



A little guide through the *Digital Single Market Act*

Introduction

On the 19th of January 2016, the European Parliament adopted the resolution *Towards a Single Digital Market Act*. The EP's adoption follows a proposition made in May 2015 by the European Commission for a European *Digital Single Market Strategy*. In the end, this strategy should lead to the enforcement of regulations and legislations contained in a *Digital Single Market Act*.

Culture Action Europe has been closely monitoring the evolution of this proposition and following key actors' comments and reactions. This guide is provided to you in order to get a better understanding of the future DSM strategy, and of its potential impact on European cultural activities.

Our understanding of the situation will voluntarily not be exhaustive, and rather follow a selective bias on cultural matters. Although we will attempt to provide our readers with some criticism and recommendations, our analysis will remain the view of the writers and will not constitute a definitive official view of Culture Action Europe.

Why a DSM Act?

As acknowledged by decades of research in political sciences, the development of the European Union as a community of States is historically linked to the constitution of a "single market". A single market is a trading environment shaped to allow freedom of movement for goods, services, labor and capital. Its objective is to find common regulation and tax regimes. As of today, it is claimed by the European Commission that half of the exchanges of goods in the EU are covered by single market regulations.

With the development of digital networks (starting in the 1970's), and the democratization of both software and hardware technologies (starting in the current of the 1990's), the idea of extending the principles of the "single market" to online transactions rapidly became self-evident to European institutions. The most prominent examples of this extension are successively:

- *The directive 2000/31/EC (8 June 2000)* on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (also called '*Directive on electronic commerce*').

- The directive 2001/29/EC (22 May 2001) on the harmonization of certain aspects of copyright and related rights in the information society (also called 'Copyright Directive').

In parallel, European institutions have contributed to the standardization of the protection against piracy (2004/48/EC), to artist's resale rights (2001/84/EC) and to the distribution of internet services at an affordable price in Europe (2002/22/EC).

However, according to the European Commission, major differences remain between the online and offline trade regulations. Allegedly, those differences engender unfair competition and obstruct innovation and entrepreneurship. After the beginning of 2000, the worldwide growth of "copyright-intensive sectors", the emergence of new modes of distribution and consumption (the so-called "new economy"), together with the apparition of new types of actors on the market (the so-called "intermediaries"), stressed a need both for more harmonization in European markets and the update of intellectual property legislations. A sophisticated articulation, between a liberalization of internal markets and a redefinition of IP protections, would represent the main challenge to be solved by a Digital Single Market strategy.

How could the DSM Act have an impact on culture?

European institutions do not have an exclusive or shared competence to enforce cultural policies to Member States. It is thus at the crossroads of European consumer protection, internal markets, intellectual property and telecommunication that artistic and cultural organizations could by some means be impacted by the reform.

The intention of the European Commission and European Council by proposing a Digital Single Market act can be expressed into three general objectives:

- The first one is to *encourage fair competition between actors*. It intends to offer online transactions an environment that mitigates national specificities for providers and reassures both customers and investors.
- The second objective would be to *encourage free movement of goods, persons, services and capital*. One of the principal challenges of the EU is recognized, both by the EC and the EP, as a situation where content and data need to be provided with better conditions for distribution, exchange, and circulation.
- And thirdly, by liberalizing online economic transactions, enlarging the size of online European customer base, and encouraging the creation and development of enterprises that benefit from online sales, European institutions have for objective to *stimulate an entrepreneurial spirit and the creation of new start-ups*.

Consequently, the principal motive for the European Commission to see barriers in the achievement of a Digital Single Market is the "fragmentation" of copyright legislation and VAT regimes amongst European countries. In the Commission's own words: "Europe has a strong potential [...] but is held back by fragmented markets which make it hard for businesses to scale-up".

Narrowing down to the level of actions suggested in the DSM strategy, the text given by the Commission raises propositions that are of great importance to the cultural sector. Through the DSM act it is intended:

