

European Copyright Reform in the Digital Single Market POPMIND Conference, Rouen, March 2019

How does the new copyright reform will influence the internet rules on a near future? What does it mean for creators, online platforms and their users?

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The control quest of the music works' circulation.

For a long time, the right holders had control upon their work. They lost this control for the first time with the emerging of peer-to-peer practices, and then with illegal streaming. They succeeded to restore a legal offer with the streaming platforms, except with Youtube... until now and the new European Copyright directive.

What is a European directive?

A European directive is different from a European regulation. **A directive is an attempt to harmonise the rules among the different European countries, but the countries are responsible on how they adapt it to their national regulation.** A directive is a norm, and the countries cannot rule below this standard. In the end, each Member States must adapt the directive and create a law at the national level. Europe has a decisive power, but each State is autonomous in the way they adapt it.

A regulation is not adaptable. It must be directly applied in the same way at all the national level (ex: GDPR - General Data Protection Regulation).

What is the history behind the European Copyright Reform?

In 2001, the European Institutions already worked on a Copyright harmonisation. However, at the time, the digital platforms were not as powerful as today.

A European principle is the free circulation of people, services and goods. Is an art form free of use when online? How can we pay the rights owners (authors, artists, labels – the ones who created the art form) then?

After 2001, there were two possible statutes, which created a **legal void** for the “online platforms”:

- ✓ A “**publisher**” who is responsible for the contents and the control of the contents. Online newspaper, magazines and streaming platforms are examples of online publishers.
- ✓ A “**host**” who provides a tool, and the tool is free of use, it is a “pipe” for the users.

This is at the heart of the debate today about the Copyright reform in 2018. In which category do online platforms such as Youtube or Facebook belong? They are free of use, the users upload the contents of their choice, and they had no control obligations until now. Nevertheless, can we really say that Youtube or Facebook are only pipes? They have an editorial ranking, they use advertising, there is a “content idea” that controls what it uploaded and they have a content policy (some contents can be delete if they do not fit with the content policy).

The different steps of the Copyright reform:

- ✓ In 2012, The European Commission announced that they would update the Copyrights.
- ✓ From 2012 to 2018, lots of reports and discussions about a proposal.
- ✓ In May 2018, the Council of the European Union approved the directive.
- ✓ The European Parliament had to approve it in July 2018, but it did not happen and it reopened debates on the topic.
- ✓ In September 2018, after a huge Youtube lobby campaign, after 250 modifications, the European Parliament approved the directive.
- ✓ In December 2018, a trilogue was opened (a discussion between the Parliament, the Council and the Commission)
- ✓ In January 2019, the trilogue canceled the Council's decision, and the negotiations went back where they started.
- ✓ Finally, in February, the trilogue agreed on a new version.
- ✓ On 26th March, the European Parliament plenary session adopted the text.

It is the first time ever in Europe, that culture and the arts were at the core of the European public debate. However, the process was quite confusing and there were many different versions until the final text. Several arguments against the copyright reform were not referring to the right version of the text, for instance about the filters.

What is the Copyright Reform really about?

Article 11 creates a new right (a “neighbouring right”) for press publishers. While the author rights apply on the reproduction of a licensed creative content, the neighbouring right protects the medium. Until now, press publishers have licence deals with their journalists but they do not have any rights on the medium they produce. Until now, we could see on feed read such as Google News some articles from other press publishers, without any rights or remuneration applied to them. With the new copyright reform, press publishers will have a neighbouring right for the use of their articles (with some exceptions such as Wikipedia).

Consequences:

- 1) Press publishers are now gathering to create collecting societies to negotiate with online platforms and get a remuneration for the use of their articles.
- 2) Google News threatens to shut down its offer, because Google News attracts lots of readers (and so advertising incomes) but now Google will have to pay back the original press publishers who created the articles.

Article 13 protects the contents remuneration on online platforms, by forcing these online platforms to be a minimum **responsible of their contents**. Until now, licences between Youtube and the authors' rights collecting societies exist for the majors, but they are highly confidential. It is impossible to know the scope or the remuneration bases. **Online platforms will have to pay for the contents they use without filtering the contents (which means they have to licence all the contents they use)**. Exceptions include parodies such as GIF or memes.

There is a scale of responsibility in this article 13. Exceptions exist for small platforms (less than 10 million euros turnover or younger than 3 years). In these cases, they will have to apply a “notice and shut down” rule: they have to do their best to get an authorisation adapted to their size, and remove the unlawful contents identified by the right owners, without any obligation to prevent from their reappearance. The “notice and take down” rule apply to small platforms with more than 5 million visitors per month who will have to prevent the reappearance of illicit contents.

This directive really targets the GAFAs. The article 13 gives a responsibility to online platforms, and **the right owners will get the opportunity to negotiate licences with online platforms, individually or through collecting societies**. If there is no agreement/license, the contents cannot exist on the online platform. **It also means that online platforms and the right owners will have to agree on a remuneration basis**: will it be on the advertising incomes, or the number of views? (The Article does not say anything about it) and how will this remuneration base be shared among the stakeholders?

