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The Role of Market-Driven and Legislative Solutions to Online Music Licensing in Europe

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The Role of Market-Driven and Legislative Solutions to Online Music Licensing in Europe

Giuseppe Mazziotti*

Abstract

In a world where a very few platforms have increasingly become the gatekeepers of digital markets, online music licensing requires solutions based on data infrastructure and detailed rights ownership information and technologies. So far, these solutions have been mostly market-driven, having developed at a time when proprietary platforms emerged as a radical alternative to fully decentralised distribution networks. This paper clarifies how social media and on-demand platforms have influenced the way music right-holders concretely license their rights, either collectively or individually. The paper critically evaluates the impact of recent regulatory initiatives the EU has undertaken with the aim to make online platforms more accountable and to grant music creators access to information they need to better negotiate their licensing deals.

1. Introduction

Music has never been as easy, convenient, and cheap to disseminate and enjoy as it is today. The Internet established an unprecedented, borderless and decentralised medium of expression and communication that has revolutionised the way people and enterprises create, produce, exploit and disseminate musical compositions and sound recordings.

This environment has changed dramatically in the past two decades. When the Internet first emerged in the mid-1990s, the end-to-end design of this new medium and

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the quick development of file-sharing software made it possible for Internet users to access and exchange large amounts of recorded music without middlemen. Audio compression formats and peer-to-peer networks allowed Internet users to share music records for free, bypassing the intermediation of record companies and avoiding payment of remuneration to composers, performers and their respective collecting societies. For almost a decade, free and unauthorised file sharing threatened the survival of the music industry since it had the potential to replace the CDs and other physical formats that were the core business of the industry.[1]

In the mid-1990s this situation led to a debate on whether or not intellectual property in digital music could survive in the absence of commercial intermediation. Some writers predicted that, in the absence of successful new models for non-physical transactions, there would be no way to assure reliable payment for intellectual works.[2] Other scholars predicted that new digital technologies would give authors greater opportunities to trace consumption of their works and to gain remuneration through sophisticated payment systems, as if the Internet could become a "celestial jukebox."[3]

Since the early 2000s, the rise of online platforms has radically changed content distribution models. Even as unauthorised file-sharing persisted and became more efficient and sophisticated, an exponential increase of bandwidth and Internet speed enabled companies like Apple to start operating on-demand music stores, such as iTunes starting in 2001. Apple was the first company that made digital music marketable by creating its own ecosystem based on proprietary technologies and its success in computers and portable devices.

Later, streaming services like Spotify and Deezer and the large-scale diffusion of social media such as YouTube, Vimeo, Facebook and Soundcloud triggered a process of re-intermediation in digital music distribution.[4] This platform-centred environment

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[1] Statistics evidenced a dramatic fall of the music business between 1999 and 2014, when global revenues from physical and digital music sales declined by 42% (from $25.2 to 14.6 billion: see IFPI (2018), *Global Music Report: Annual State of the Industry*, available at http://ifpi.org).

[2] Barlow (1994), 'The Economy of Ideas: Selling Wine Without Bottles', 2.03 *Wired* 84.

[3] Goldstein (1994), *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*, Hill & Wang, New York.

[4] See Zittrain (2008), *The future of the Internet and how to stop it*, Yale University Press, New Haven, p. 12, who explained how the rise of a network of proprietary platforms and applications progressively eroded the open Web, following the logic of the so-called 'Web 2.0': see O'Reilly (2005), *What is Web 2.0*, available at http://oreilly.com.

allowed music right-holders to start licensing their works and earning remuneration from the technology companies that exploited their music. The great variety of platforms and services forced actors in the music sector to change their licensing models and strategies in order to survive as economically viable businesses.

This paper seeks to explain why regulators, especially in the European Union, are increasingly concerned about digital music markets. Economic rewards for individual authors and performers and the artistic freedom ultimately guaranteed by compensation of their work are relevant to many public policy goals in a democratic society that values free expression and cultural diversity. In a world where a relatively small number of media conglomerates and tech companies can control - through big data and sophisticated algorithms - what we read, watch, listen to, discover and share with others, smooth and technology-friendly licensing solutions are essential to protect the value of creative work.

Unauthorised access to digital music (often referred to as "online piracy") remains a very significant problem.[5] Online platforms give access to copyrighted music either for free on social media or in exchange for a low monthly fee on streaming services. This situation has inevitably challenged the main function of copyright by making licensing activities of music creators (i.e. composers, performers and record producers) less effective and impairing their ability to earn remuneration from online exploitations. In this environment, in light of the uncertain or very low commercial value of the vast majority of their works on digital platforms, most music right-holders are compensated very little or not at all.

This paper assesses the role of markets and regulation. First, it briefly examines current music distribution, emphasizing the dominant and distinct functions and business models of on-demand music services and social media (Section 2). Then it clarifies how online platforms have influenced the way music right-holders concretely license their rights, either collectively or individually (Section 3). Section 4 identifies the effects social media and on-demand platforms have had on music right-holders' remuneration. Section 5 critically evaluates the impact of several regulatory initiatives

[5] IViR (Institute for Information Law) (2018), *Global Online Piracy Study*, University of Amsterdam, p. 12-13, whose surveys show high or very high rates in consumption and acquisition of illegal content among the populations of a very diverse group of countries (France, Germany, Netherlands, Poland, Spain, Sweden, UK, Canada, Brazil, Hong Kong, Indonesia, Japan and Thailand).

the EU has undertaken, especially in the field of collective rights management, with the aim to make the licensing of music copyright more modern, efficient and transparent. Finally, the paper identifies several market and technology factors that condition the sustainability of digital music markets, explaining of the potential of regulation and how copyright licensing might become more effective than it currently is (Section 6).

2. Today's digital music landscape: on-demand services and social media platforms

In today's Internet landscape, online platforms are the most popular services to access and/or share recorded music. These technologies are also the most easily accessible and legitimate alternative to unauthorised music that is still made available via platforms and file-sharing protocols that enable direct exchanges among users without requiring storage of infringing works on any servers.[6]

2.1. Online platforms

The value of online platforms is incorporated in their design. Platforms entail hardware architecture and software giving different categories of users the possibility of communicating, interacting, exchanging and finding information and services. Platforms rely on powerful network effects: the higher the number of their users, the more useful (and lucrative) a platform is.[7] These effects are also cross-sided because platforms, in reorganising economic relations, give rise to two-sided or multi-sided interactions among different categories of users.

[6] In assessing liability of peer-to-peer platform operators in the early Internet age, the Court of Appeals for the 9th Circuit and the US Supreme Court found Napster and Grokster, two popular providers of file-sharing software, indirectly liable of copyright infringement, even though these companies did not store infringing materials on their servers. Napster was found to have given its users the means to infringe copyright while having specific knowledge of such infringements: see *A&M Records* v *Napster*, 239 F.3d 1004 (9th Cir. 2004). Grokster, instead, was found to have induced or encouraged direct infringement by advertising infringing uses of its technology or giving instructions on how to infringe, even though it could not be aware, from a technical point of view, of the infringing activities. *See MGM Studios* v *Grokster*, 545 US 913 (2005).
[7] See Poell, Nieborg and van Dijck (2019), 'Platformisation', *Internet Policy Review*, Vol. 8(4), available at https://policyreview.info/concepts/platformisation, whose literature review details the main features of platforms and explain their economic and business implications.

In the specific case of online music, platforms function as intermediaries between music listeners and music creators (i.e. composers, performers and record producers). This means that the higher is the number of listeners on YouTube or Spotify, the more appealing and useful these platforms become for music creators, and the other way around.

A distinctive feature of platforms is their ability to exploit not only network effects, but also their users' preferences and attention. Platforms rely on development of data infrastructures, whose information derives from users' behaviour. These environments are structurally designed to collect and store personal data through their websites and a growing number of interfaces (apps, plugins, sensors, trackers) and devices (e.g., smartphones, smartwatches). Whenever a user pays for a product or opts for one of their service features, this interaction produces valuable information for a platform operator. Because of their extensive knowledge of users' preferences, platforms can sell and earn revenues from online advertisers wishing to reach specific categories of users, knowing their preferences on the grounds of their behaviour on the platform. A music platform that enables advertisers to target listeners becomes a multi-sided market, by connecting listeners, music creators and advertisers, causing even stronger network effects and generating additional income that a platform can use in order to remunerate (somehow) content creators.[8]

2.2. Legal infrastructure

From a legal point of view, on-demand content services are very different from social media (or "content-sharing" services). On-demand services such as iTunes, Spotify and Deezer act as intermediaries between traditional creative industries and consumers. All music works and records they make available are licensed *ex ante* and their use is remunerated through fees each platform negotiates with content producers and/or authors' collecting societies. These platforms work either as retailers of permanent digital copies or as subscription-based radio services, giving access to large repertoires of recorded music.

[8] *Ibidem*.

