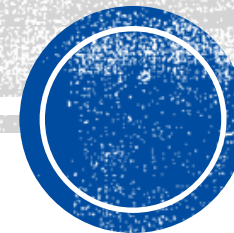


**PRINCIPLES OF  
COLLECTIVE  
MANAGEMENT OF  
COPYRIGHT AND  
RELATED RIGHTS IN  
THE DIGITAL MUSIC  
INDUSTRY**

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Ukraine

Kyiv, 22<sup>nd</sup> of March  
2021



# ONLINE MUSIC DISTRIBUTION

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Context: from disintermediated forms of communication (P2P file sharing) to **re-intermediation** in content distribution via online platforms

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Digital platforms raised policy issues on online intermediary liability for copyright infringement and '**neutrality**' ("notice-and-takedown" mechanisms)

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**Piracy** still has a significant impact and is an alternative to lawful access to copyright works for free (freemium services, UGC services) or via payment of remuneration (download or streaming platforms)



# HOW COPYRIGHT PROTECTS MUSIC

**Musical compositions**

**Performances + Sound recordings**

THE KÖLN CONCERT

Part I

Keith Jarrett



KEITH JARRETT  
THE KÖLN CONCERT



ECM



# ARE CREATORS' ONLINE RIGHTS EFFECTIVE ?

- Right-holders are not remunerated at all, often
- Most of them are compensated very little because of the **uncertain or very low value** of creative works on digital platforms
- Individual creators have no or very little **bargaining power** vis-à-vis online platform owners
- Different degrees of **contract law protection** ranging from freedom of contract (e.g., USA, UK) to laws adopting a “paternalistic” approach seeking to protect individual right-holders as weaker parties and “workers” (e.g., France, Germany, Netherlands, Italy, Spain and the EU under Directive 2019/790)





# WHY HAS MUSIC LICENSING BECOME AN ISSUE ON DIGITAL PLATFORMS?

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With the significant exception of Google's YouTube and its 'Content ID' technology, social media (or "content-sharing services") have not facilitated copyright enforcement, at least until recently

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For almost a decade, social media have not given individual creators the possibility of monetizing online exploitations of their works: Terms of Service forced users to license their contents **for free**, under a **global and irrevocable license**

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Notice-and-takedown systems work much better for wealthier rightsholders than for individuals or small-size content producers

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Online platforms give rise to **scalable and very unequal environments** where a very few superstars have a disproportionately high share of the market



This industry is 15 years old, having started soon after Google's acquisition of YouTube in **2006** and the launch of Twitter and their counterparts in China: Youku & Weibo

By 2017, more than 3 million YouTube creators received some form of remuneration from their uploaded content, worldwide

Top 5000 YouTube channels have reached the amount of **250 billion video viewings** in aggregate

4000 '**professionalizing-amateur**' channels reached at least one-million subscribers

# SOCIAL MEDIA INDUSTRY

(DATA  
FROM  
CUNNINGHAM  
AM &  
CRAIG,  
NYU  
PRESS  
2019)



In today's Internet "if  
content is king, then  
distribution is King Kong"

Stuart Cunningham and David Craig, *Social Media  
Entertainment* (New York University Press, 2019)



# YOUTUBE'S SPECIAL POSITION AND PROJECT

- First-mover (2005) and most developed online content platform
- The platform gives access to **both** user-generated and professionally created content
- Founded by former PayPal employees, from the beginning YouTube sought to develop a **scalable project** capable of growing very large audiences (i.e., millions)
- It developed also technologies, business models and **partnerships** that are now essential elements of all the largest platforms
  - Online analytics
  - Content identification systems
  - Splits of advertising revenue based on cost per thousand





# A RELEVANT DISTINCTION BETWEEN ONLINE PLATFORMS

## Social media entertainment

- Content-sharing services offer scale, technological affordance and remuneration for creators
- Platforms were “born global” and achieved media globalization without copyright control
- Revenue-sharing business models are based on community development and network effects: YouTube, Facebook, Twitter, Instagram, Snapchat

## Online music services

- Mainstream, premium content, supported by sophisticated algorithms
- Distributed and produced by professional music creators
- Based on copyright control and traditional rights clearance