- To enforce the Copyright Directive exceptions. The copyright exception brought by the directive 2001/29/EC allowed to reproduce copyrighted content for uses that are non-commercial and remained optional so far. The enforcement of those exceptions would **for example** make it irreproachable to reproduce a copyrighted building or piece of art that finds itself in the public space (it is called *Freedom of Panorama*).
- To enforce the Audiovisual Media Service Directive principles. The 2010/13/EC directive is currently open for public review. In the context of the DSM act, it is suggested that principles such as the neutrality of online platforms or the diversity and findability of online content should become mandatory. Historically, this directive, in one hand, provides a framework for stricter rules against audiovisual programs encouraging behaviors prejudicial to health (alcohol, tobacco, etc.) and prohibits the use of subliminal techniques. On the other hand, it defends the right to freedom of information and media pluralism across the European Union.
- To apply the “country of origin” principle. According to both the European Commission and the European Parliament, at the age of international online commerce, the fragmentation of laws in the European Union makes it difficult for providers to operate. The “country of origin” principle would solve this by stating that, wherever a provider distributes its product or service, it would obey the law of the country where it is residing. **For example**, a music producer based in the UK could operate in France or Poland, but would obey UK rules. Several governments and lobbies contested that the “country of origin principle” would lead the EU to a “race to the bottom”, with firms relocating to countries with lower wages and the weakest consumer, environmental protection, employment and health and safety rules”.
- To harmonize VAT rates. Considering whether cultural contents constitute specific or regular goods has influenced a lot the VAT rate it should applied. European states have for this reason struggled finding common ground. **For example**, since 2012, a controversial discussion goes on to define whether an eBook (a book provided electronically) is a service (in which case it can’t receive a reduced VAT rate as a regular book does in many European countries).
- To permit “geographical portability” of online content. In order to simplify consumption of online content amongst EU countries, the DSM act would bring legislations that forbid country or price discrimination, as well as actions that facilitate cross-border delivery. This means, **for example**, that instead of having national licenses, the European Commission encourages editors and publishers to subscribe to pan-European licenses. European institutions insist on the fact that this would finally allow a consumer from Italy to keep listening to Spotify or

watching Netflix independently from the fact that he or she is in Germany or Spain.

Who are the key actors?

Discussions spread very quickly as the Commission was formulating its proposition. The most remarked moment amongst these discussions is probably the writing, by Julia Reda, of a report evaluating the 2001 Copyright Directive.

Along her reporting task, Reda has been contacted by a large amount of lobbies (86 requests in total) of which she has publicly disclosed their names and classed them in 6 categories: *Users, Schools & Libraries, Technical Providers, Artists, Collecting Societies and Publishers*.

“Although the directive was meant to adapt copyright to the digital age, in reality it is blocking the exchange of knowledge and culture across borders today.”

Julia Reda, vice-president of the Green/ALE group at the European Parliament

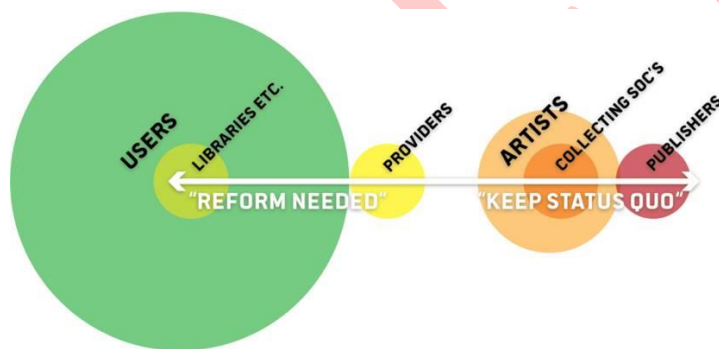


Figure 1 – « Le rapport Reda expliqué »,
available online: <https://juliareda.eu/copyright-evaluation-report-explained/>

Undeniably, those debates engendered a variety of positions and arguments, that we will attempt to briefly summarize here.

- On the pro side, most actors agree on the fact that it is time to adapt to the “digital era”. As MEP **Yana Toom** (ALDE) says, “Electronic government and electronic commerce have become our everyday reality”, and it would be time to face it. It is before all, the consumer and the citizen that should be free to use content when and wherever, and for this “they need one digital market”, says MEP **Corazza Bildt** (PPE).

The Reda report counts several active “**end-user**” **lobbies** (i.e the *European Consumer Organisation*) representing consumers’ needs and demands. Those organizations consider “geographical segregation” or “price discrimination” as archaic practices, that act in real disfavor of consumers. They would additionally position in favor of the enlargement and mandatory application of exceptions mentioned in the Copyright Directive (such as the free use for non-commercial research or private study, or uses for the benefit of people with a disability).

Think tanks, such as Terra Nova, with the same arguments, also stand on the pros' side.

School and library lobbies (e.i. *German Library Association*, *Research Libraries UK*, *Netherlands Library Forum*, etc.) will generally follow the same direction, uniting with **open internet lobbies** (i.e. *Electronic Frontier Foundation*, *iCommons*, *Open Knowledge Forum*, etc.), or even forming macro-lobbies such as *Creativity for Europe*.

From an economic perspective, it is important to mention the **internet and service provider lobbies**, who defend the idea that bringing back profit to Europe necessitate that we enlarge the choice of content available online (e.i. *European Trade Association Representing Online Platforms*), spend more money in our ICT infrastructures (i.e. *Digital Europe*) and let parties define the terms of their contract and copyright agreements (i.e. *Interactive Advertising Bureau Europe*).

The **European Commission**, who is pioneering the project of reform, together with the **Parliament** and the **Council**, support the strategy. However, there are some points of disagreements, notably according the country of origin or their political party. This what we will find out in the following part.