To the contrary, user-generated content platforms such as YouTube and Vimeo, Facebook and other dedicated music services like Soundcloud are open to all kinds of music creators and uploaders, insofar as each of them accepts a platform's Terms of Service. These platforms allow each of their users to create a public or semi-public profile and publication and exchange of information among other users.[9] Unlike on-demand digital music suppliers, broadcasters and radios, social media enable their users to gain access to both professionally produced and unprofessional content. Given that each account holder on social media is technically free to upload whatever kind of content he or she wants, these platforms have ended up storing and making available to the public all sorts of pre-existing or newly created contents, some of which are carefully produced or selected and curated by professional users-creators and some of which are clearly amateurs' output.

From a copyright-related point of view, social media users are requested to grant each platform a global, free and perpetual licence covering uploaded materials under contractual conditions (i.e. Terms of Service) that apply to standard user accounts. Moreover, Terms of Service contractually prevent users from sharing unauthorised works whose copyright belongs to third parties. In spite of that, from the beginning of the Web 2.0 era, social media have been reluctant to monitor the content their users upload and to enforce their own terms of service. At least until recently, the principle of platform neutrality and the idea, justified by the need to defend the Internet neutral design, not to oblige online intermediaries to monitor traffic end-users delivered or received through their networks justified such conduct.

2.3. Platform neutrality and a different scope of intermediary liability exemptions

The development of interactive services and the rise of social media occurred at a time when, in both the European Union and the United States, the law sought to foster development and growth of online communication infrastructure. To that end, US and EU statutes granted liability exemptions in favour of providers of web hosting services.[10]

[9] See Boyd and Ellison (2007), 'Social Network Sites: Definition, History, and Scholarship', *Journal of Computer-Mediated Communication*, Vol. 13(1), p. 210.

[10] See, respectively, US Digital Millennium Copyright Act (DMCA) signed into law by President Clinton on 28 October 1998, which amended the U.S. Copyright Act (see US Code, Title 17); and Directive 2000/31/EC

With the rise of online platforms, at least in the US, these "safe harbour" provisions have progressively been applied in favour of user-generated content services. Under these provisions, platforms are liable for copyright infringement of unauthorized works uploaded by their users to the extent that they fail to take infringing content down, in response to right-holders' notices.

In the US, the 1998 Digital Millennium Copyright Act and its safe harbour provisions have a broader application that encompasses and covers almost any Internet entities.[11] US courts recently held that video-sharing platforms such as YouTube and Vimeo can seek safe harbour protections when they prove absence of knowledge or awareness of facts or circumstances from which infringing activity is apparent (so-called "red flag" knowledge). This approach is motivated by the intent to protect Internet service providers from the expense of monitoring user uploads, which was a specific concern of the US Congress when designing the safe harbour provisions.[12] This liability principle eventually allowed the US-based social media industry to emerge and to scale up in the last fifteen years, placing the burden of policing online platforms on copyright holders and their antipiracy bodies (i.e., via "notice-and-takedown" mechanisms).[13]

In the EU, instead, also because of the lack of a federal (i.e. EU-wide) law on indirect copyright infringement, things were more uncertain, and courts were more reluctant to grant immunity to social media. The EU Court of Justice stressed and clarified that a liability exemption is applicable to online platforms insofar as a platform confines

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of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000, 1.

[11] See Ginsburg and Budiardjo (2018), 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives', 41 *Columbia Journal of Law and the Arts*, 153, p. 207 ss.

[12] See *Viacom* v *YouTube*, 676 F.3d 19, 39 (2d Cir. 2012) and *Capitol Records* v *Vimeo*, 826 F.3d 78 (2d Cir. 2016).

[13] Another legal aspect that greatly facilitated the growth of a social media industry in the US, and as a consequence in the rest of the world, is the so-called "server rule", based on an influential judgment of the Court of Appeals for the 9th Circuit in *Perfect 10* v *Amazon*, 508 F.3d 1146, 1159 (9th Cir. 2007). This rule exempts hyperlinks of any kind, which are essential for the functioning of social networks (i.e., simple linking, deep linking, framing, etc) from direct copyright liability in so far as the service provider does not store and serve a copy of the copyright work to which the link points. The 9th Circuit could reach this conclusion also in light of the absence, under US law, of an express authors' right of "making available" or "communication to the public". For a critical analysis of this rule and of its implications for creators, see Ginsburg and Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content', cit., p. 177 ss. These authors believe that this exemption from copyright liability derives from a misinterpretation of the statutory right to display or perform a work publicly by transmission or other means of communication, granted under Sect. 106 of the US Copyright Act.

itself to providing a hosting service *neutrally*, by a merely technical and automatic processing of the (potentially infringing) contents uploaded by its customers.[14]

This means that the exemption should not apply when an online intermediary plays an *active role* that entails knowledge of (or control over) such content. The CJEU found that this was eBay's role in supplying assistance and optimising presentations of the customers' sale offers or promotion of these offers. In the domain of social media, this should have meant that service providers could not have escaped copyright liability if they optimised the presentation of the uploaded works or promoted them, as is customary for platforms in the age of algorithms and machine learning. Nonetheless, national case law evidenced a lack of uniformity in the understanding of YouTube's activities. For instance, in Germany and France, courts found that, while YouTube presented itself as an alternative to Spotify and similar services, it did *not* carry out an act of communication to the public (even though it did optimise and promote its users' videos).[15]

At least for a full decade, intended or unintended online platform neutrality shielded social media companies from copyright infringement claims. This immunity was economically harmful especially for content creators who had little or no resources to monitor user uploads and to ask for removal of their unauthorised works. Notice-and-takedown procedures have been mostly beneficial, in the realm of social media, to music industry majors and their anti-piracy bodies, in which the industry invested significant amounts of money. Moreover, standard Terms of Service that users are normally requested to accept, at the time they create their accounts, grant platform providers such as Facebook or Instagram a global, free and perpetual licence to exploit all user-authored contents across the platform, on a territorially unrestricted basis. This means that social media services impose by default a condition of *gratuity* of use on authors of available content. Acceptance of a platform's (non-negotiable) terms and conditions make content creators instantaneously lose their opportunities to be remunerated across platforms, unless the service provider allows the account holder to become a platform partner and to monetize their successful content.

[14] See C-324/09, *L'Oreal and Others* v *eBay International AG and Others* (2011), par. 116-124.
[15] See the *GEMA* v *YouTube* cases in Germany (Higher Regional Court Hamburg, July 2015; Higher Regional Court Munich, January 2016); see also *Kare Productions* v *YouTube*, settled by Court of Paris (January 2015), which reached a similar conclusion.

Whereas the United States still relies on the safe harbour provisions embodied in the 1998 Digital Millennium Copyright Act, the European Union recently adopted a copyright directive that clarifies the standard of copyright liability applicable to social media by excluding the application of the exemptions embodied into the 2000 e-Commerce Directive. Directive 2019/790 seeks to protect the commercial value of copyright works - in particular recorded music - by making these service providers directly liable for works their users make available.[16] The main intent of Article 17 of this directive is to ensure EU-wide uniformity in understanding whether and how social media platforms are liable of copyright infringement. In affirming this principle, the directive obliges social media companies to obtain licenses and to implement content identification technologies that can either restrict access to unauthorized works or help copyright holders to be remunerated for online exploitations of their works.

3. Collective or individual copyright management?

Music digitisation and the aggregation of large repertoires require increasingly well-developed solutions based on sophisticated forms of music copyright licensing. Historically, in mass media environments, copyright law has been able to pursue its main function to financially reward music composers mainly through contractual mechanisms of collective rights management. Individual authors would not be in a position to practically exercise and exploit their rights if they were not represented - nationally and internationally - by societies and other entities able to license rights in their works, in aggregated ways, to commercial users.

What is the role of collective management of music rights in the online platforms environment? Do creators still rely on it or, instead, it is losing appeal? How are composers, performing artists and record producers exercising their rights in reproduction and communication of their works to the public against large-scale online content aggregators? Is there room for collective management and for individual licensing, in this media environment?

[16] Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/6/EC and 2001/29/EC, OJ L130, 17.5.2019 (hereinafter "2019 Copyright Directive").

3.1. Collective management in the online platform environment

Collective management in the music sector has existed for more than a century and was developed internationally as a viable solution to enable radio and TV broadcasters to use large amounts of musical compositions while clearing the rights of music creators. Traditionally, collecting societies worked as unions, helping composers solve conflicts arising with their music publishers and preserving the bargaining power of individual composers.[17]

One of the historically most significant achievements of collecting societies in the music sector has been that of allowing authors, through collective bargaining, to keep and co-own with publishers, on a fifty-fifty per cent basis, the rights these societies administer. This means that — unlike music performers — music authors, because of their membership in collective organizations that manage their rights on the grounds of a mandate, have never transferred their rights to music publishers in their entirety. This deal has clearly protected their right to fair remuneration and allowed composers to earn more, sharing commercial risks with their publishers.

