

Master Class: Legal Tech: Disruption and Evolution in the Television Industry

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Live streaming content and copyright regulation?

Extract from the 2017 IAEL Book

“Tech: Disruption and Evolution in the Entertainment Industries”

“How platforms advanced technologies and Models are revolutionizing the audiovisual industry”

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Live streaming content and copyright regulation?

- ▶ I. Should live streaming services be under the same regulations as TV channels?
- ▶ II. Should live streaming platforms monitor copyright infringements?

I. Should live streaming services be under the same regulations as TV channels?

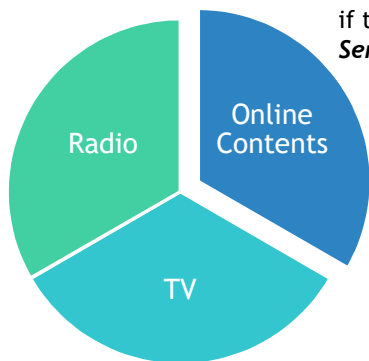
Should they be under the authority of the FCC (USA) and CSA (France)?

Recent facts

- ▶ In November 2018, President Emmanuel Macron announced his intention to **expand the powers of the French CSA** (equivalent of the US FCC) to **regulate online contents and video games** (objectives: fight against pornographic contents accessible to children, prevent broadcasting of contents that lead to violence to women)
- ▶ French President's plan is to proceed to changes of laws in order to expand the powers of the French CSA
- ▶ **What we may expect:**
 - ▶ Evolution of French law regarding freedom of communication (dating from 1986)
 - ▶ European revision of the Audiovisual Media Services Directive

Can the French CSA control audiovisual internet content?

- ▶ CSA already has the power to regulate the following contents:



if they meet the criteria of a SMAD (*service de médias audiovisuels à la demande*) = *On-Demand Audiovisual Media Services* (Art. 2 of law from September 30, 1986):

One considers as **on-demand audio-visual media service**, any communication service to the public through **electronic means allowing users to view programs at the time they have chosen and at their request, from a list of programs; the selection and the organization of which are controlled by the producer of the service.**

One **excludes** the services that do not come under an economic activity pursuant to article 256 A of the General Tax Code, the ones whose audio-visual content is of secondary importance, the ones consisting in **providing or broadcasting audio-visual content created by private users for the purpose of sharing and exchanging within a community of interests**, the ones consisting in ensuring, for distribution to the public by online communication services to the public, the storage alone of audio-visual signals provided by recipients of these services and the ones the audio-visual content of which is selected and organized under the control of a third party. An offer composed of on-demand audio-visual media services and other services which do not come under audio-visual communication shall be subject to the present act only for its first part.

- ▶ Currently, the CSA range of action is pretty narrow under French law since it notably **doesn't include the control over contents provided by non-professional users.**
- ▶ Furthermore, CSA's actions are limited to the French territory.

Case - "Les Recettes Pompettes by Poulpe" on YouTube vs CSA

- ▶ A YouTube channel broadcasted a program called "Les Recettes pompettes" where the presenters were drinking alcohol while they were cooking.
- ▶ According to the French CSA, despite the warning that were placed at the beginning of the show ("*This program isn't adapted to a young audience*" and "*The abuse of alcohol is harmful*"), **this program infringed French law regarding alcohol consumption and the editor was warned (Studio Bagel Productions).**
- ▶ CSA based its decision on the fact that **this program** (which was broadcast on a YouTube channel and was made by professionals) **was to be considered as a "SMAD"** (On-demand audiovisual media service) and **that in this respect the CSA should have jurisdiction.**

Internet isn't a lawless area regarding audiovisual contents

- ▶ In France, PHAROS (Plateforme d'Harmonisation, d'Analyse, de Recoupement et d'Orientation des Signalements) platform enables individuals to report the following violations: pedophilia, racism, anti-Semitism and xenophobia, incitement to racial, ethnic and religious hatred, terrorism and apology for terrorism, financial scams and scams using the internet.
- ▶ The French CSA can order sanctions against professional users who shared inappropriate contents, and request the ban of this user from the online platform.