- On the con side, if most parties support the Digital Single Market act, a certain amount of MEP's underline some imprecisions that would lead to exacerbate economic and social inequalities. **Rozière** (S&D) and **Blanco López** (S&D), who mostly regret that authors' remuneration is made a minor issue, point out the « unbalanced power struggle between giants of the internet (i.e. Google, Amazon, Apple, etc.) and creators ». **Kammerevert** (S&D), who is also rapporteur for the *Culture Committee* in front of the Parliament, maintained some criticisms, or warnings, about the fact that more digitalization necessitate a clear adapted author's right, and that this has not yet been reached.

On the right wing as well, voices of Eurosceptic **Helmer** (EFDD) and even those of conservative MEPs such as **Verheyen** (PPE), **Sojdrova** (PPE), were heard to defend the idea that the Act, because it focuses on the economic potential of culture, will lead to an impoverishment of the quality in cultural content.

Similar tensions emerged between national states. Tensions mostly show an opposition between the Anglo-Saxon approach to copyright, supported by Great Britain, and the "continental" approach to author's rights, mostly defended by **France** or **Germany**. The second approach led, for example, the **French Conseil d'Etat**, to stress the creation of a new legal status for online intermediaries (i.e. *Google*), who do not act anymore as simple online content hosts but as true service editors ("éditeurs de services") who indirectly earn money from copyrighted content.

Editors, **publishers** and **authors** (*European Composer and Songwriter Alliance*, *Federation of European Publishers*, *Société Civile des Auteurs Multimédia*, etc.) are unanimous on the idea that a reform of copyright is not necessary and that it will benefit intermediaries who already enjoy a position of

force. For example, Google, because it benefits from a status of simple “host”, is not taken responsible for hosting copyrighted content on Youtube. Yet, this multinational corporation can generate profit from it through advertising and traffic building. Right holders will be able to ask for the content to be withdrawn, but legally not legitimate to claim part of Google’s benefits after the damage has been recognized.

Editors and authors also underline the idea that the enforcement, together with the extension, of the list of copyright exceptions is leading Europe to “no copyright at all”. Some even declare the death of the author.

What precautions ought to be taken?

Think outside the reform. As the name suggests, the Digital Single Market proposition is built to boost new markets and generate new sources of revenue. It is thus credulous to denounce the fact that the Commission plans to an emphasis on the economic dimension of culture and its potential for growth.

A critical analysis of this reform would thus be more relevant observing not only the reform itself, but the lack of coherence or the absence of reforms on other topics. Indeed, a move on copyright legislation, may it be necessary, might strongly hurt cultural organizations’ revenue if it is not associated with a framing of contract agreements between technical providers, publishers and authors. A reform of the *Directive on electronic commerce*, which establishes the status of intermediaries (such as Google) and gives them urgent responsibilities, has not yet been considered frankly in the DSM act.

Abandon the “black & white glasses”. It is true that there are fundamental differences between *author’s right* and *copyright*: the former refers to the author as a natural person and moral owner of the rights, whereas the latter confers all the rights to the producer. In practice however, it would be dangerous to overestimate their differences. The author’s right in many countries becomes a protection of economic rights, whereas the copyright starts integrating principles of moral rights (linked to the author).

Similarly, we can expect the final conclusions of the European Commission to be found in a compromise between copyright and authors’ right. In that sense, **defending arts, culture and the civil society in Europe would not take anymore to stand either for the copyright or the authors’ right, but rather to observe where the compromise is located, who and what motivates it.**

But also pay attention to misunderstandings. Precisely because it intends to reach a form of compromise amongst all protagonists, an important part of the strategy (intentionally?) remains vague and very interpretable. From a micro perspective, it can lead under/over-interpretation of regulations and exceptions proposed in the Act, and, from a more macro-perspective this can lead to political agreements based on misunderstandings. The most intriguing is the unity between defenders of the free market (liberals) and the defenders of an open internet (libertarians). **Our challenge is**

to understand whether or not misunderstandings allow such consensus, and to position for or against by distinguishing clearer positions.

What's next?

The challenge now remains to find a non-discriminatory compromise between opportunities brought about by digitization and liberalization of online markets on one side, and the necessity to maintain both high quality content and fair working conditions, also in the cultural and creative field.

On **6 May 2015**, the European Commission releases *Digital Single Market Strategy for Europe* proposal.

On **9 July 2015**, the European Parliament adopts the *Copyright Directive evaluation report* written by Julia Reda.

On **22 September 2015**, the European Parliament drafts a report on the Commission proposal.

On **16 November 2015**, the Committee on Culture and Education gives its opinion on the EP's draft.

On **12 December 2015**, the Commission makes several proposals on copyright reform and regulation of online markets.

On **19 January 2016**, the European Parliament adopts the resolution *Towards a Single Digital Market Act*.

By the **end of 2016**, the applicable DSM strategy shall be delivered. The resolution will feed into the 16 initiatives that the Commission is to deliver by the end of 2016, according to its communication "A Digital Single Market Strategy for Europe".

Culture Action Europe will be monitoring upcoming events. In order to bring a relevant analysis and suited comments, we would welcome your reactions and ideas concerning this draft report.

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