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Music Creators' Rights under EU Law

Summary of Research Results

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T 2.2

Music creators' rights: does EU law foster fairness?

Directive 2019/790's key fairness-enhancing provisions:

Art 17: copyright liability regime for online content-sharing service providers (OCSSPs)

Art 18 (+ Arts 20-22): fair remuneration of creators, ADR and contractual adjustment remedies, revocation rights

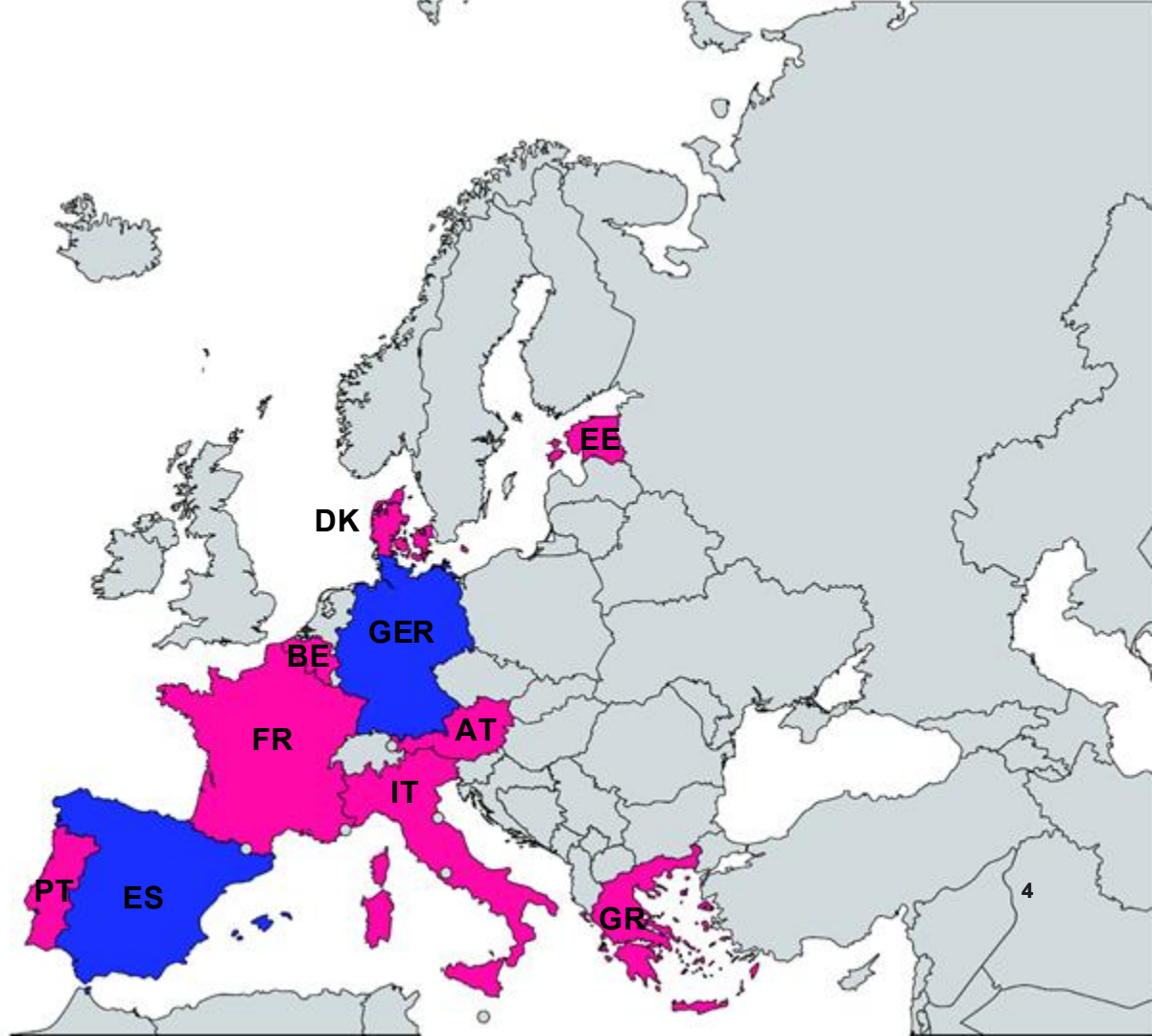
Art 19: transparency of information/data within the industry and right to access info from exploiters ("sub-licensees")