Although so much has changed in technology and communications in the past century, collective management of rights in the music sector is still based on an old-fashioned subdivision of trade in two separate categories:

(i) Mechanical (or reproduction) rights cover production and distribution of physical formats embodying musical compositions (for instance compact discs);

(ii) Performing rights are a much broader category targeting concerts and other public performances of a copyright work as well as transmissions via TV and radio broadcasts.

In spite of the blurred distinction between copying and transmission of works over the Internet, collecting societies have maintained and relied upon this distinction in order to license their members' rights. Mechanical and public performance rights have been

[17] Mazziotti (2011), 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management', 34 *Columbia Journal of Law and the Arts*, 757, p. 773.

transposed and applied to online uses to cover, to a different extent, both download and streaming services.

To better understand today's licensing strategies of different types of music right-holders, it is important to bear in mind that author societies in Anglo-American jurisdictions — unlike their continental-European sister societies — emerged and historically developed for the sole management of performing rights. In the UK and the US, for instance, music publishers have historically been the sole proprietors of mechanical rights through their own trade organisations, after having acquired them from the authors. In continental Europe, instead, authors and music publishers usually co-own the same rights under the shield of their respective collecting societies.[18]

As a general rule ultimately justified by copyright's principle of territoriality, especially in the pre-digital era, these bodies have operated on a strictly national basis. This means that, in the vast majority of countries, authors' societies are *de facto* or legal monopolies that cooperate with each other through mutual representation agreements, with the purpose to cover the entire global music repertoire.

Given the long-term, *de facto* exemption from copyright liability of social media, collective rights management ended up developing mostly in the realm of on-demand music stores and streaming services. These services are comparable to pre-existing mass media environments, like traditional broadcasting. Platforms such as Spotify, Pandora, Deezer and Apple Music give access only to professional and mainstream musical content, having a minimum of commercial appeal. These service providers carefully select music and clear the related rights through agreements negotiated and concluded with authors' and publishers' collecting societies and/or licensing bodies representing specific right-holders and repertoires. In this environment, therefore, collective management still performs its traditional tasks in giving commercial users of digital music the possibility of clearing rights in large repertoires of musical compositions through a relatively small number of transactions concluded with professional rights managers.

In the social media industry, instead, the room for collective management has been much smaller, at least at the beginning of this industry. Initially, user-generated content platforms offered scale and technological affordance to all sorts of users, without

[18] *Ibidem*, p. 773-775.

distinguishing between professional and amateur creators. From the outset, platforms like YouTube have given access to both user-generated and professional content, creating also a civic space for citizens to use it mostly for non-commercial ends.

As the first mover in this industry in 2005, YouTube played a key role in the evolution of the social media industry.[19] After its acquisition by Google in 2007, this start-up founded by former PayPal employees scaled up and became the largest user-generated content platform in the world. In doing so, YouTube developed technologies, business models and partnerships that are now essential elements of all the largest online platforms: online analytics, content identification systems and splits of advertising revenue.

Social media could start and grow because, especially under US law, tech companies could rely on liability exemptions granted to web hosting services. Considering this advantage and the role platform neutrality played for a decade, companies like Google and Facebook (as well as start-ups they acquired over the years, such as YouTube and Instagram) achieved media globalization without having to clear *ex ante* rights in works uploaded by their users. Services such as YouTube, Vimeo, Daily Motion, Facebook, Instagram and Soundcloud were genuinely born global also in light of their immunity from a territorially fragmented system of copyright licensing and enforcement.[20]

The global reach of social media and their multi-territorial distribution of music were at odds with a business – i.e., collective rights management – that has traditionally been fragmented from a territorial perspective. Moreover, a coexistence of commercial and non-commercial content, which is typical of the social media landscape, made it more difficult for copyright holders and service providers to identify and commercially evaluate large amounts of content being uploaded on such platforms every day.

YouTube's expansion and a progressive refinement of its infrastructure and of its proprietary 'Content ID' became relevant for the whole social media landscape. On the one hand, this infrastructure and the ability to differentiate treatment of different kinds of content placed this platform in a position to start clearing rights in professional music

[19] See Cunningham and Craig (2019), *Social Media Entertainment – The New Intersection of Hollywood and Silicon Valley*, New York University Press, New York, p. 41.
[20] See Cunningham and Craig (2019), *Social Media Entertainment*, cit., p. 15, where the authors emphasize that social media entertainment is largely born global because its content is not primarily based on intellectual property control (as it is, instead, in the film and TV broadcasting sectors).

works through agreements concluded with traditional collecting societies. On the other hand, 'Content ID' and online analytics enabled YouTube to launch partnerships directly with new generations of content creators and to transform the company into a gigantic, worldwide talent scouting agency and producer of original content.[21]

3.2. Room for individual licensing

In the pre-digital era of the music business, individual licensing was mostly confined to the realm of record producers' rights. Societies of record producers traditionally played a limited role in exercising rights the law grants them. They mostly joined forces to negotiate and collect revenues in those sectors - such as radio and TV broadcasting and private copying of sound recordings - where they hold mere rights to remuneration.

A legitimate supply of digital music services presupposes that content suppliers clear both authors' (and publishers') rights in musical compositions and record labels' rights in sound recordings. Being the exploitation of sound recordings the core business of online music services, the related licensing fees are normally much higher than the fees for musical compositions licences. Traditionally, record producers also own music performers' rights after buying them from performers at the time of a record production. Producers are consequently in a position to license all these rights to online platforms on an individual basis.

Direct licensing of rights in sound recordings is relatively easy for the three music industry majors (Universal, Sony and Warner), which have internal expertise and resources to handle licensing activities on their own. Thousands of small- or medium-sized record producers, instead, have to resort to professional intermediaries and rights aggregators such as the Amsterdam-based Merlin agency.[22]

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[21] In YouTube's ecosystem, the platform obtains an individual licence directly from content creators, initially through acceptance of the platform's Terms of Service. As soon as a content creator's audience grows and meets certain requirements, YouTube allows creators to enter into partnership agreements. These agreements enable monetisation of content exploitation based on a split of advertising revenue between each creator of original content (55%) and YouTube (45%): see Cunningham and Craig, *Social Media Entertainment*, op. cit., p. 46. Interestingly, as these authors remark, revenue splits have shifted from a high of 70/30 granted to YouTube's premium creators to an ordinary split of 55/45.

[22] Founded in 2007, MERLIN (Music and Entertainment Rights Licensing Independent Network) is the largest digital rights agency for independent record labels: http://merlinnetwork.org.

The rise of online platforms and technologies, which perform data analytics and content identification, has strongly encouraged the largest players, in an increasingly concentrated music sector, to individualize their management of both their publishing and recording rights. Liberalisation in the relationship between music right-holders and collecting societies triggered a process of customisation or individualisation in online music rights management (see Sect. 5.2. *infra*).

The music industry majors have sought to progressively abandon, at least in the EU digital market, traditional collective management schemes. Such vertically-integrated major right-holders sought to skip the intermediation of authors' collecting societies in order to be able to package all necessary rights in their music repertoires and sound recordings in order to directly license them to commercial users through their own licensing agents, under autonomous licensing conditions.

For different reasons, composers and performing artists are also increasingly opting for an individualised approach to licensing of their rights. In the domain of on-demand music services, a non-negligible number of professional composers and performers of their own music produce their own records and, as a result, hold all rights they need to grant licences to each platform, earning all the remuneration a platform allocates to content creators (see Section 4.1 *infra*). On social media platforms, this happens because artists seek mostly exposure and find convenient to directly licence their works to YouTube, which increasingly operates as a 'publisher' and producer of original music and records (see Sect. 4.2 *infra*).

4. Effect of content platformisation on digital music markets

How do online platforms impact on success and remuneration of different kinds of music creators? This section seeks to explain why content platformisation has triggered a harsh debate on a so-called 'value gap' between on-demand services (Sect 4.1.) and social media (Sect. 4.2.).[23]

[23] In a letter addressed to the former European Commission's President, Jean-Claude Juncker, signed in June 2016 by more than 1000 artists and songwriters from across Europe (or who regularly perform in Europe) claimed that the future of music was jeopardized by a substantial "value gap" caused by user-upload

4.1. On-demand music services

On-demand content services act as intermediaries between traditional creative industries and consumers.[24] In these settings, all works are licensed *ex ante* and their use is remunerated through fees music right-holders negotiate with each service provider.

