



Global Best Practices for Protecting Copyright Online and Curbing Online Infringements

11 September 2019, Bangkok



Policy principles for success

- 1** Music's value – both cultural and economic – must be recognised
- 2** Copyright frameworks must be clear and provide for legal certainty
- 3** Right holders must be free to license, i.e. decide who can use their music and how, both online and offline
- 4** Adequate legal remedies must be available to prevent music from being made available illegally

Copyright Directive 2019: Providing legal certainty as to copyright liability of Online Content Sharing Services

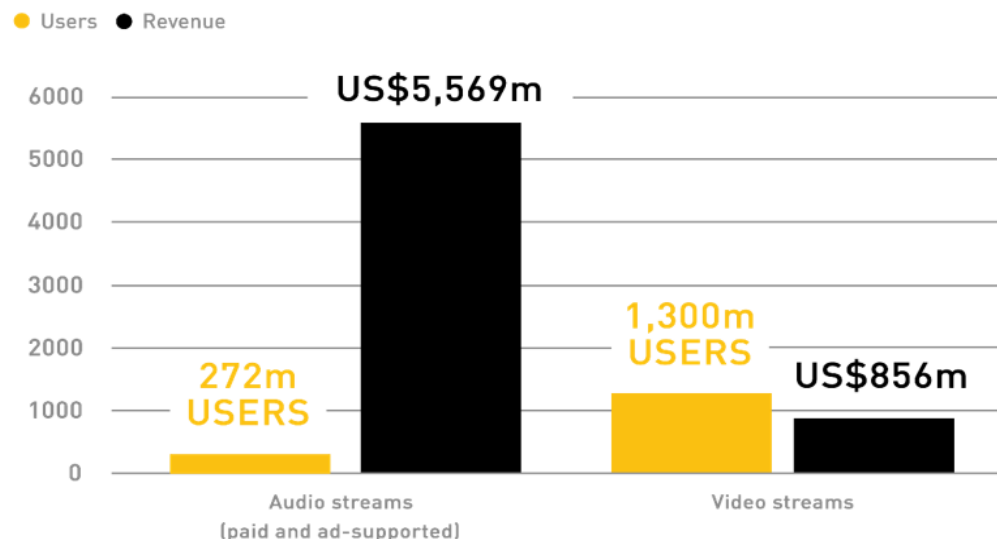


Online Market Distortion: The Value Gap

The “Value Gap” is the mismatch between the value of music to certain online platforms and what they pay content owners.

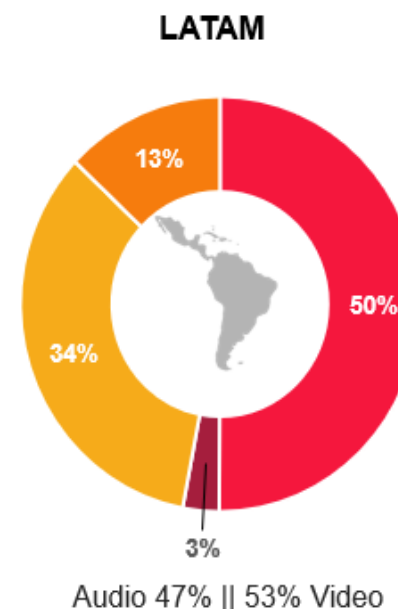
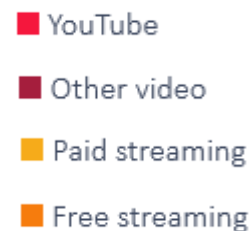
- Most online music services negotiate licenses prior to launching a service = normal, given the exclusive nature of copyright online (WIPO treaties: Art.8 WCT and Art.10 and 14 WPPT).
- Yet, some online music services claim to be mere “hosting services” and either refuse to enter into licence agreements or offer “take it or leave it” terms that vastly undervalue music rights.

AUDIO AND MUSIC VIDEO USERS VS REVENUES 2017



User upload services, seeking to benefit from inconsistent applications of online liability laws, comprise the vast majority of video streaming activity. They have the world's largest on-demand music audience, conservatively estimated at more than 1,300 million users.* The revenue returning to rights holders through video streaming services in 2017 amounted to US\$856 million. By contrast, a much smaller user base of 272 million users of audio subscription services (both paid and ad-supported), that have negotiated licences on fair terms, contributed US\$5.6 billion.**

AUDIO AND MUSIC VIDEO ON-DEMAND STREAMING TIME 2018



The EU Directive's Solution to the Value Gap

1

Art.17 sets special rules for OCSSPs, while the 'old' Copyright Directive continues to apply to all other services or users (Art.1(2) and Recital 65).

