align copyright reform with international human rights standards, says expert* (11 March 2019, United Nations Human Rights Office of the High Commissioner) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E>. See similarly an open letter signed by 57 human rights and digital rights organisations *Article 13 Open letter – Monitoring and Filtering of Internet Content is Unacceptable* (16 October 2017) <https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194>

²⁷ See, for example, *Article 13 and Its Implications for Freedom of Expression* (4 July 2018, International Federation of Library Associations) <https://www.ifla.org/publications/node/59489>. See similar in open letter “Article 13 of the EU Copyright Directive Threatens the Internet” signed by 70 internet experts, including Vint Cerf and Tim Berners Lee, at <https://www.eff.org/files/2018/06/13/article13letter.pdf>. See also see similarly *Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market* (8 september 2017) https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon-rev-18_9.pdf

²⁸ *Statutory Review of Copyright*, Report of the Standing Committee on Industry, Science and Technology (June 2019) p. 177 <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>

²⁹ Lateral Economics examines the potential transaction costs of trying to license intermediary use of copyright in Chapter 3 of the Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) <https://lateraleconomics.com.au/wp-content/uploads/2014/01/Excepting-the-Future-Report-to-ADA-Sept-2012.pdf>

their tools.³⁰ Thus the new EU measures impose a cost and technological burden that will make it impossible for small startups to compete with the large platforms.³¹ This effect will only be heightened in a small market such as Australia, and will penalise Australian-based digital platforms compared to their international peers who operate in markets that do not have such an unrealistically high bar to entry.

- Similarly, it will make it impossible for small and independent creators to compete with the dominant publishers, record labels and movie studios, with platforms likely to default to only allowing the upload of material that falls within the “bundle” of licences they negotiate with multinational rights holder conglomerates.
- There is no evidence that it will increase revenues returning to creators. Artists testifying to the Canadian Copyright Review gave varying evidence on their experience with revenue from platforms, leading the review to conclude that “the challenges the music industry and its creators currently face are much more complex and multi-faceted than” advocates of an EU-style platform liability scheme suggest.³²
- It essentially abdicates parliament’s right to make decisions on issues such as free speech to programming algorithms on technological platforms run by large multinationals.

Mandating filters will significantly undermine, or even effectively eliminate, user rights to reporting the news, criticism and review, or parody and satire, and would make public discourse and the commercial livelihood of millions of creators subject to proprietary technologies. It is widely acknowledged that filters:

- cannot recognise legitimate use under copyright exceptions such as fair dealing. As Google Canada’s David de Burgh Graham stated to the Canadian Copyright Review, “fair dealing is a contextual test that requires analysis on each individual case. On any automated system, no matter how good the algorithm, no matter how sophisticated the machine learning that we’re applying—and we are doing that—basically, we’ll never be able to ascertain that.”³³ For example, existing filters have been responsible for the takedown of a copyright lecture explaining the concept of fair use;³⁴ a political

³⁰ YouTube, for example, reports that it has invested over \$100 million in developing its Content ID technology - Google, How Google Fights Piracy (November 2018) p.27 available at https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

³¹ See discussed in open letter “Article 13 of the EU Copyright Directive Threatens the Internet” signed by 70 internet experts, including Vint Cerf and Tim Berners Lee, at <https://www.eff.org/files/2018/06/13/article13letter.pdf>

³² *Statutory Review of Copyright*, Report of the Standing Committee on Industry, Science and Technology (June 2019) p. 177 <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-177#45>

³³ See testimony by Google Canada’s David de Burgh Graham to the Canadian Copyright Review, which acknowledged that Youtube’s content-management system does not apply the Canadian fair dealing exception - *Statutory Review of Copyright*, Report of the Standing Committee on Industry, Science and Technology (June 2019) p. 177 <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-177#45>

³⁴ See Eriq Gardner, Lawrence Lessig Sues Over Takedown of YouTube Video Featuring Phoenix Song (Yahoo Entertainment, 23 August 2013) available at <https://www.yahoo.com/entertainment/news/lawrence-lessig-sues-over-takedown-youtube-video-featuring-050000789.htm>

commentary on Martin Luther King Jr's "I have a Dream" speech;³⁵ and a conference live stream when attendees began to sing happy birthday.³⁶ Yet platforms seeking to comply with these strict liability laws will have little option but to apply filters tightly, removing such material without human review or appeal opportunities. This is why, despite a last minute addition of language by the European Commission calling on member states' to protect uses for the purposes of quotation, criticism, review, caricature, parody or pastiche in their domestic legislation, the initiative has been widely criticised as a "meme killer".³⁷ The proposed protection simply isn't technically possible.