# COLLECTIVE VIS-À-VIS INDIVIDUAL LICENSING

## On-demand music services

- Collective rights management is widely predominant
- Individual management applies mostly to the licensing of record producers' rights (which include music performers' rights)
- Professional composers and performers/producers of their own music and records can directly license *all* rights to platforms

## Social media

- Individual copyright management was predominant, especially at the beginning of this industry
- Collective rights management by traditional CRMOs and other collectives developed together with content identification technologies (e.g., YouTube's Content ID) and platforms' ability to distinguish professional materials from amateur contents



# REGULATORY INTERVENTIONS

## Collective rights management

- 2005 Commission Recommendation (competition + multi-territorial licensing)
- 2008 “CISAC” Decision (antitrust: no restrictions/cartels)
- Directive 2014/26 (governance of CRMOs + multi-territorial licensing)

## Authors’ and performers’ rights

- Directive 2014/26: authors’ freedom to choose a society of their choice, irrespectively of nationality or country of residence
- Directive 2019/790 (Art 17): copyright covers user-generated content *directly*
- Directive 2019/790 (Art 18-23): transparency, fair remuneration and contractual adjustment/termination rights



# MULTI- TERRITORI AL LICENSING OF ONLINE MUSIC RIGHTS

- Introduction of several **technical requirements** (so-called European ‘Licensing Passport’) for CRMOs wishing to issue multi-territorial licenses
- **“Tag-on” regime**: creation of neutral hubs for aggregated ‘national’ repertoires





# CAPACITY TO PROCESS MULTI- TERRITORIAL LICENCES (ART. 24)

- Sufficient capacity to process data electronically in order to identify repertoires and monitor their uses; issue e-invoices to users; collect and distribute rights revenues
- Ability to identify accurately musical works that the organization is entitled to represent
- Ability to identify rights and their corresponding rights holders with respect to each relevant territory
- Use of **unique identifiers**, on the grounds of voluntary industry standards and practices
- Use of adequate means to identify and resolve inconsistencies in data held by CRMOs



# TRANSPAR ENCY OF INFORMATI ON

- Collecting societies must be able to provide – by electronic means- online service providers and rights holders with accurate information about
  - Musical works represented
  - Rights managed wholly or in part
  - Territories covered



# OTHER PROVISIONS

- Accuracy of multi-territorial repertoire information (Art. 26)
- Accurate and timely reporting and invoicing (Art. 27)
- Accurate and timely payments to right holders (Art. 28)





# AGREEMENTS BETWEEN COLLECTIVE RIGHTS MANAGEMENT ORGANISATION S (ART. 29)

- Any representation agreement between CRMOs whereby an organization mandates another CRMO to grant multi-territorial licenses for online rights in musical works in its own music repertoire should have a **non-exclusive character**
- The mandated CMRO should manage those online rights on a **non-discriminatory basis**
- The mandating CRMO shall inform its members about the main terms of the agreement (including duration and costs)
- The mandated CRMO shall inform the mandating organization about the main terms according to which the latter's online rights will be licensed





# “TAG-ON” REGIME (ART. 30)

- A CRMO is **obliged to accept** a request of repertoire representation coming from another CRMO if the former has already been granting (or offering to grant) multi-territorial licenses for the same category of online rights in musical works
- The requested CRMO should respond in writing and without undue delay and should include the represented repertoire **in all offers** it addresses to online service providers
- Management fees should **not** exceed the costs reasonably incurred by the requested CRMO
- The requesting CRMO should provide the requested CRMO with information relating to its own music repertoire. Where information is insufficient, the requested CRMO should be entitled to charge the costs reasonably incurred in meeting such requirements or to exclude works for which information is insufficient or cannot be used



# TYPES OF BODIES LICENSING ONLINE RIGHTS IN EUROPE

- CRMOs granting multi-territorial licenses for their own repertoires and, possibly, upon request, for other CRMOs' repertoires
- CRMOs licensing regional repertoires, such as ARMONIA and the Nordic Copyright Bureau (NCB)
- CRMOs having formed joint ventures to set up 'licensing hubs', as in the case of PRS For Music, STIM and GEMA having established "ICE"
- One or several CRMOs establishing subsidiaries to cater for multi-territorial licenses, either exclusively for selected repertoires or non-exclusively (e.g., Aresa GmbH as a subsidiary of GEMA or Solar Music)
- Single music publishers creating their own independent licensing entities