2

Art.2.6 **Online Content Sharing Service Provider** (OCCSP) is a service that:

- As its main or one of its main purposes stores and gives the public access to a large amount of copyright-protected content uploaded by its users (Recital 63); and
- Organises that content (Recital 62); and
- Promotes that content for direct or indirect profit-making purposes (Recital 63)

3

Confirms that OCSSPs “communicate to the public” or “make available to the public” – i.e. **engage in copyright-restricted acts** – and shall therefore obtain authorisation from right holders (Art.17 and Recital 61). Contractual freedom remains unaffected.

4

Confirms that OCSSPs, which perform acts of communication to the public/making available, **do not qualify for the “safe harbour” liability limitation** under Art.14 of the EU E-Commerce Directive (Art. and Recital 65).

If an OCSSP has **not** been licensed, **Art.17 stricter rules apply.**

Global best practices on legal remedies and online copyright enforcement



Common challenges to direct legal action

Sites operate anonymously, concealed by privacy services...

...and sophisticated networks of (regularly changing) shell companies

...established in jurisdictions where legal remedies difficult to obtain or enforce

Lack of accurate disclosure of operator details from intermediaries

Ease of regeneration if main domain suspended

Misconception that "take down" is an answer to infringement

Website blocking is often the only available and effective legal remedy to curb online copyright infringements

Cooperation by all intermediaries is essential

Website blocking successfully tested in 33 countries through different procedures

