

Fairness in the EU music ecosystem policy: heading towards a multifaceted approach

Abstract

Although fairness is an old concept originating from competition law and the early stages of the European market integration process, the concept regained traction and a powerful policy meaning when the 'Digital Single Market Strategy' (European Commission 2015) identified 'fairness' as a primary regulatory concept that justified the implementation of legal solutions seeking to curb the exceptional power of a handful of digital services and to reduce multiple forms of inequalities exacerbated by the dynamics of online markets. In fact, the 2015 Digital Single Market Strategy includes multiple references to 'fair competition', a 'fair level playing field', 'fair remuneration' of creators and 'fair licensing' conditions. From then onwards, the EU lawmakers understood that the protection of competing values and interests in Europe's digital economy would have required a new balance and new legislative remedies. This urge is what made today's concept of 'fairness' arise, especially in a culturally and commercially very sensitive field such as the music sector, where the attempt to foster 'fair' or 'equitable' remuneration of music composers and performers was confined into the realm of copyright law. In the past ten years, instead, the EU institutions decidedly addressed sensitive issues such as unfair remuneration, contractual imbalances, poor or opaque music licensing and enforcement opportunities within a broader legislative and policy framework. This has clearly expanded and deepened the EU policies related to the music sector by linking them to a more complex set of principles and notions which include fairness, diversity, accessibility, availability, transparency and accountability. In turn, this underscores the emergence and progressive consolidation of an EU multifaceted policy approach for the European music ecosystem.

Key Points

- The dominance of very large digital platforms strengthened the need to strike a fair balance in the protection of distinct values and interests in the relationships between music creators, publishers and record labels, online gatekeepers, and users.
- Although 'fair remuneration' for copyright holders was discussed in the EU for three decades, 'fairness' was introduced and used as a policy concept in a much broader regulatory context only in the past few years.
- EU policy related to the music sector has been significantly expanded by linking it to principles (e.g., diversity, accessibility, availability, transparency and accountability) which underscore the progressive adoption and consolidation of an EU multifaceted policy approach.

Today, the pursuit of 'fairness' has become a central concern for a variety of actors and stakeholders in the European music ecosystem (Mazziotti & Ranaivoson 2024). In early March 2024, the European Commission (2024) fined Apple over €1.8 billion for abusing its dominant position on the EU music market. The Commission mentioned that the fine was related to 'unfair' trade practices and pointed out that Apple's provisions 'amount to unfair trading conditions, in breach of Article 102(a) of the Treaty on the Functioning of the European Union (TFEU)'. This case shows that there is an increased policy interest in ensuring that the music ecosystem and the practices it involves are 'fairer' (Ferraro 2021). Considering that 'fairness' has been a key factor in rethinking policies for the music sector and the objectives they encompass, it is crucial to provide key insights about the conditions that have driven the emergence and incorporation of 'fairness' in the EU policy related to the music sector.

Research carried out under the Fair MusE project (Vlassis A., Psychogiopoulou E. et al. 2024) showed that the copyright policy discussions about 'fairness' first emerged in the 2000s, in a period when the increasing digitisation of technologies disrupted the business models of the recording industry. The music sector faced substantial revenue losses in subsequent years with the end-to-end nature of the Internet triggering heated debate on remuneration, ownership, access to knowledge, and the very *raison d'être* of copyright. Broader policy discussions concerning 'fairness' intensified over the course of the 2010s, with a significant acceleration after the launch of a European Commission's Communication entitled 'Digital Market Strategy' in 2015. This led not only to a modernisation of digital copyright rules in Directive 2019/790 but also to the adoption of key measures aimed at enhanc-

ing digital platforms' accountability and transparency as of the early 2020s (Flew & Gillett 2021). In particular, the trend of platformisation (Hesmondhalgh 2020, Vlassis 2021) heightened policy concerns about the effects of platforms' activities and practices on 'remuneration', 'transparency', 'content moderation', 'cultural diversity' and 'fair competition'. This trend inevitably widened the debate on how to approach and define 'fairness' inside and outside EU copyright law and how to foster it in a constantly evolving and data-driven digital economy and technological architecture.