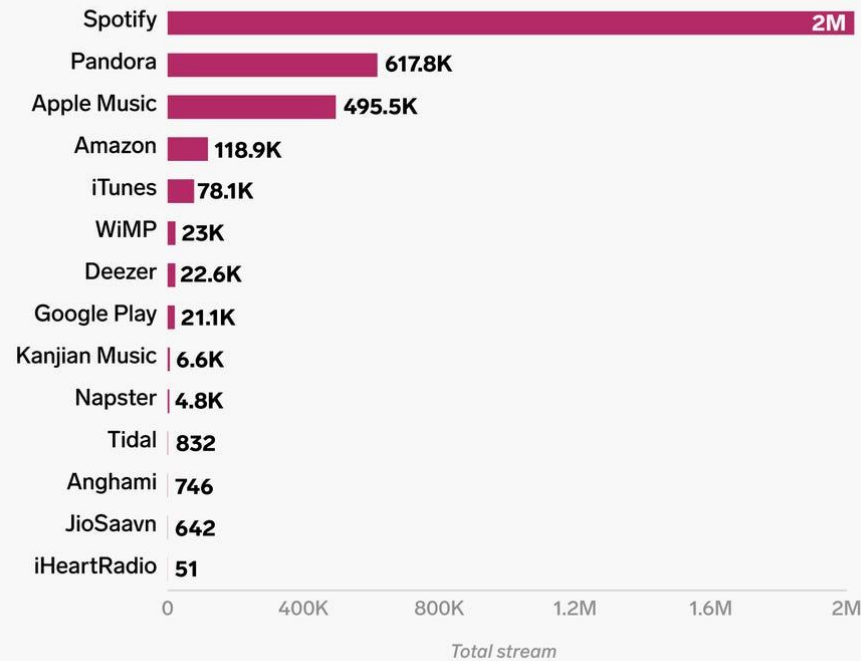
## ZOE KEATING

- Avant-garde cellist and composer
- She licenses all major music services directly
- She owns all rights in her music and records
- She periodically reveals her payouts



# KEATING'S STREAMS AND PAYOUTS (2019)

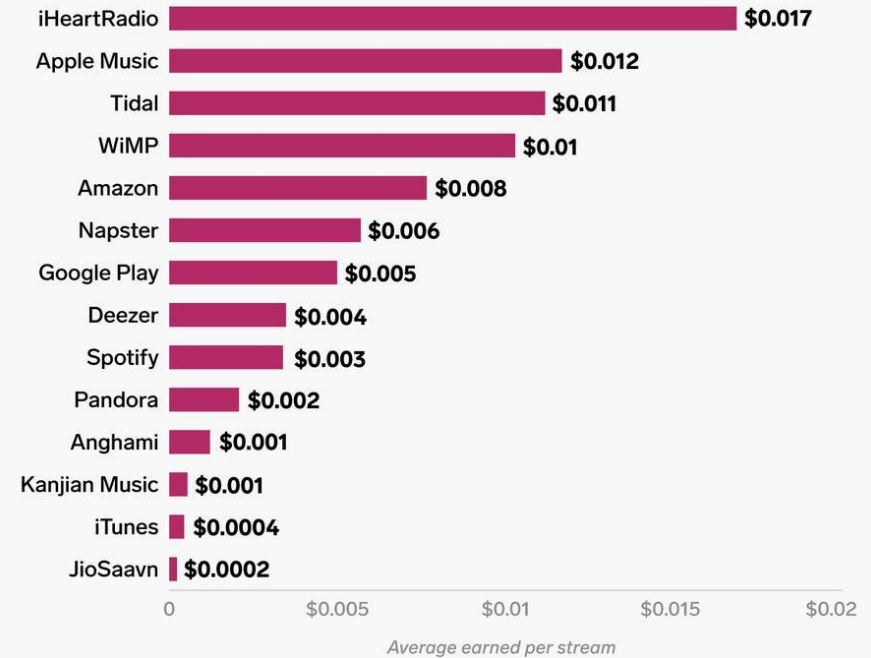
## Keating is streamed most often on Spotify and Pandora