As observed in the economic literature, composers and performers work in a scalable and very unequal environment where very few superstars have a disproportionately high share of the market, while the majority of artists earn below the average income of professionals with an equivalent level of education.[25] The algorithm-based functioning of digital music platforms exacerbates pre-existing inequalities in exposure, success and distribution of music works and disparities in income related to different genre and repertoires. In larger and larger digital markets for creative works, a "winner-takes-all" nature of success induces scalability, combined with self-reinforcing trends deriving from platforms' designs and network effects.[26]

Even though the remuneration these services pay to a given licensor and to a group of right-holders can be identified, it is hard to assess how much creators earn concretely. This is because copyright licences normally contain non-disclosure clauses that allow service suppliers to keep this information secret (see Sect. 6.1. *infra*). This situation of opacity is even worse for musical compositions, for which online services negotiate fees and conclude agreements with collecting societies that manage the rights of thousands of

services, like Google's YouTube, that were taking value away from artists and songwriters: see Standeford (2016), 'European Music Industry Presses Brussels to Solve "Value Gap" from User Uploads', *IP Watch*, 30 June 2016, available at: http://ip-watch.org.

[24] See Renda, Simonelli, Mazziotti, Bolognini and Luchetta (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, Centre for European Policy Studies (CEPS), p. 116 ss.

[25] See, for instance, Towse (2018), 'Copyright Reversion in the Creative Industries: Economics and Fair Remuneration', 41 *Columbia Journal of Law and the Arts*, 467, p. 474-475. This author explains that this is the consequence of an excess of supply of labour, with the majority of artists being unable to find the type of work they had hoped to do after many years of studying. She also recalls that only a portion of artists' income comes from "arts" work, the rest coming from occupations that are both arts-related (e.g. teaching) and arts-unrelated.

[26] See Renda, Simonelli, Mazziotti, Bolognini and Luchetta, cit., p. 119 ss., who refer to a so-called 'Power Law' described by Taleb (2007), *The Black Swan: The Impact of the Highly Improbable*, Random House, New York. This 'Law' predicates that in the digital environment authors will be a population with "a very small number of giants and a huge number of dwarves', due to scalability, self-reinforcing trends and global viral phenomena arising at any point on the global market. These authors also stress how Anderson's 'Long Tails' mitigate the effects of the Power Law: see Anderson (2006), *The Long Tail: Why the Future of Business is Selling Less of More*, Hyperion Books, New York, who emphasized how small niche repertoires, which would not have been profitable in the brick-and-mortar economy, can thrive and survive in the digital world.

composers and lyricists in millions of works. The fact is that, at least at the beginning of the Web 2.0. era, these bodies could not guarantee a fine-grained allocation of revenues based on efficient and transparent use of their repertoire information.

Sometimes right-holders break contractual secrecy or, more simply, information on their platform earnings is publicly revealed by the press. When this happens figures show that platforms generate low remuneration for music right-holders. This situation penalises mostly authors and owners of niche and small repertoires. However, even music stars whose works reach dozens of millions of streams or viewings are reported to have been underpaid. For instance, in an article published by the Guardian in 2013, David Byrne disclosed that, for the biggest hit of that season ("Get lucky"), the two co-authors and members of French band Daft Punk earned approximately 13000 USD each, as a result of 104.760.000 Spotify streams.[27]

Although on-demand services pay licensing fees that, on average, are ten times higher than fees paid by social media (see Sect. 4.2.), the remuneration these services pay to artists is proportionately very low. The example of composer and cellist Zoe Keating is very useful to have an idea about the levels of artist remuneration in this industry.[28] Keating is an excellent example of musical independence because she is – simultaneously – the (only) composer, performer and producer of her own music. Being free from record labels, she can license all rights and earn all royalties in her works and recordings. To do so, she only relies on a distributor, who makes her works available to all music services and charges a commission on her royalties.

From January to September 2019 Keating's music was streamed approximately 2 million times on Spotify; 617.800 times on Pandora; and 495.500 times on Apple Music.[29] Pandora and Spotify were among the music services that paid her the lowest remuneration rates: Spotify's per-stream royalty amounted to USD 0,003; Pandora's was USD 0,002. Other services paid higher royalties: for instance, Apple's per-stream

[27] See Byrne (2013), 'The internet will suck all creative content out of the world', *The Guardian*, 11 October 2013, available at https://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world.
[28] Keating is well-known in the music industry for releasing her annual royalties from major music services. She directly disclosed this data to Business Insider on an exclusive basis. See Meyers, 'A music artist breaks down exactly how much money Spotify, Apple Music, Pandora and more paid her in 2019', *Business Insider*, 9 January 2020: see http://businessinsider.com. Keating's website is accessible at http://zoekeating.com.
[29] Meyers, 'A music artist breaks down exactly how much money Spotify, Apple Music, Pandora and more paid her in 2019', cit.

payment amounted to USD 0,012.[30] As a result of these pay-outs, in the first nine months of 2019 Keating earned approximately USD 759,34 per month from Spotify; USD 642,16 per month from Apple Music; and USD 137,28 per month from Pandora.

4.2. Social media

Social media are not like an online store or a commercial service where consumers pay a fee to access content. Rather, their business model (much like Facebook's) looks like that of traditional broadcasters, where money comes from advertisers willing to pay for consumer attention. However, unlike free-to-air broadcasters, platforms such as YouTube or Facebook have neither content platform editorial responsibility nor an institutional mission to inform, educate and entertain. The fact that users create or choose all uploaded contents makes it simply impossible for algorithm-based platforms to guarantee diversity of accessible works. What these services care about, as an indispensable element of their user attention markets, is to host appealing content that allows them to keep their users active on their platforms in order to collect and process their data and to target them with personalised advertisements.

Although this industry has existed for more than a decade, social media developed in the absence of clear and internationally accepted norms on copyright liability. With the remarkable exception of YouTube and its 'Content ID' and partnership programs, user-generated content platforms were able to initially disregard copyright and ended up building media environments where creative works were shared and exploited for free, with no remuneration for content creators.

Meanwhile, YouTube's expansion and significant improvement in terms of content licensing policies and algorithmic copyright enforcement shows how social media services have evolved. In light of this evolution, EU lawmakers recently adopted a complex provision which obliges the EU Member States to make sure that content-sharing services such as YouTube, Facebook and Instagram implement best practices - developed under the ongoing supervision of the EU Commission - in order to ensure copyright enforcement across their platforms (see Sect. 6.2. *infra*).[31]

[30] *Ibidem*.
[31] See 2019 Copyright Directive, Article 17.

Directive 2019/790, as a whole, aims at ensuring a better functioning of digital content markets and a more transparent and fair remuneration for content creators on social media. To this end, its Article 17 obliges EU Member States to make sure these platforms obtain licences for works their users make available to the public. The same provision requires social media to implement technologies that ensure that these licensing agreements enable monetization and control over digital content. Moreover, the directive codifies principles of transparency and fair remuneration that authors and performers, as well as their collective organisations, are expected to benefit from in their bargaining with these service providers.[32]

It is unclear, however, whether a tighter and generalised implementation of content identification standards (or "filters") and repertoire databases, in response to the provisions adopted in Europe in 2019, might result in higher income for music composers and record producers. Software and licensing mechanisms, such as those underlying the functioning of YouTube's Content ID or Audible Magic's technologies, might eventually encourage a non-negligible portion of music right-holders - especially those whose works originate from online platforms (and not from legacy content media) - to opt for monetization solutions based on direct, individual licensing that openly contradict the logic and purposes of collective management.

Media and communication scholars explained how, in these new revenue-sharing businesses, amateur creators can grow inside of YouTube's platform to become "professionalizing amateurs".[33] This new category of content creators acts solely as YouTube's or other social media partners, relying often on platform-affiliated firms that, after YouTube's launch of its creator partnerships and programmatic advertising in 2006, started signing creators for the purpose of maximising value from their content and communities.[34] These creators agree with each platform owner – directly or through their managers – on a split of advertising-based revenues generated by community development and network effects.

Recent studies showed that, by the end of 2017, revenue-sharing businesses enabled more than 3 million YouTube partner creators to receive some form of

[32] See Art 18 to 23.
[33] See Cunningham and Craig, *Social Media Entertainment*, op. cit., p. 11-14.
[34] Cunningham and Craig, *Social Media Entertainment*, cit., p. 115 ss.

remuneration from their uploaded content, worldwide.[35] Given that YouTube treats royalties paid to content creators as sensitive information subject to confidentiality (see Sect. 6.1. *infra*), the only way to know (at least approximately) how much the company is paying to creators of original works is that of interviewing authors, agents, collecting societies and their respective lawyers.[36] An investigation of this kind revealed that YouTube's advertisement-based royalties are in the range of USD 80 to 100 per million of viewings. This amounts to a per-stream average fee ranging from USD 0,00008 to 0,00011, which is approximately ten times lower than the per-stream fees Zoe Keating earned from services like Spotify, Pandora and Apple Music.