The debate about how to promote 'fairness' in the music ecosystem, thus, began to feature more prominently due to several reasons: (i) the increasing digitisation of music creation and dissemination technologies and then the platform shift turned upside down a carefully established equilibrium among the different actors involved in the music value chains, posing significant challenges for rightholders and legacy industry players; (ii) alongside the enhanced consumer welfare through wider accessibility of cultural content (Nieborg and Poell 2018), the size and scale of digital platform companies, including streaming services and social media platforms, generated capacity for market dominance, large-scale consumer data collection and exploitations and citizens' cultural influence; and (iii) given the intensive platformisation of the music industry, the social and cultural status of digital platform companies also became an issue to consider in the EU policy framework, besides their technological and economic aspects.

A chronological analysis of the historic development and evolution of the European institutions' policy discourse in music sector carried out within the Fair MusE project (Vlassis A., Psychogiopoulou E. et al. 2024) reveals that the issue

of 'fairness' in copyright law, especially with regard to the 'fair' remuneration of right-holders, has been a predominant topic of discussion over time. However, due to the process of platformisation, copyright regulation and the debate around the economic and cultural sets of values that should underpin it (Mazziotti 2015; Sganga 2024) progressively became part of a broader legal and policy framework dealing with the governance of digital platforms. The negotiations around Article 17 of Directive 2019/790 on the increased liability and ex ante rights clearance obligations of digital platforms is a clear illustration of this: the negotiations were highly polarised and mobilised a wide range of actors, focusing on broad issues related to freedom of expression and fundamental rights on the Internet, the protection of European culture in a platform-based economy (Bonnamy 2021) and so on.

From this perspective, what platformisation did was to make EU policy for the music ecosystem go beyond copyright, and the legal and policy debate that surrounds it. As a result of this multifaceted policy approach, the music sector has been placed in a wider context where the consolidated dominance and large-scale reach of digital platforms has progressively justified an increasing scrutiny at the EU level of their terms of service, algorithm functioning, content moderation policies and copyright licensing activities. Moreover, the emergence of a cross-sectional principle of transparency in EU digital policies for a platform-dominated economy evidences the need for balancing competing values and interests with a view to protecting the economic value and the autonomy and sustainability of cultural creation through a horizontal approach to 'fairness'. In this sense, EU platform regulation seeks to dynamically help music creators exercise their rights and regain control over the exploitation of their works, enhancing their remuneration opportunities through instruments that are, politically and legally, outside the remit of copyright law and the traditional rights aimed at protecting creativity, cultural diversity and competition in the creative industries.

Towards a multifaceted policy approach that balances different rights and interests

Digital platforms have revolutionised policymaking for music. The EU institutions have not only addressed copyright concerns within a broader legislative and policy framework; they have also expanded and deepened EU policy related to the music sector by linking it to a wider and more complex set of principles and notions – from fairness and diversity, to accessibility, availability, transparency and accountability. This underscores the emergence and progressive consolidation of an EU multifaceted policy approach for the European music ecosystem.

This multifaceted policy approach presently followed by the EU institutions should cherish and guarantee a delicate balance between the different rights and interests within Europe's music ecosystem from a copyright perspective. By consistently promoting a culture of respect for intellectual property rights while ensuring a fair balance between the rights of the various right-holders in the music sector and between the music right-holders' prerogatives and the rights of users and commercial exploiters, the EU institutions should secure a sustainable mu-

sic environment that fosters fair remuneration for creativity and cultural exchange, at the same time facilitating access to and enjoyment of cultural creation without excessive barriers.

An EU policy for the music ecosystem and the values that drive it

Developing and consolidating an EU policy for the music ecosystem per se has taken much time. The European Parliament's Resolution on 'Cultural Diversity and the Conditions for authors in the European music streaming market', approved in January 2024, takes significant steps in this direction. The Resolution calls on the European Commission to reflect on the possibility of imposing measures, such as quotas for European musical works, on music streaming platforms. This is symbolically (and legally) important if we consider that, over the last thirty years, EU legislative instruments related to the European music ecosystem consisted mostly of reforms of national copyright laws, including complex collective rights management issues, and regulation of aspects of the digital economy that are relevant also for the music ecosystem. With the aforementioned Resolution, an EU institution seeks for the first time to trigger reflection on policy measures which are explicitly related to the digital music economy without being restricted to copyright issues.

In their policy efforts to cater for the specific needs of the music ecosystem in ways that transcend copyright, the EU institutions should advocate and deploy principles of fairness in the context of policy initiatives that improve gender equality, diversity and inclusion within the music industry. Relevant initiatives should ensure fairer opportunities for creators, performers, musicians and producers from diverse backgrounds, with the principal aim to empower underrepresented communities and support the development of independent music scenes.

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