Platform accountability

Fair remuneration of (human) creators

Transparency on exploitation modes and platform earnings

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Article 18's transpositions

National definitions: Distinct versions deriving from the large discretion the Directive leaves to Member States (which are free to implement this principle “*through different existing or newly introduced mechanisms*” - Recital 73) → **legal fragmentation**

Examples:

- **Greece:** fair remuneration is defined as a specific percentage based on gross income or expenses
- **Italy:** fair remuneration is calculated on the basis of i.) revenues derived from the exploitation of the work and ii.) sector-specific practices; if the parties cannot reach an agreement, the Italian Communications Authority will decide on the amount
- **Denmark & Estonia:** mere soft law instruments provide criteria for what constitutes “appropriate” and “proportionate” remuneration

How to foster fair remuneration?

- **Contract law-based mechanisms:** [Articles 20-23 DSM Directive](#)
- **Lump-sum payments and contractual buy-outs (fragmented scenario)**
 - Lump-sums **can** be compatible with Article 18, “... *but it should not be the rule*” (Recital 73)
 - Certain Member States are stricter (Italy, Germany) than others (France) due to **long-term under-compensation concerns**
 - While the revenues of record companies appear to have increased after the implementation of DSM Directive, the positive impact of Article 18 is yet to be seen especially with regard to **session musicians** who are remunerated under contractual buy-outs
- **Collective Agreements**

Statutory remuneration rights

- **Spain:** remuneration rights for performers for the making available online of their fixed performances; introduced with the implementation of Directive 2001/29
 - The Spanish Supreme Court confirmed its compatibility with EU law
- **Belgium:** new non-transferable right and non-waivable remuneration right for acts of communication by streaming and social media services for authors and performers who have transferred or licensed their exclusive right to a producer or publisher
 - There is a referral pending before the CJEU
- **Germany:** three new non-waivable remuneration rights for authors and performers vis-a-vis OCSSPs (social media platforms)
 - There is a Constitutional Court complaint pending

Transparency obligations

Art. 19 DSM Directive: requires licensees and copyright assignees to provide up-to-date, relevant, and comprehensive information to the authors and performers on the exploitation of their works and performances **at least once a year**, i.e. in an active way

- This obligation was implemented by all Member States rather uniformly
- Re-states the importance of **transparency**, as seen in several other regulatory instruments:
 - **Directive 2014/26:** duties of good faith in licensing + users' and CMOs' data disclosure obligations + CMOs' transparency and reporting obligations (Art. 16-20)
 - **2022 Digital Services Act:** Art. 14's and Art. 27's transparency requirements for online platforms' Terms and Conditions and recommender systems
 - **2022 Digital Markets Act:** Art. 5 and Art. 6's transparency requirements related to online advertising for 'gatekeepers' providing core platform services
 - **2024 AI Act:** Art. 53's obligations for providers of general-purpose AI models

Transparency v secrecy: a reality check

- Accuracy and transparency would require a standardised approach to the sharing of data and metadata, whereas at the moment the **music publishing industry** embraces a proprietary, silo-based approach
- In the **recording industry**, featured performers' data is easy to collect because their remuneration is royalty-based: data is much poorer and inconsistent, instead, for session musicians
- **DSPs and social media services** provide very different levels of data disclosures to right-holders, with YouTube appearing better equipped and more transparent than TikTok, among social media services
- **CMOs** are still seeking to implement reliable matching systems to accurately monitor uses of their works and allocate revenues to their members on the grounds of users' reports (using recordings - not musical works - as a reference)

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**Direct copyright liability of
social media platforms: effects
on different types of music
creators**

Two “value gaps”: *within* and *outside* the recording and music publishing sectors

Article 17 DSM Directive

"Value gap" between the revenues social media platforms generate by enabling users to upload, often without right-holder's authorisation, and consume copyright-protected works and the (significantly lower) value that is returned to the music industry

Article 18 DSM Directive

"Value gap" between the earnings of music publishers and producers and those of authors and performers, which arises from information asymmetries, contractual buy-outs, and unfair contractual terms