These figures show that, at least under default contractual conditions, the main reason why creators publish their work on a platform like YouTube is to acquire and enhance online exposure, and not remuneration. This does not mean that ads-based revenue of original works might not be *per se* very lucrative, as in exceptional cases where YouTube paid out much higher per-stream fees to creators of very successful, viral content.[37]

5. EU regulatory interventions and their consequences

The concern that digitisation might have deprived music right-holders of their ability to license their rights and be compensated for their works materialised when the practice of music file sharing without intermediation rose to prominence. At a time when the Napster and Grokster networks reached their peaks of users, influential academics, in

[35] *Ibidem*, p. 5, where the authors report that, by 2017, the most successful 5000 YouTube channels reached an aggregate amount of 250 billion video viewings and 4000 professionalizing-amateur channels reached at least one million subscribers.

[36] This is a conclusion reached on the basis of interviews the Author conducted in Europe and in the US in 2019. Interviewees included individual artists, representatives of collecting societies (ASCAP, CISAC, GESAC, SIAE), tech companies (Google, YouTube), digital music services (Deezer), attorneys specialising in copyright in France, Belgium, Italy and USA, academics and governments (US Copyright Office, Canadian Heritage, EU Commission, French Ministry of Culture).

[37] See, for instance, the case of one of the most-watched YouTube videos ever ("Gangnam Style"), created by popstar Psy. At least until January 2013, this video gathered 1.23 billion viewings, generating on average 0.65 cents each time a user streamed the video (for a total of USD 8 million revenue, a half of which was paid to the content creator): see Mims, 'Google: Psy's 'Gangnam Style' Has Earned $8 Million on YouTube Alone', *Business Insider*, 23 January 2013, available at https://www.businessinsider.com/google-psys-gangnam-style-has-earned-8-million-on-youtube-alone-2013-1?IR=T.

slightly different ways, proposed legalization of this form of content distribution.[38]

The main idea was that allowing non-commercial sharing of online works against payments made through Internet access providers would have ensured remuneration for creators without hindering peer-to-peer communications. To measure user demand and ensure remuneration proportionate to effective use of these works, scholars proposed either registration of copyright works with a government agency (and a subsequent incorporation of fingerprints into content files) and/or periodic surveys and inquiries aimed at metering uses of registered works. Other scholars objected to this idea that such a broad statutory licensing scheme would have discouraged formation of new markets and the emergence of innovative services based on exclusive rights and customised licenses.[39]

When online music stores and content platforms started creating environments where new markets and services could form and grow, EU regulatory interventions sought to improve the functioning of digital markets and licensing solutions by *(i)* modernising collective rights management (Sect. 5.1.); *(ii)* encouraging customised forms of music licensing and creation of new licensing entities (Sect. 5.2.); *(iii)* reforming the corporate governance of collecting societies (Sect. 5.3); and *(iv)* codifying principles of transparency and fair remuneration for individual authors and performers (Sect. 5.4.).

5.1. Modernisation of collective rights management in Europe

When file sharing and piracy dramatically affected the music industry, and legitimate music services were still struggling to emerge, authors' collecting societies were still unprepared and slow in launching their own licensing solutions for online uses. The European Union started pursuing the goal of ensuring a more effective, modern and responsive system of collective management while attempting to remove barriers in cross-border digital trade entailing the licensing of copyright.

A 2005 Recommendation of the European Commission was a turning point in the

[38] See Netanel (2003), 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing', 17(1) *Harvard Journal of Law and Technology*, 1; and Fisher (2004), *Promises to Keep. Technology, Law and the Future of Entertainment*, Stanford University Press, Stanford.
[39] See, for instance, Merges, 'Compulsory Licensing vs. the Three "Golden Oldies"', (508) *Policy Analysis*, 15 January 2004, available at: http://www.cato.org.

history of collective rights management in Europe.[40] The main attempt of this soft law instrument was to trigger a radical change in existing copyright licensing structures in the digital music sector. The recommendation set out best practices to enhance efficiency and transparency of these bodies and encourage them to provide better services to their members and to potential exploiters. These practices concerned crucial aspects such as equitable royalty collection and distribution without discrimination on the grounds of residence, nationality or category of the right-holders; increased collective rights managers' accountability; fair right-holders' representation in the organization's internal decision-making; and effective dispute resolution procedures.

At the same time, the European Commission sought to foster efficiency of collecting societies by removing (or at least reducing) territorial restrictions arising from mutual representation agreements concluded among collecting societies established in the European Economic Area (EEA). Under those agreements, collecting societies traditionally administer, along with their own national repertoires, repertoires of affiliated, foreign societies in their own countries of establishment and operation. In 2005 the Commission argued that mutual representation agreements in the EEA were contrary to the logic of the EU Single Market in so far as they obliged collective rights managers not to license their repertoires outside of their territory of origin and activity. Moreover, that situation ended up preventing collecting societies and new entities from modernizing their licensing solutions at a time when online content piracy was still rampant.

The Commission ultimately recommended the implementation of multi-territorial licences that would have better reflected the borderless character of online uses within the EU. A multi-territorial approach to licensing of music rights, according to the Commission, would have softened transaction costs for commercial users of digital music by reducing the number of agreements these services needed in order to operate on an EU-wide basis.

The Commission's plan to liberalize collective rights management became even more effective after a controversial antitrust decision (the so-called 2008 "CISAC decision") issued against the international umbrella association of collecting societies and

[40] Commission Recommendation of 18 October 2005, Official Journal L 276, 21.10.2005, 54.

all the EEA members of this association.[41] The Commission found that their agreements had unlawfully restricted authors (composers and lyricists) from entrusting their rights to a society established outside of their country of residence. Moreover, the EEA collecting societies were found to have formed a cartel in order to territorially delineate their licensing of online rights along national borders, with a subsequent exclusion of multi-territorial licenses from the market. An appeal brought by almost all of the EEA collecting societies before the EU courts is still pending. So far, in its first instance judicial review of the CISAC decision, the General Court found that the Commission did not prove the existence of a cartel imposing national partitions of online music licensing solutions.[42]

5.2. From collective to customised music licensing

Irrespectively of the outcome of appeals against the CISAC decision, the aforementioned EU Commission measures had the effect of triggering a significant restructuring in the domain of rights management organisations and fostering the implementation of multi-territorial licensing. As a result of a phase of restructuring, which is still in flux, the landscape of online music licensing in Europe has inevitably changed.

Several categories of licensors and models of rights management have emerged and consolidated. A complex scenario evidences a phenomenon of disintegration of former unity of music repertoires that traditional collecting societies guaranteed, through reciprocal representation agreements, on a strict country-by-country basis.

A principle of multi-territorial licensing of single (although potentially vast) music repertoires and catalogues has progressively replaced the aforementioned unity. Different organisations - which include traditional collecting societies, joint ventures, independent agencies and technology providers – manage distinct repertoires or catalogues on a EU-wide basis. The business purpose of these old and new licensing entities is that of gathering (or at least facilitating the bundling of) all mechanical and performing rights that subsist and need to be cleared in a specific music repertoire for this repertoire to be licensed to online platforms and generate revenues for the related right-holders.

[41] European Commission: Decision of 16.07.2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC).
[42] T-442/08 *CISAC & EBU* v *European Commission* (2013).

Categories of online music licensors in the current European landscape can be described as follows:

- Traditional collecting societies, which established their own hubs, grant multi-territorial licenses in their own aggregated national repertoires. Hubs of this kind such as ICE,[43] Armonia[44] and the Nordisk Copyright Bureau[45] clearly perform a joint licensing function. These societies clear rights in aggregated musical repertoires at regional level that no longer include the repertoires of Anglo-American music publishers.
- Several collecting societies established subsidiaries or exclusive partnerships to grant multi-territorial licenses for selected repertoires of major publishers, who have withdrawn their repertoires from aggregated repertoires. For instance, Solar Music was created to administer the combined Anglo-American catalogues of Sony and EMI Publishing for online and mobile licensing.[46] Germany-based Aresa GmbH is a wholly owned subsidiary of GEMA representing the mechanical rights in the Anglo-American repertoire of BMG Rights Management for online and mobile distribution across the EU.[47] SACEM (France) became Universal Music's digital licensing partner for Europe.
- Independent licensing entities, such as AMRA, represent both single publishers and music composers on a global basis, specializing in digital services.[48] For instance, AMRA relies on Kobalt's rights management platform to collect and

[43] Founded in 2010, ICE is a non-for-profit joint venture between PRS (United Kingdom), STIM (Sweden) and GEMA (Germany). ICE's aggregated music repertoire is the largest in Europe: see http://iceservices.com.
[44] Armonia is a joint venture offering a single licence for a 13-million musical works repertoire in more than 30 countries. Its members are SACEM (France), SACEM Luxembourg, SIAE (Italy), SGAE (Spain), SPA (Portugal), SABAM (Belgium), ARTISJUS (Hungary), AUSTROMECHANA (Austria) and SUISA (Switzerland): see http://armoniaonline.com.
[45] The members of the Nordisk Copyright Bureau (NCB) are the performing rights societies from the Nordic countries: KODA (Denmark), STIM (Sweden), TONO (Norway), TEOSTO (Finland) and STEF (Iceland). NCB owns 50% of Network of Music Partners (NMP), a joint venture created by NCB and PRS (UK), which offers back office services to the music copyright organisation industry: see http://ncb.dk.
[46] See Solar Music CELAS: http://celas.eu.
[47] See http://aresa-music.com.
[48] See http://amra.com.

process billions of micro-transactions, providing transparent and accurate reporting services to the copyright holders it represents.[49]

The fact that today's online music licensing is mostly repertoire-based, and that licensors are often not in a position to clear full packages of rights through single transactions, end up fragmenting representation of music right-holders across the EU. Fragmentation of repertoires also makes it difficult for online music services to identify and locate *all* relevant right-holders.