Source: Zoe Keating

BUSINESS INSIDER

## iHeartRadio and Apple Music pay Keating the most per stream



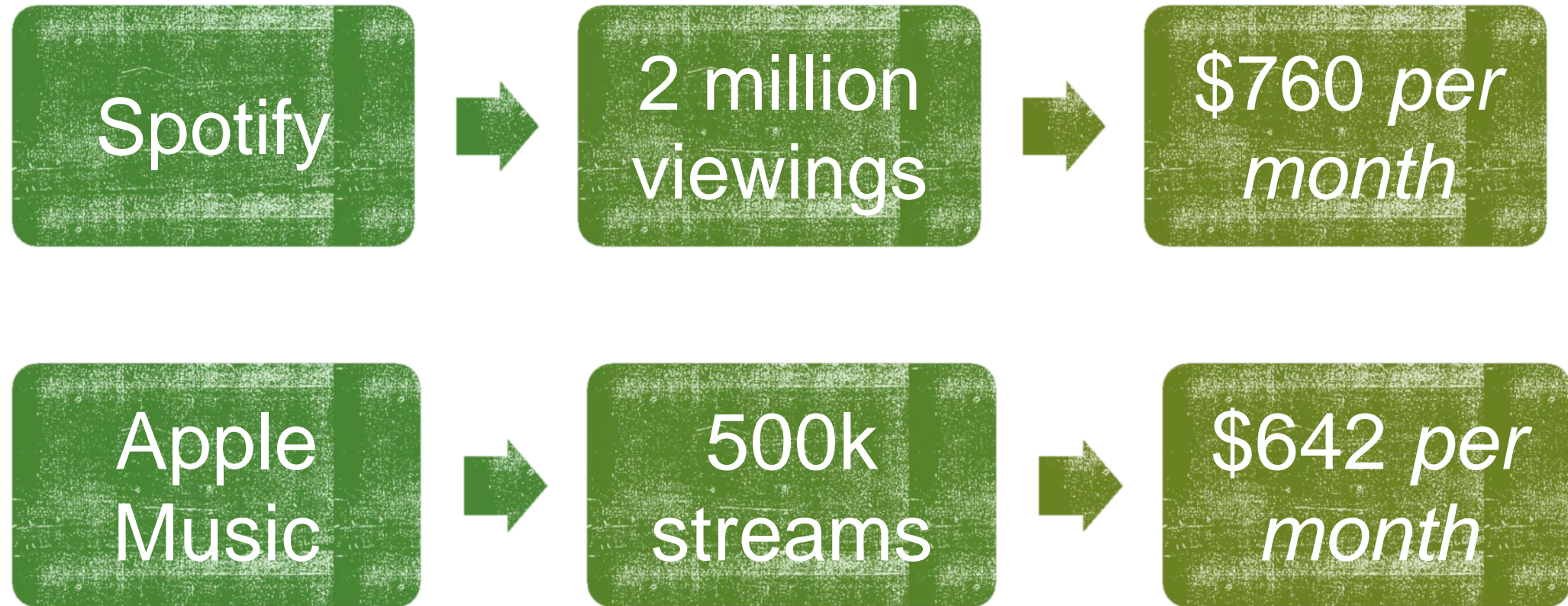
Source: Zoe Keating

BUSINESS INSIDER

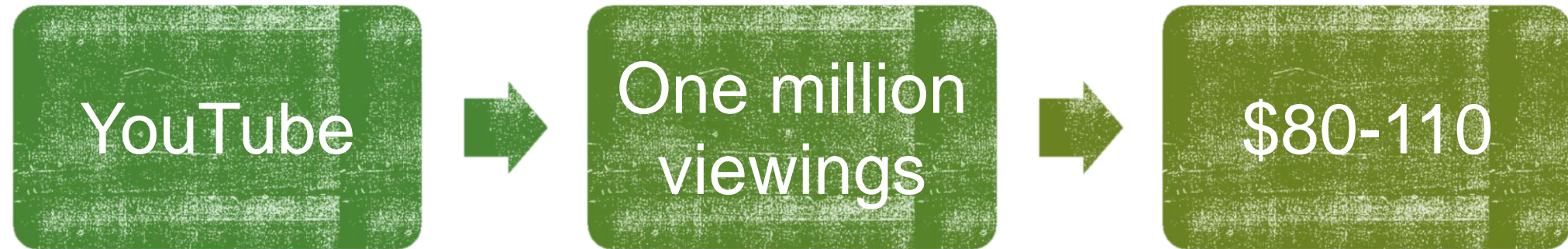




# EARNINGS FROM MUSIC SERVICES (ALL RIGHTS, 2019)



# HOW MUCH RIGHT-HOLDERS EARN ON SOCIAL MEDIA





# DIRECTIVE 2019/790 ART 17 (PLATFORM LIABILITY)

- Art 17 creates a more stringent standard of liability for services like YouTube, Facebook, Twitter and the like by clarifying that these platforms communicate works to the public
- It makes online platforms exceeding a certain size and annual turnover *directly* liable for works for materials their users upload without a copyright owner's consent (cf. Terms of Service)
- Art 17 ends an era of “neutrality” in which UGC platforms could give undifferentiated access to copyright works by relying on notice-and-takedowns
- The CJEU had already clarified (*L’Oreal v eBay*, 2011) that platforms organizing and optimizing access to content could not invoke the EU safe harbor



# EU INDUSTRIAL & CULTURAL POLICY

- Platforms providing free access to a multiplicity of contents must distinguish between a YouTuber's or Facebook user's original works and pieces of content that are professionally produced and originate from outside of the platform
  - Original content: YouTube or Facebook obtain permission directly from the creator (Terms of Service and content production partnerships: e.g. YouTube has more than 9000 partners)
  - External Content: YouTube or Facebook might not have a license
- Art 17 obliges platforms to seek licenses (and, possibly, pay) for “external” content
  - Cooperation with right-holders in implementing sector-specific content identification technologies: for instance, for sound recording, TV programs, photos, film excerpts (YouTube's Content ID but also Audible Magic's products)
  - Help content owners either remove their work or, if they wish so, monetize it





# CRITERIA SPECIFYING AND MITIGATING PLATFORM LIABILITY

- Targeted services are the ones competing with other (licensed, on-demand) content services