Value of music rights and fair remuneration

Music Streaming Services/ DSPs

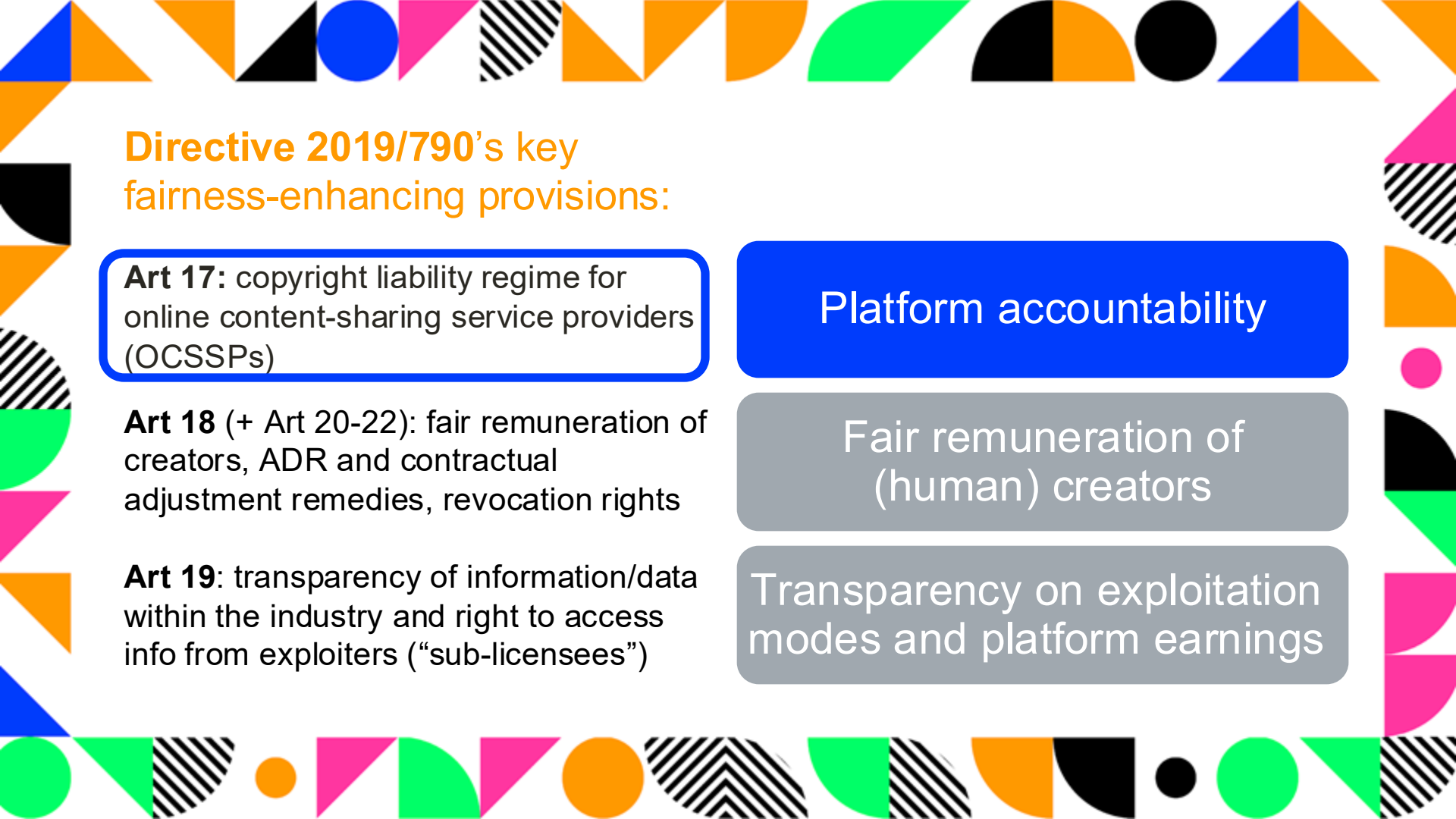
- Negotiated licenses with right-holders since their inception
- “Freemium”/subscription-based business models are more transparent and less “disruptive” for creators

**Fair and transparent remuneration
is easier to calculate**

Social Media Services

- Historically reluctant to negotiate licenses
- Offer their service “for free”, while relying on personalized advertising
- Sale of user engagement data to online advertisers to generate profit
- Right-holders would need access to accurate data on revenue streams
- This data is a trade secret

**Fair and transparent remuneration
has proven to be impossible**



Directive 2019/790's key fairness-enhancing provisions:

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Platform accountability

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Article 13

Internet Social Service
Provider (ISSP)

Strict liability

One-size-fits-all solution

Mandatory upload filters

Article 13 was the subject of intense debate due to concerns about its potential negative impact on users' and tech companies' fundamental rights.