Fifteen years after the 2005 Commission Recommendation, we still do not know whether the EU regulatory interventions (which include a 2014 directive: see §5.3. *infra*) eventually reduced the sheer number of deals music service providers have to close in order offer their services across the whole EU.[50] It is still unclear how repertoire-specific music licensing schemes on a multi-territorial basis has influenced diversity of available music content and triggered price discrimination among different repertoires.

5.3. Goals and principles of Directive 2014/26

After years of reluctance to intervene through binding legislative measures in a sector where national governments wanted to preserve their autonomy and cultural policies, in 2014 the EU enacted a directive that incorporates the best practices originally contained in the 2005 Commission Recommendation.[51] The main end of this directive was to establish a common legal framework for collecting societies in Europe.

Consistently with one of the main findings of the 2008 CISAC decision, Directive 2014/26 obliges EU Member States to grant individual right-holders contractual freedom to entrust the management of any of the rights, categories of rights or types of works of their choice, for the territories of their choice, to a collective rights management organization, irrespective of nationality, residence or establishment of either the

[49] See http://kobaltmusic.com.
[50] Ongoing uncertainties and lack of data in this sector are the main reasons why the EU Commission launched a call for tenders to carry out a study on emerging issues in online collective management in June 2019: see http://ec.europa.eu (ref.: SMART 2018/0069). In January 2020 this study was awarded to a team headed by consulting firm Ecorys: http://ecorys.com (news published on 6 January 2020).
[51] Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and on multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, 72.

organization or the right-holder.[52] Moreover, the directive creates a common level playing field for collective rights management organizations in order to enhance their accountability, efficiency and transparency. In doing so, the directive expressly requires Member States to allow independent and for-profit licensing entities to operate as copyright licensors.[53]

In the specific domain of online music services, the 2014 directive intends to strike a balance between two potentially conflicting goals. On the one hand, the directive promotes competition among suppliers of collective rights management services and holders of different music repertoires. On the other hand, it aims at preserving EU-wide access to diverse musical works by facilitating aggregation of different repertoires in repertoire packages licensed to online platforms.[54] In doing so, the directive sets out and imposes high standards of service and technical requirements (e.g., use of time-sensitive and authoritative databases, processing usage reports and invoicing) to all societies and independent licensing entities wishing to issue licences for cross-border digital uses.[55]

Whether or not Directive 2014/26 has effectively achieved (fully or at least in part) its main objectives to simplify and make copyright's collective management EU-wide or multi-territorial remains unclear. Uncertainties persist on the effects of the directive and whether traditional collecting societies and independent licensing agencies ended up ensuring high standards of transparency and fairness towards right-holders and commercial users of digital music.[56]

5.4. Transparency and fair remuneration of individual creators

In May 2019 the EU enacted a significant reform at the intersection of copyright law and web communication policy. One of main goals of this directive is to help legacy content industries, such as the music and news publishing industries, take economic advantage of the exponential diffusion of their contents enabled by online platforms.

[52] See Directive 2014/26, Art 5(2).
[53] Directive 2014/26, Art 3.
[54] Directive 2014/26, Art 29-30.
[55] Art 23-28.
[56] Directorate General 'Connect' of the EU Commission launched a call for tenders to conduct a study (ref.: SMART 2019/0024) to assess the effectiveness of governance and transparency rules imposed on collecting societies and, to a certain extent, independent management entities under Directive 2014/26. The study will be conducted by the end of 2020.

Despite the controversies this directive raised among different stakeholders and internationally, national constituencies persuaded the majority of EU lawmakers that a "value gap" exists between remuneration music right-holders earn from on-demand music services and licensing fees they gain from social media (see Sect. 4.2. *supra*). The majority of the EU decision makers considered that online platforms were taking too much of the value of their cultural industries, with a potentially disruptive effect of their knowledge economy and of cultural diversity, one of the axioms of the EU.

To support cultural creation, Directive 2019/790 introduces new legislation codifying a principle of fair and proportionate remuneration, in particular with regard to online content exploitations.[57] The directive grants authors and performers a subjective right to receive - on a regular basis - timely, accurate, relevant and comprehensive information on modes of exploitation of their works, direct and indirect revenues generated, and remuneration due.[58]

When the directive will be transposed into national laws, authors and performers will be able to enforce this right, also via voluntary dispute resolution procedures, primarily against music publishers, record producers and radio and TV broadcasters, which are their traditional contractual partners. However, their right to obtain data on revenue generated by their works goes beyond that, to include licensees or assignees of their copyright, such as social media platforms and digital music services.[59]

In this new legislative framework, a right to transparency is linked to the exercise of two, newly codified rights, each of which requires significant amendments of national copyright contract laws:

- A right to contractual adjustments, when author or performer remuneration proves to be disproportionately low when compared to subsequent relevant direct or indirect revenues deriving from exploitation.[60]

[57] 2019 Copyright Directive, Art 18 ('Principle of appropriate and proportionate remuneration').
[58] See Art 19 ('Transparency obligation').
[59] See 2019 Copyright Directive, Art 19(2), which provides that authors, performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event their contractual counterparts do not hold the information that would be necessary to make the right to transparency effective.
[60] See Art 20.

> A right to revocation of licences or transfers of copyright where there is an absence of exploitation of the work, having regard to the specificities of different sectors and different types of works and performances.[61]

Harmonisation of these rights at EU level seeks to remedy a situation where individual creators systematically relinquish their online rights, transferring them to content producers. In the music industry, in particular, having codified these rights and having made them compulsory on a EU-wide basis is a clear attempt to help composers and performing artists take advantage of commercial success and online distribution of their works. The newly codified rights, if effectively implemented, are likely to raise a barrier to alienability of copyright interest and the practice of cultural industries to take advantage of freedom of contract and of their bargaining positions and market power to gather as many copyright interests as possible.[62]

The effectiveness of this barrier will have to be tested after transposition of the revocation right into national laws. Under the 2019 Copyright Directive EU member states are free to exclude certain types of works from revocation mechanisms if works usually contain contributions of a plurality of authors or performers and revocation by an individual author or performer would affect the legitimate interests of all right-holders. Given that musical compositions and performances are often the outcome of more than one author or artist, will these works be excluded from revocation rights? Moreover, national transpositions are requested *(i)* to quantify the "reasonable time" after which an author or a performer can request revocation of a licence or a right transfer and *(ii)*

[61] See 2019 Copyright Directive, Art 22. The new EU right is similar to the termination right US law has conferred to authors as of the 1976 reform of the US Copyright Act. Given that the 1976 reform introduced a unitary copyright term - in order to make US law comply with the minimum term of protection required by the Berne Convention (life of the author + fifty years) – Section 203 of the US Copyright Act replaced a pre-existing reversion right with a *termination* right. The main difference is that today's US right is not automatic and requires the author, after thirty-five years from the grant, to properly notify the grantee and to record the notification in the Copyright Office within statutory deadlines. In the absence of such formalities the author loses her termination right. Another relevant difference is that the termination right is enforceable "notwithstanding any agreement to the contrary", whereas the previous right to reversion upon renewal could be overridden through contract by the publisher: see Ginsburg (2018), 'Foreign Author's Enforcement of U.S. Reversion Rights', 41 *Columbia Journal of Law and the Arts*, p. 459, p. 462.
[62] See Macmillan, ''Are You Sure/That We Are Awake?': European Media Policy and Copyright', in Donders, Pauwels and Loisen (eds), *The Palgrave Handbook of European Media Policy*, op. cit., p. 382, at 388.

indicate specific time frames within which the right to revocation can be exercised in different content sectors, including the music industry.

An effective implementation of the aforementioned provisions in the 2019 Copyright Directive will require disclosure of large amounts of data, on a sector-by-sector basis, a significant part of which is currently covered by confidentiality. To spur a transparent and fair allocation of earnings along the music industry value chains, producers and exploiters of copyright works like broadcasters and online platforms will have to take measures whose costs will depend concretely on how authors' and performers' new prerogatives will be transposed under national laws.[63] It has to be seen how these old and new exploiters of professionally created music will handle such an unprecedented regulatory burden. Also unclear is how music right-holders and their individual agencies or collecting societies will process the information they are expected to receive from a much broader media sector, which includes the online platform economy.