SOUTH AMERICA

Argentina Uruguay
Brazil
Mexico
Peru

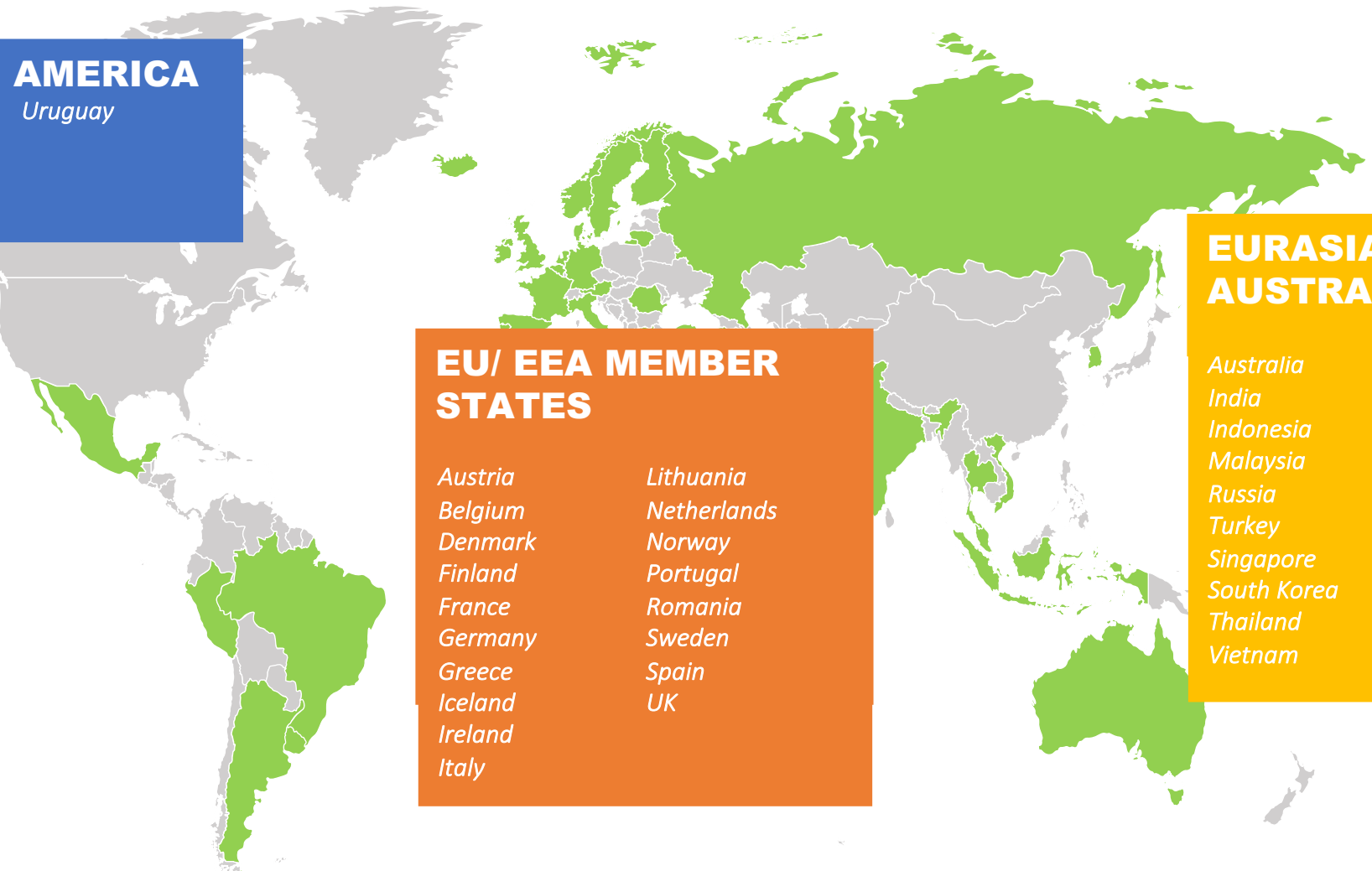
EURASIA AND AUSTRALASIA

Australia
India
Indonesia
Malaysia
Russia
Turkey
Singapore
South Korea
Thailand
Vietnam

EU/ EEA MEMBER STATES

Austria	Lithuania
Belgium	Netherlands
Denmark	Norway
Finland	Portugal
France	Romania
Germany	Sweden
Greece	Spain
Iceland	UK
Ireland	
Italy	

Over
3,000
unique URLs
blocked to sites
containing
music



Website Blocking – Best Practices

- 1 Scalable: across multiple sites and ISPs
- 2 Fast and dynamic: e.g. UK blocking orders
- 3 ISPs should cover their own costs of implementing blocks (cf. #1)
- 4 Governments should support industry initiatives – e.g. MoUs between rights holders and ISPs

Scalable and flexible - AGCOM procedure



- Administrative procedure for website blocking, including mirror sites
- Over 280 sites blocked
- AGCOM can order blocks on basis of complaints from rights holders
- Decisions rendered within 35 working days (12 for large scale infringements)
- Fast track procedure addresses large scale infringements and “domain hopping”/mirror sites
- Example: *1fichier* – first blocking order in respect of a cyberlocker

Fast and dynamic blocking - UK dynamic injunctions



- Website blocking through an application to the High Court (civil procedure)
- Effective: both DNS and IP level
- Broad/dynamic injunctions covering future changes to domains and IP addresses
- Blocking of live streams and “rolling orders” established following *Premier League* case, 2017
- Over 160 sites blocked to date (+ 100s of mirror/proxy sites)
- Typically unopposed, may be decided without a hearing, decision within 1-3 months

Industry initiatives – Danish MoU



- A voluntary code of conduct between rights holders and Danish ISPs, agreed in 2014
- 248 sites blocked (357 if mirror and proxy sites included)
- Court orders obtained by rights holders against one ISP will be adhered to by all ISPs within 7 days
- ISPs will block access to new domains for the same site, rights holders must notify these to ISPs
- Example: 1st block of music piracy site *convert2mp3* under Danish code (site now entirely shut down)

Intermediaries' Duty of Care

- Often best placed to stop or prevent online copyright infringements
- Best practices applicable intermediaries:
 - Internet access providers – website blocking
 - Host providers – “know your customer” & disclosure cooperation
 - Domain Registrars – “know your customer” & disclosure cooperation
 - Advertisers/Ad networks – “watchlist adoption” & “expedited removal of service”
 - Payment Providers – “know your customer”, “enhanced T&Cs” & “voluntary termination”
 - Search – demotion of infringing sites in search results (e.g. UK Code of Conduct)
- Better voluntary cooperation is required from all intermediaries

Need for Notice and *Stay Down*

- **Notice and *Stay Down* for services that benefit from intermediary liability privileges (aka Safe Harbours)**
 - Notice and Take Down has proven to be ineffective – an old remedy for the internet of 20 years ago!
 - Wasted resources on both sides while thousands of notices generated for the same content
 - ‘Stay Down’ obligation confirmed in:
 - CJEU in *L’Oreal vs eBay*
 - Italian Supreme Court in *RTE vs Yahoo!*
 - German Federal Court of Justice in *Rapidshare*
 - Commercially available technologies exist to implement ‘Stay Down’

Thank you!