Article 17

Online Content-Sharing
Service Provider (OCSSP)

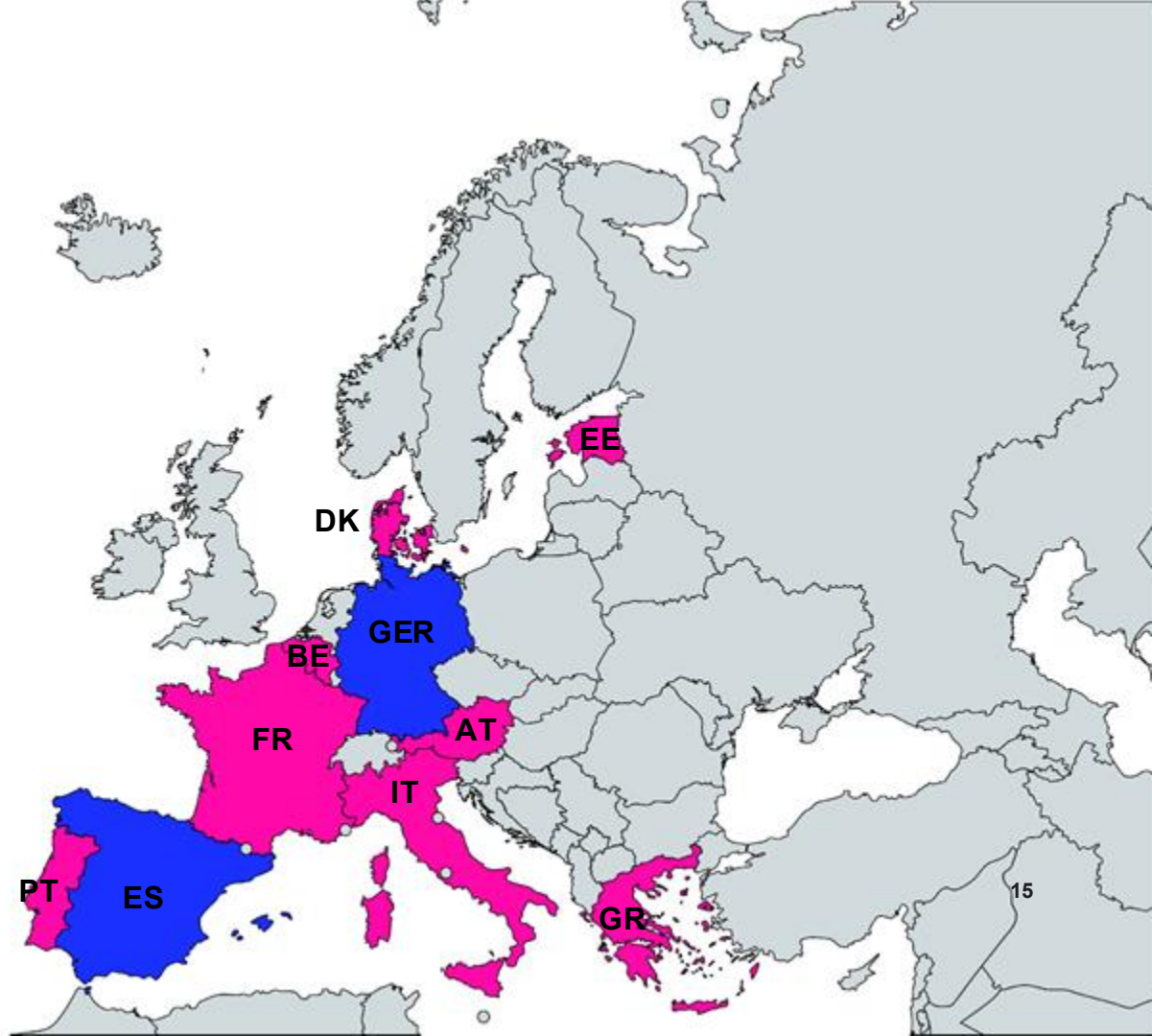
“Best efforts” requirement

Start-up privilege and further proportionality considerations

Fundamental rights safeguards and focus on licensing instead of filtering

The final version of Article 17, upheld by the CJEU, strikes a fair balance between the rights and interests of all stakeholders involved.