6. Obstacles to licensing solutions and possible remedies

In an increasingly complex digital music business, there are still obstacles that make copyright licensing ineffective and inadequate to cope with fast-changing business models. Even though platforms have given music right-holders opportunities to restart earning money from their works - after an early age of no remuneration on the Internet - they still pose basic threats to sustainable markets for music creators and their works and productions.

This section identifies factors that still make online music licensing burdensome, weakening the bargaining power of music creators and reducing transparency of market conditions vis-à-vis online platforms.

[63] For instance, before the adoption of the 2019 Copyright Directive the European Broadcasting Union (EBU) complained that an obligation to systematically inform all authors and performers about use of their works and performances would have raised unprecedented burdens for creative industries, at a time when such industries are already facing significant market disruption: see EBU, *European Parliament Fails to Provide a Realistic Solution on Copyright Contract Law Provisions*, Press release, 20.6.2018.

6.1. Market power, origin and size of the largest online platforms

Business models that have emerged in the last decade via social media and licensed on-demand services have cut off or reduced the power of previous retailers and commercial intermediaries. This trend has changed the value chains of content distribution. A quick transition from bricks-and-mortar markets to online services where subscribers pay to access collections of works (or to freely access large amounts of user-uploaded content) placed online platforms in a unique position to exploit digital content.

Today's largest online platforms are often referred to as "GAFA" (Google, Amazon, Facebook and Apple) or "over-the-top" content suppliers. These are all huge tech companies headquartered in the United States, each of which has a different core business. Each of these companies offers a broad variety of goods and services, through platforms that – because of their market power and ability to know Internet user preferences – and to influence their behaviour - are under increasing scrutiny all over the world.

Tim Wu recently argued that Google, Facebook and Amazon are a threat to democracy as they become bigger and bigger.[64] A major concern he expressed is that Amazon, Facebook and Google have and exert too much economic power to the detriment of consumers, suppliers or competitors. For this reason, Wu advocates a radical change in the US antitrust enforcement policy that would allow the Department of State (the US antitrust authority) to ultimately break up tech giants' businesses in order to preserve competition in digital markets.[65] Wu emphasizes that, at least in the US, antitrust law is not an effective remedy against the excess of corporate power of the Internet behemoths because, as spelt out by the Supreme Court in a 2004 judgment, monopoly is an important element of a free-market system and is desirable because it induces risk taking that produces innovation and economic growth.[66]

When it comes to merger control, US courts have consistently applied a "consumer welfare" standard under which the US government is entitled to block a merger — such as Facebook's acquisition of Instagram and WhatsApp — only if it can prove that the merger results in increasing prices for consumers. As Wu emphasizes, applying this

[64] Wu (2018), *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports, New York.
[65] Wu, *The Curse of Bigness*, cit., p. 132-133.
[66] *Verizon Communications Inc.* v *Trinko*, 540 U.S. 398 (2004).

standard in markets where large companies offer web-based services often for free makes this form of antitrust scrutiny impossible.[67]

As things stand under US law, antitrust does not seem a realistic remedy (at least for now) in the country of establishment of the largest platform owners. However, market-driven forces can still help preserve competition in digital markets in so far as the largest tech trusts, in spite of their different core businesses, end up competing with each other in a disruptive way. This phenomenon materialized when these companies started offering services and products that are at the core of their competitors' business. This happened, for instance, when Google launched an ultimately unsuccessful social network, Google+, in response to Facebook; both Apple and Facebook have heavily invested in technologies that improve online search, etc. This cross-market competition (or 'disruptive competition') potentially reduces the bargaining power and influence these companies have on the market.[68]

In the European Union, instead, antitrust seems a more effective and viable remedy against potential abuses of online platforms' dominant positions. The EU has developed a different approach to antitrust law that allows the EU Commission, acting as the EU antitrust authority, to sanction anticompetitive practices with the aim to protect competitors and not only consumers. Recent EU Commission decisions imposing multi-billion fines on Google for abuses of its dominant position on several relevant markets are the most prominent example of an antitrust policy developed in the last decade.

After years of investigations, the EU Commission concluded that Google had violated EU competition law *(i)* for having suppressed search rivals by denying equal access to its platform in the context of shopping offerings (Euro 2.4 billion);[69] *(ii)* for having imposed illegal restrictions on Android device manufacturers and network operators to strengthen its dominant position on general online search market (Euro 4.34

[67] See Wu, *The Curse of Bigness*, cit., p. 120-123.
[68] Hemphill, (2019), 'Disruptive Incumbents: Platform Competition in an Age of Machine Learning', 119 *Columbia Law Review*, 1973, p. 1993-1997.
[69] EU Commission, 'Antitrust: Commission fines Google Euro 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service', Press release, 27 June 2017 ('Google Shopping' decision): https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

billion);[70] and *(iii)* for having abused its market dominance by imposing several restrictive clauses in deals with third parties whose websites made impossible for Google's rivals to place their own search advertisements on the same websites (Euro 1.49 billion).[71]

A profoundly different approach to antitrust policy and to potential restrictions of anticompetitive conduct exemplifies a broader distance between the US and the EU in understanding whether and how online platforms should be subject to regulation. In July 2019, the EU adopted Regulation 2019/1150, whose main aim is to ensure that online intermediation services (such as online marketplaces, social media and application distribution platforms) and search engines make their terms and conditions easy to understand, easily available, transparent and fair for business users of such services.[72] This EU-wide legislation requires online platforms to provide their business customers with thorough information on how their intermediation services work. For example, the regulation intends to ensure that online intermediaries guarantee transparency on parameters determining their ranking of search results (and the possibility of influencing such ranking through direct or indirect remuneration) and different conditions and channels through which platform users can offer their goods and services to the public.

As regards content platform regulation, the European Commission has clearly shown its intent to establish a horizontal legal framework where the largest content-sharing platforms bear enhanced responsibilities and play a decisive role in preventing, removing and keeping offline a broad variety of illegal content, including copyright-infringing materials.[73] This scenario is in the US far from materialising because of a broad implementation of laws ensuring online platform neutrality, such as the 1998 Digital Millennium Copyright Act (DMCA) safe harbour provisions, and also Section 230 of the

[70] EU Commission: 'Antitrust: Commission fines Google Euro 4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine', Press release, 18 July 2018 ('Google Android' decision): https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.
[71] EU Commission, 'Antitrust: Commission fines Google Euro 1.49 billion for abusive practices in online advertising', Press release, 20 March 2019 ('Google AdSense' decision): https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.
[72] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11 July 2019, p. 57.
[73] European Commission, Recommendation of 1 March 2018 on measures to effectively tackle illegal content online, C(2018) 1177 final, Brussels, 1.3.2018.

1996 Communications Decency Act.[74] Needless to say this different policy also has implications for how online platforms remunerate content creators, especially in the music sector, and indirectly support cultural diversity.

The US is not only the GAFA's country of origin but is also home to the most successful creative industries, including the largest music industry in the world. From a US industrial policy perspective, the fact that some of the online platforms might encourage large-scale use of unauthorised or a poorly remunerated works, with a subsequent decrease of value for copyright, is more than compensated for by a continuous growth of the technology sector and development of market-driven solutions which allow the creative sector to control or monetize its productions.

6.2. Black boxes and music industry value chains

The largest online platforms have a market power that enables them to set out and impose conditions and price of the works they make available to the public. In these environments a significant portion (or all, in some cases) of their profits come from advertising revenues and exploitation of their personal data infrastructures. In today's computer industry, all the information on revenues generated by digital content and the levels of remuneration paid to individual creators or their collecting societies are regarded as commercially sensitive. As a result, this data is either kept secret in platforms' black boxes or confidential under contractual agreements online content services conclude with rights licensors.

As we have seen, Directive 2019/790 seeks to ensure transparency along the value chains of digital content by obliging assignees and licensees of copyright works — including online music services and social media — to disclose allocation of earnings and to inform individual creators about revenues their works generate, on a sector-by-sector basis. However, it is still to be seen how effective disclosure and processing of such a vast array of data will become, especially in jurisdictions where music right-holders are not represented by efficient or technologically well-equipped collecting societies and where national lawmakers might not be inclined to establish such a heavy administrative

[74] 47 U.S.C. Sect. 230 grants immunity to websites from liability for defamation arising from comments of their users. In the same way as the 1998 DMCA, Sect. 230 was based on the assumption that holding websites responsible for user-generated content would have hindered a fast development of the Internet, as we know it.

burden, especially on tech companies.