- have a high rate of error. Incorrect use of existing filters commonly results in the shutdown of legitimate websites³⁸ or incorrect removal of public domain material such as whitenoise,³⁹ historical works,⁴⁰ or even birds chirping.⁴¹ This error rate will only increase as smaller and emerging platforms attempting to comply end up with poorly executed solutions.
- Are vulnerable to deliberately abuse, with existing filters already used to extort creators,⁴² silence critics⁴³ and damage competitors⁴⁴ by some bad actors;
- are able to be avoided by bad actors using technical workarounds. For this reason filters are criticised as both over-censoring (by blocking legitimate content) and under-censoring (by letting deliberately infringing content through).⁴⁵

³⁵ Sony takedown over Martin Luther King speech ((DMCA Horror Stories, 2016)

https://www.takedownabuse.org/stories/sony_vs_fight_for_the_future/

³⁶ See Tim Cushing, YouTube Kills Livestream Of Convention When Audience Starts Singing 'Happy Birthday' (Techdirt, 15 October 2013) <https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthday.shtml>

³⁷ See, for example, Connor James Ibbetson, *Article 13 – the EU's new 'meme killer' copyright law* (25 June 2018, UX Connections) <http://www.uxconnections.com/article-13-meme-killer-copyright-law/>

³⁸ See, for example, See Daniel Nazer, Topple Track Attacks EFF and Others With Outrageous DMCA Notices, (EFF, 9 August 2018) available at <https://www.eff.org/deeplinks/2018/08/topple-track-attacks-eff-and-others-outrageous-dmca-notices>.

³⁹ See Paul Donoghue, Musician hit with copyright claims over 10 hours of white noise on YouTube (ABC News, 10 January 2018) <https://www.abc.net.au/news/2018-01-10/white-noise-youtube-copyright-infringement/9314858>

⁴⁰ See Sony Finally Admits It Doesn't Own Bach and It Only Took a Bunch of Public Pressure (EFF) available at <https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure>

⁴¹ See Nancy Messieh, A copyright claim on chirping birds highlights the flaws of YouTube's automated system (TNW, 28 February 2012) <https://thenextweb.com/google/2012/02/27/a-copyright-claim-on-chirping-birds-highlights-the-flaws-of-youtubes-automated-system/>

⁴² See Laurence Adams, New Scam Holds YouTube Channels for Ransom (Bleeping Computer, 2 February 2019) <https://www.bleepingcomputer.com/news/security/new-scam-holds-youtube-channels-for-ransom/>

⁴³ See Adam Steinbaugh, Ares Rights Continues Questionable DMCA Censorship For Ecuador, Targets Chevron (13 December 2013) <http://adamsteinbaugh.com/2013/12/13/ares-rights-dmca-chevron-censorship-ecuador/>. See more discussion of abuse of takedown filters at Cory Doctorow, How the EU's Copyright Filters Will Make it Trivial For Anyone to Censor the Internet (EFF, September 11 2018) <https://www.eff.org/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet>

⁴⁴ See Anita Campbell, Fraudulent DMCA Takedown Requests: Finally, a Lid on Them? (Small Business Trends, 26 December 2018) <https://smallbiztrends.com/2015/05/fraudulent-dmca-takedown-requests.html>

⁴⁵ See, for example, David Fewer et al, *Copyright Review 2018: Balance as the Guide* (December 2018, Canadian Internet Policy and Public Interest Clinic) p.5

Australia should strongly resist any calls to introduce laws that would so clearly benefit a few major players at the expense of consumers and small and independent creators.