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“Online Content-Sharing Service Providers” (Art. 2(6)) – Who are they?

- **France:** explicit thresholds for what constitutes a “large amount of works”
- **Denmark:** no mention of carve-outs for, among other things, non-profit encyclopaedias
- **Spain:** either those who store and give access to a large amount of works or those who have a “large audience” in Spain
→ **this broadens the scope of Art. 17’s strict obligations**

A unique approach to Article 17's safe harbour

Spain: even if a provider meets the Directive's "best efforts" requirements, right-holders can still claim damages if the exploitation of a work causes "significant harm"

▶▶ This constitutes a significant deviation from the European law model and the objective of striking a fair balance between the rights and interests involved

Article 17(4)(a) – the new licensing obligation

“Best efforts” to obtain a licence from right-holders:

German law specifies that, when Online Content-Sharing Service Providers (OCSSPs) fulfil the “best efforts” requirement,

- They shall actively seek a license *only* from i) representative right-holders known by them or ii) collecting societies/other management entities operating in Germany → **the second option contradicts today's EU-wide online music licensing models and how OCSSPs clear digital music rights**
- Their licence shall cover “considerable repertoire of works and right-holders” → **this provision places small or independent music repertoire right-holders in a disadvantaged position**

The impact of the “best effort” criterion on licensing negotiations in practise

 Complete Music Update

Music industry welcomes German ruling holding TikTok liable for unlicensed content

A German court has held TikTok liable for hosting unlicensed content following a lawsuit filed by a Berlin film distributor which relied on...

<https://completemusicupdate.com/music-industry-welcomes-german-ruling-holding-tiktok-liable-for-unlicensed-content/>



*** BBC

Universal Music to pull songs from TikTok

Universal Music is set to pull its millions of songs from TikTok after a breakdown in talks over payments.

<https://www.bbc.com/news/business-68150311>



 Billboard Italia

SIAE Will Not Negotiate with Meta “Blindly”, Says CEO Matteo Fedeli

Billboard Italy reached out to the executive of SIAE to discuss the interruption of the negotiations for the new license deal.

<https://billboard.it/english/siae-meta-matteo-fedeli-interview/2023/03/19101923/>



Article 17(4)(a) – empirical findings

As shown by our empirical investigations, the “best efforts” requirement led to an **overall increase in right-holders’ bargaining power** in all Member States under investigation:

1. Social media services are **obliged to engage in negotiations with copyright holders** in order to benefit from Article 17’s safe harbour
2. As evidenced by a few German cases, rights clearance efforts by content-sharing platforms are now subject to the **scrutiny of national courts/authorities**
3. This has already brought social media’s business practices **in line with those of digital service providers** (DSPs)
4. This also means that, in terms **repertoire data, social media and DSPs have become remarkably similar** in the use of sound recordings

The implementation of upload filters as “best effort”

- Article 17(4)(b),(c) indirectly obliges large social media services to use **upload filters** to comply with the “best efforts” requirement and with the *ex ante* licences obtained from right-holders
- Upload filters work well to prevent unauthorised uploads of **recorded music** as the music industry implements and provides tech companies with **reliable identifiers for sound recordings**
- They also encourage social media services and right-holders to **cooperate by exchanging data** to build modern and reliable copyright data infrastructures
- YouTube's transparency reports indicate that there are **far less "false positives"**, i.e., violations of **users' fundamental rights**, as predicted by scholars

(Not) safeguarding user's fundamental rights (Art. 17(7)-(9))