The fact that Article 17 of Directive 2019/790 clarifies that social media are directly subject to an obligation to seek licences for all copyright works their users upload would be an empty promise if these platforms could not rely on adequate infrastructure of technologies and rights management information. Tools such as content identification software (like YouTube's Content ID and Audible Magic's technologies) and repertoire databases need to be sophisticated enough to avoid thwarting freedom of expression and communication while enabling a fine-tuned licensing of copyright works on social media.[75]

The burden the 2019 directive places on online music services and social media with regard to fine-grained data on content-generated revenues would be ineffective if these services could not count on an effective measurement of access to digital works.[76] This will happen only if right-holders and service providers cooperate in order to share all the necessary information on the relevant rights on musical compositions and sound recordings as well as who owns and controls them.[77]

Even though the music sector is the most advanced industry where content identification technologies have been implemented so far, there are still no fully interoperable standards giving music rights licensors and licensees access to repertoire-related information. Availability of such data would greatly facilitate the operative elements of licensing agreements and would promote the creation of a level playing field for all contributors to the music industry value chains.

The first attempt of this kind in the music sector was the so-called "Global Repertoire Database" (GRD). This ambitious project aimed at creating a comprehensive

[75] Directive 2019/790, Art 17(7), expressly prevents right-holders and online services from using technologies that end up preventing communication of non-infringing materials and of works whose lawfulness depends on copyright exceptions, such as quotations, caricatures and parodies. To this end, Article 17(9) obliges EU member states to make effective and smooth remedies available to platform users.
[76] Art 17(4) and 17(5) acknowledge that disabling access to unauthorised copyright materials might be impossible for platforms dealing with types of works (e.g. photographs) for which there is no high standard of professional diligence for purposes of content identification.
[77] The whole system Art 17 aims to put in place under national laws is based on cooperation, exchange of information and definition of industry standards and best practices among different categories of copyright holders and social media. The directive also requires the EU Commission to promote and supervise a stakeholder dialogue on these issues (cf. Art 17(10)). Moreover, the impossibility for social media to obtain a licence and to rely on industry standards is a factor mitigating liability of the service provider (cf. Art 17(4)).

database of the global ownership and control of musical works, openly available to composers, publishers, collecting societies, and commercial users of the global repertoires. The GRD would have enabled cost savings — by eliminating duplication in activities of data management and processing — and would have allowed a more efficient management of online works by lowering administrative barriers for companies wishing to distribute music online. Such an open, reliable and fully interoperable database would also have ensured a quicker and more efficient compensation to content creators.

Unfortunately, despite the support and involvement of all the big music publishers and some of the key digital players (including Google) who would have needed access to data, the project failed in 2014 because of lack of financial support from collecting societies that would have ended up benefiting from the initiative without having contributed to it.[78] PRS For Music (UK) and Swedish collecting society STIM, which formed a joint venture to work as data and technology provider, were the only societies involved in this project. This unsuccessful attempt shows that a proprietary approach to the development of a standard database might not be the right solution.

An alternative to a proprietary resource could consist of a standard repertoire database deriving from a legislative obligation. A law reform could oblige music publishers and collecting societies to freely disclose and make available all data they control with regard to their repertoires to a third party wishing (or being institutionally mandated) to develop a single, universal database. In a market-driven version of this solution, several companies or organizations could use this data to develop their own databases, and then the market would decide what database is the best. In a government-driven system, instead, such a database could be built under the supervision and control of a public body and be accessible to everyone in the digital music sector, as a free resource.

Interestingly, especially for a jurisdiction that believes in capitalism as no other, the US Congress drew upon this last model in enacting the 2018 Music Modernization Act (MMA) and, in particular, its Title I, the Musical Works Modernization Act (MWMA).[79]

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[78] PRS for Music, *Statement on the GRD*, 9 July 2014, available at https://prsformusic.com/press/2014/statement-on-the-grd.

[79] The Musical Works Modernization Act (MWMA) is part of a broader act, i.e. the 2018 Music Modernization Act (MMA), Public Law 115-264, 132 Stat. 3676, which embodies a collection of three reform provisions on music copyright: see Fromer and Sprigman (2019), *Copyright Law – Cases and Materials*,

The MWMA contemplates a system of compulsory licensing of mechanical rights beneficial to online music services.[80] Such a compulsory "blanket" licence will come into effect on January 1, 2021. From that date onwards, digital music services will be able to obtain an all-encompassing licence, on a mandatory basis, to clear mechanical reproduction of musical compositions that will cover activities defined as "making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream."[81]

The administration of such a new licensing scheme is based on the creation of a new, publicly owned and funded collective, named 'Mechanical Licensing Collective' (MLC), acting under the supervision and control of the US Copyright Office. The institutional mission of the MLC is to develop and maintain a musical works database "containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works (and shares thereof) and the sound recordings in which the musical works are embodied." The licence applies only to mechanical and distribution rights, and not to public performance rights, which will continue to be licensed separately by performing rights organizations such as ASCAP and BMI. Moreover, this licence will be available only to music services that have a direct economic relationship with end-users and exert direct control over the supply of its service. This clearly excludes social media from the scope of application of this new mechanism.

Such a musical works database aims to facilitate the matching of sound recordings to musical compositions and to support the ability of the new collective to identify music-right holders so that they can be remunerated.[82] The MWMA requires the US Copyright Office to administer this new licensing scheme and the related database,[83] whose information will have to be provided "to the extent practicable," and engaging "in commercially reasonable efforts" by musical work copyright owners to the MLC.[84]

v. 1.0, New York, accessible at http://copyrightbook.org, freely available under the terms of the Creative Commons Attribution-NonCommercial-No Derivatives 4.0 International Licence, p. 385 ss.

[80] See US Copyright Act (17 USC), Sect. 115(d)(1), as revised by the MWMA.

[81] Sect. 115(e)(7).

[82] See Fromer and Sprigman, cit., p. 386.

[83] Sect. 115(d)(3)(E)(i).

[84] Sect. 115(d)(3)(E)(iv).

Conclusion

In early 2020 vast areas of the globe experienced the Covid-19 pandemic and unprecedented lockdown regimes. At a time when people had to live and work at home in isolation, artists and audiences realised how dependent they have become on online services and social media to access art, culture and entertainment. This is especially true in the field of performing arts. Social distancing meant that in most the world, all live shows and performances had to be cancelled before an undetermined amount of time.

During this health emergency, the vast majority of music creators understood more clearly than ever before that online platforms are essential for their own financial and artistic survival. Music creators found themselves at a dead end: they were deprived of the performing side of their businesses, and the online platforms, functioning mainly an exposure tool, brought them little or no remuneration.

In response to Covid-19, many artists spontaneously started webcasting their live performances from their homes over social media channels, trying to keep or grow their audiences and to market themselves. Certainly, such a response to the 2020 lockdown crisis suggests that social media can open up broader markets for web-based live performances. This new business requires artists to agree with each platform – as they would do with a traditional radio or TV broadcaster - upon the conditions under which these live shows take place and generate revenue.

With regard to pre-recorded music, instead, a very few platforms have increasingly become the gatekeepers of digital markets for both creators and consumers. These platforms are based on very sophisticated (and secret) data infrastructure and algorithms that are designed to exploit consumer behaviour to maximize advertising revenue.

Online music licensing requires solutions based on *(i)* data infrastructure and *(ii)* detailed rights ownership information and technologies that allow right-holders to financially benefit from online exploitations of their musical works. So far, these solutions have been mostly market-driven, having developed at a time when proprietary platforms emerged as a radical alternative to end-to-end, fully decentralised online distribution networks. The remarkable evolution of platforms like YouTube have shown that social media companies are capable not only of enabling new forms of content production but also developing licensing schemes and technologies for music creators.

As this paper has shown, there are other solutions that markets are unlikely to develop on their own. In the field of collective rights management, in particular, the EU undertook regulatory initiatives aimed at making traditional collecting societies more efficient, transparent and accountable. These measures also granted music right-holders contractual freedom and flexibility in choosing their online licensing partners and in deciding how their licensing activities should be run, also from a territorial perspective.

The paper has also shown that the EU and the US have a very different understanding of platform neutrality and of the conditions under which social media companies should be exempted from copyright liability, especially after the enactment of the 2019 Copyright Directive. The EU has decidedly moved towards the idea of horizontal platform regulation through new legislative measures aimed at reducing the market power of the largest tech companies. To this end, EU law created duties of information and data disclosures on online platforms in order to strengthen the bargaining power of individual authors and performers through access to data on revenues generated by their works. Moreover, recent decisions of the EU Commission have demonstrated that antitrust enforcement can be an effective remedy against abuses of dominant position the largest platforms might commit in attempting to exclude or harm rivals in markets that depend on their services.

Last but not least, content platformisation has raised issues regarding to levels of remuneration of content creators that the EU took very seriously, especially in adopting its 2019 Copyright Directive. National transpositions and the response of tech companies to this directive will tell us whether duties of content licensing, filtering and professional diligence embodied into Article 17 will stop – or at least reduce – the race to the bottom social media triggered on the value of digital music in Europe.