The directive does not force the online platforms to filter the contents. Still, the implementation of the law will be complex and might require tracking the contents, which Youtube's "content idea" software actually already does. With the reform, Youtube will probably dump his "content idea" software to other platforms and make money with it.

What about the samples and footages?

Today, many artists and Youtubers who create contents using samples or footages subject to copyright law (ex: sample and footage with Disney images or songs) are filtered and banned. Indeed, Youtube has deals with major labels to track their contents on the online platform. It means that Youtube should be able to pay for these author rights, rather than removing the contents from the platform. The copyright reforms aims at taking down Youtube's discretionary power to apply the same law on all the contents.

What is the position of artists in the debate?

The International Artists Organisation gathers 11 member countries to express how the digital shift affects the musicians and to propose solutions to MEPs regarding these challenges.

As long as Youtube is only a "host", it does not have the same obligations as Spotify or Deezer in terms of licences, while Youtube gathers much more listeners than the streaming platforms. **Youtube remunerates 10 times less the artists than the streaming platforms.**

Youtube fosters concentration and multinational companies, spoiling smaller creators and independent labels. Indeed, artists are paid through labels and, in most of the cases, by author right societies. For a long time in Germany, German authors did not have their contents available on Youtube because GEMA could not have a deal with Youtube, as they were not allowed to have a NDA (non-disclosure agreement) regarding the authors they represent. Youtube was refusing to disclose the contract terms. Since then, GEMA changed its statutes and now had a NDA deal with Youtube.

Youtube has a significant turnover but the system lacks of transparency, and benefits to the strongest actors, artists being the weakest. With the article 13, if the remuneration to author right societies increases, there are more chances for the artists to earn more money as well. If the cake is bigger, the piece for artists is bigger as well.

The article 14 (-14) is about the proportionate artists remuneration. This article will have different impacts and debates on the implementation at national level. It could mean that artists have a direct share of remuneration from the online platform. In France, for instance, it is not the case now. Labels get this %, and then decide what they give back to the artists. In Spain, there is already a "remuneration entitlement", with the collective society redistributing the online platform's remuneration to its members.

In the European Parliament, there are distensions among the political groups. Polish MEPs from the S&D will vote against the directive while the French socialists are in favour. Beyond these contradictions, **the European sovereignty is in danger, facing one multinational company that spends millions of euros**

in lobbying. If the European institutions give way to GAFAs, it would give the message that there is no European sovereignty.

Authors have a very complicated position in this debate. They have to defend their own interests within the copyright reform but they depend a lot on labels, producers, collective societies, which might have different interests, and they also sometimes have direct contracts with Youtube: they need Youtube to develop their carrier so it is difficult to expose their opinion publicly. In case they would like to anyway, there are problems of censorship because many other platforms, such as the french entertainment magazine "topito", depends on Youtube and refused to publish the artists statements. In the end, Youtube is so powerful in the debate because everybody needs Youtube.

What are the limits of the Copyright Directive?

The copyright directive is not very precise regarding the **transparency requirements of Youtube**. Even if the copyright will force Youtube to share its cake with the music sector, we do not know how big the cake is. **There are many questions, about transparency and the value gap, which were raised during the debate about the copyright directive, but it is not the role of this directive to answer all these questions.**

There can be problems as well in case of "over claim" or "under claim": An estimation shows that it would represent 50% of the uploaded videos on Youtube. It can be a problem for the right holders if:

- ✓ No one claims the right, then the money is lost and the artist is not remunerated.
- ✓ Several right holders claim the right (> 100%), the video is blocked for the time the stakeholders find an agreement. It can happen that some labels voluntarily claim others labels videos to block their videos and rights.

The Pirate Party, as well as organisations such as the Electronic Frontier Foundation or the French organisation La Quadrature du net, who advocate for a free internet, raised questions about **the role and care about the internet user**, and criticized the use of the copyright as a form of protectionism. These actors indirectly supported positions similar to Youtube's ones, being at the same time one of their main opponents. **They also raised the concerns about the censorship on Youtube, related to the filters, and still advocating for more regulation of the GAFAs.**

Indeed, the automatic filters represent some risks in the margin. For example, if someone posts on Youtube a video about police violences, and if there is, in the background, a picture of a brand, for which the internet user has not the rights, the video might be deleted. Finally, these side effects are not so minor. **Much is entrusted to a technology that is known to be porous.**

How the copyright reform does impacts the reorganisation of the music sector?

However, the staff of the music industry is not necessarily well prepared and trained to the technological big bang it will represent. **How will collective societies adapt? How to track and claim the rights on the platforms?** It will be a big challenge for the sector.

This situation does not exist in the audio-visual sector because the stakeholders created transparency through a chain of rights. A central, private and independent company manages the "rights chain" based on declarations signed by all the stakeholders.

There is a need of cooperation in the music sector to create such a tool, it could be, for instance, a European institution to declare the music contracts. In the end, the structuration of the music sector is very new and uncontrolled. And the artists are the first ones to suffer from the lack of cooperation.