Austria & Germany

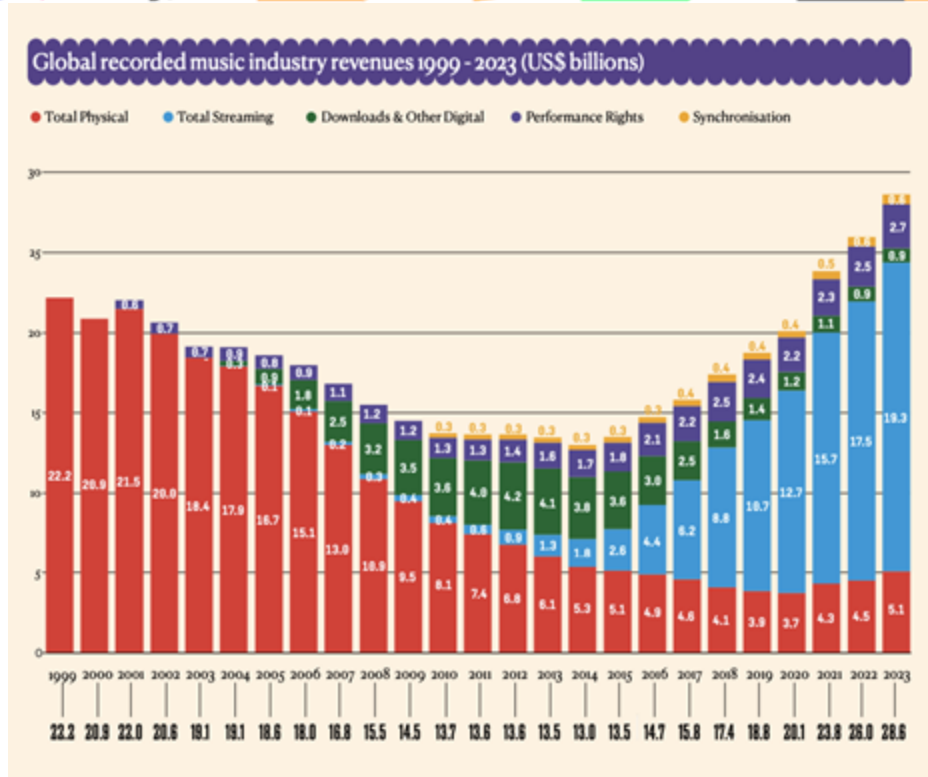
- They introduced **ex-ante safeguards** for user-generated content containing minor uses of works e.g. snippets of sound recordings not exceeding 15 seconds.
- These short snippets of sound recordings are highly valuable and often form the foundation of social media platforms' business models.
- Both introduced **exceptions** to also safeguard right-holders.

Italy & Spain

- Both Member States' laws require that **user-generated content remain inaccessible** after a takedown request until the complaint procedure is finalised.
- As these laws do not provide any exceptions to this general rule, there is a significant risk of infringing on social media users' fundamental rights.

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Governance and licensing practices of creators' collecting societies in online music markets



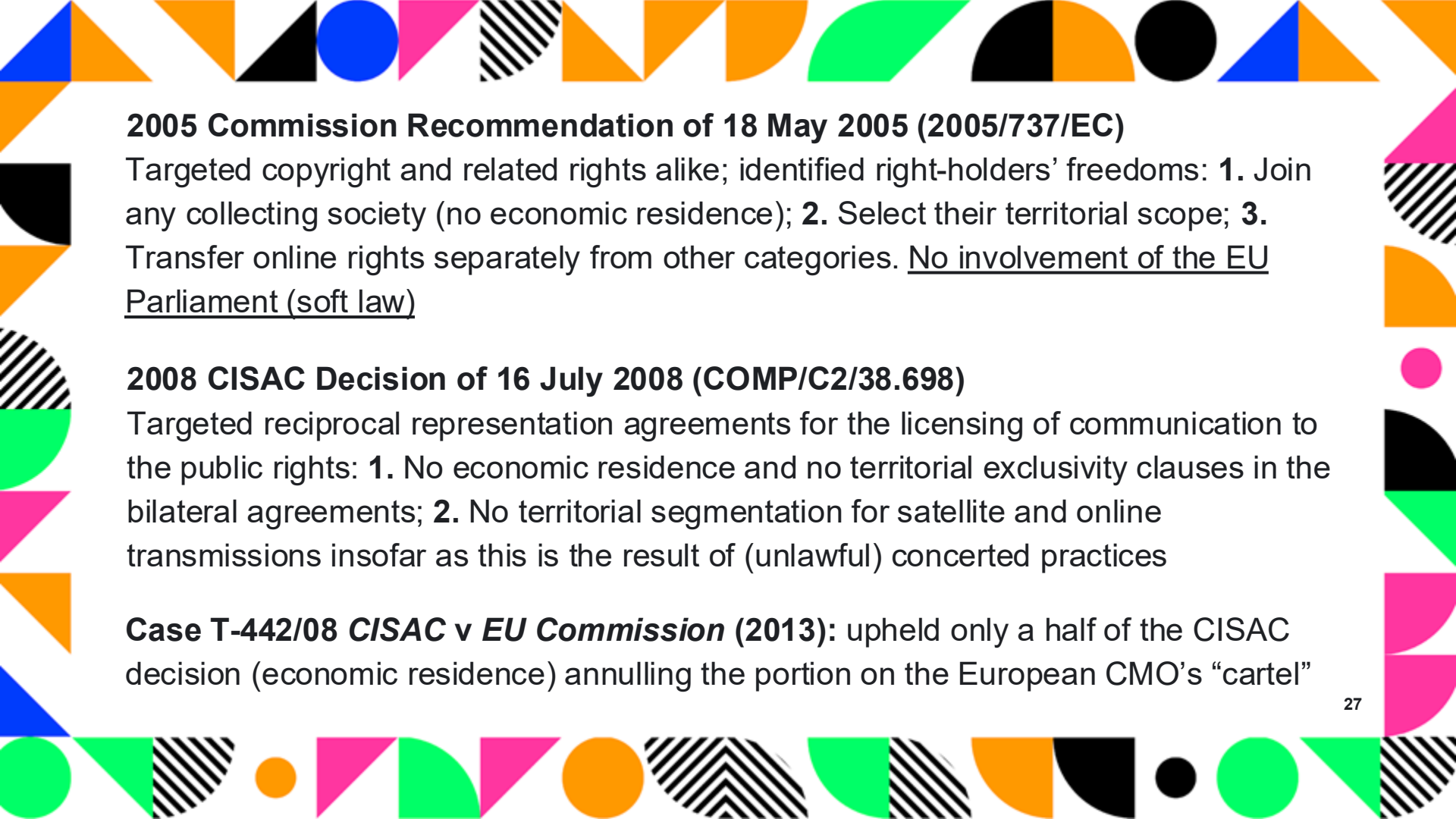
Source: IFPI, *Global Music Report, 2024: State of the Industry* (IFPI, 2024), excerpt publicly available at https://www.ifpi.org/wp-content/uploads/2024/04/GMR_2024_State_of_the_Industry.pdf accessed 30 August 2024. All statements in this presentation attributable to IFPI represent Fair Muse's interpretation of data published as part of the IFPI Global Music Report in March 2024, and have not been reviewed by IFPI. Each IFPI publication speaks as of its original publication date (and not as of the date of this presentation).