Questions regarding the potential evolution of the authority of the CSA

- ▶ The case “Les recettes Pompettes” and Emmanuel Macron’s announcement raise the following questions:
- ▶ **Should online audiovisual content follow the same rules as traditional TV content?**
 - ▶ For French authorities, control over online streaming audiovisual content is key to protect young people from being exposed to inappropriate content.
- ▶ **What should differentiate a professional content from a non-professional content?**
 - ▶ There is an increasing number of professional contents on online platforms and more and more platforms finance and partner with producers to increase their offer of contents from which they can generate advertising revenues.
- ▶ **Should the French CSA have authority over professional and non-professional contents shared on audiovisual streaming platforms? If so, will the French CSA have the sufficient resources to proceed to such controls?**
- ▶ **How can the CSA regulate content available on platforms that are not based in France? Would all online platforms collaborate with the French CSA?**
- ▶ **What should be online platforms liability within the scope of regulating the content they enable the sharing of?**

Questioning of the freedom of speech / Should internet platforms such as GAFA regulate online audiovisual contents?

- ▶ The implementation of upstream control on audiovisual contents shared online, may lead to automatic online censorship.
- ▶ Associations of defense of online freedom warn that private companies and GAFA shouldn't be entrusted with police and justice missions:
 - ▶ « instead of encouraging private censorship, we should let the police and the justice do their jobs. There are many different solutions already in place: encourage reporting to the PHAROS platform, provide the police with appropriate means in order to help them process internet users' reporting.»
- ▶ **This debate is part of a general discussion regarding a review of French regulations.**

II. Should live streaming platforms monitor copyright infringements?

Should internet platforms hosting “large amounts” of user-uploaded content monitor users’ behavior and filter their contributions to identify and prevent copyright infringement?

Debates regarding article 13 of the project of EU Directive on Copyright

- ▶ Article 13 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market
 - ▶ “**Information society service providers** that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users **shall**, in cooperation with right holders, **take measures** to ensure the functioning of agreements concluded with right holders for the use of their works or other subject-matter or **to prevent the availability on their services of works** or other subject-matter **identified by right holders through the cooperation with the service providers**.
 - ▶ **Those measures, such as the use of effective content recognition technologies**, shall be appropriate and proportionate. The service providers shall provide right holders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.”

Censorship machine vs copyright infringements: debates

- ▶ In Europe, media conglomerates as well as some countries, such as France, Spain and Portugal are **pushing for a law that would force all kinds of internet platforms to install a “censorship machine” to surveil all uploads and try to prevent copyright infringement.**
 - ▶ They notably want the European Commission to add to its Directive proposal that **platforms need to automatically remove media that has once been classified as infringing, regardless the context in which it is uploaded.**
- ▶ Nevertheless, this request raises important debates, and censorship machines also carry risks:
 - ▶ Restriction of freedom of expression
 - ▶ Harm to independent creators
 - ▶ Surveillance risk
 - ▶ Important burden on startups and favor to the largest platforms

What does the European Parliament think?

- ▶ **The EU Parliament vote is scheduled for early 2018.**
- ▶ **JURI:** vote is scheduled for late February 2018: the (leading) Legal Affairs Committee proposed major changes, but their future is unclear: The draft report by rapporteur MEP Comodini (EPP) proposed removing the obligation for automated monitoring, leaving platforms to ensure the functioning of agreements with rightholders without prescribing how.
- ▶ **ALDE group** shadow rapporteur is in favour of the Commission proposal, while **S&D** and **Greens/EFA** shadow rapporteurs have argued for its removal.
- ▶ **Internal Market and Civil Liberties Committees** want to remove the obligation to use automated content recognition technologies.
- ▶ **Industry Committee** wants the words “content recognition technologies” removed also, but wants to keep the underlying obligation for platforms to prevent the availability of copyrighted content.
- ▶ **Culture Committee** wants to expand the proposal to forbid users from keeping private backups of their legally purchased files, by also forcing cloud storage providers like Dropbox to install copyright machines.

Conclusion

- ▶ **Whether it is for the nature of the audiovisual content or for the fact that such content infringes copyrights, the issues are about the same today:**
 - ▶ To what extent online platforms shall be part of the monitoring and controlling of audiovisual online contents?
 - ▶ Shall online platforms be entrusted with upstream censorship missions: regarding the nature of the content? regarding copyright infringements?
 - ▶ How can a Government delegate to online platforms such missions while these online platforms aren't necessarily based in its country?