- Providers of services giving access to open source as well as not-for-profit scientific and educational repositories and not-for-profit encyclopedias are expressly excluded
- “Start-up” exemption: annual turnover below E10 million + average number of monthly unique visitors in the EU not exceeding 5 million
- Copyright exceptions shall apply + out-of-court redress mechanisms for users
- Platforms shall be liable if they do not make their **best efforts** to prevent access to unauthorized works in accordance with **high industry standards of diligence** and, in any event, if they do not act expeditiously after receiving a notice from right-holders



# MAJOR OBSTACLES

- **Secrecy** and/or lack of data on how the largest platforms extract value from music
- Power and size of the largest (“over the top”) US-based online platforms
- Absence of **standards of rights management information**
- Risks and social costs triggered by online copyright **enforcement**: freedom of expression and threats to copyright exceptions; net neutrality and online business freedoms
- Persisting uncertainties on copyright liability of online intermediaries in the US (1998 DMCA + “server rule”) and the EU (2019 DSM Directive + direct platform liability)





# POLICY SOLUTIONS FOR ONLINE MUSIC LICENSING

- **Duty of data disclosure**

The law could oblige copyright transferees and licensees, including online platforms, to disclose secret information such as the amount of revenues different kind of works generate on social media and streaming services (cf. EU 2019 DSM Directive: Art 18 - 23)

- **Standardization of repertoire databases**

- i. Collecting societies and other rights licensors could make their copyright ownership information freely available for third parties to develop standard repertoire databases
- ii. The 2018 US Music Modernization Act created a new “Mechanical Licensing Collective”. From 2021 onwards, the law will oblige US-based CRMOs to make all their rights information available for the new collective to grant blanket licences to online music services



# THANK YOU!

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