Online music rights licensing: basic structure

- Commercial users need authorizations from different **right-holders**:
 - ◆ Composers + Publishers
 - ◆ Phonogram Producers + Performers
- Collective management is well developed mostly for the clearance of **authors'** and **music publishers'** rights
- Collective management for “**neighboring rights**” is much less developed (i.e., record producers normally license their rights individually or through rights aggregators)
- Each collecting society traditionally represents *directly* a domestic (i.e. national) repertoire: in the domain of online licensing, CMOs represent their direct repertoires on a multi-territorial basis

Evolution of collective rights management

- While **CMOs** originally resembled trade unions, they soon became a ‘**one-stop shop**’ for clearing “**performing**” and “**mechanical**” rights and to distribute royalties
- In the field of **neighbouring rights**, performing artists’ and phonogram producers’ organisations remained active mostly in collecting remuneration under **national statutory schemes**
- The clearing of rights in one country with one CMO representing the entire global music repertoire ensured that all users’ reports were or could be **processed by one CMO**
- However, CMOs’ monopolies and their network of **reciprocal representation agreements (RRAs)** presupposed *territorial* exploitations. RRAs started being insufficient or inadequate as soon as online music services started seeking multiple licences for all territories where they operated simultaneously
- CISAC members’ original response to these new needs was the conclusion of the **Santiago** (performing/online) and **Barcelona** (mechanicals/online) **agreements** in 2002. However, both agreements were dismissed after being notified to the EU Commission on EU competition law grounds

A decorative border surrounds the text, composed of various geometric shapes including triangles, circles, and semi-circles in colors like blue, orange, pink, green, black, and white. Some shapes have patterns like stripes or dots.

2005 Commission Recommendation of 18 May 2005 (2005/737/EC)

Targeted copyright and related rights alike; identified right-holders' freedoms: **1.** Join any collecting society (no economic residence); **2.** Select their territorial scope; **3.** Transfer online rights separately from other categories. No involvement of the EU Parliament (soft law)

2008 CISAC Decision of 16 July 2008 (COMP/C2/38.698)

Targeted reciprocal representation agreements for the licensing of communication to the public rights: **1.** No economic residence and no territorial exclusivity clauses in the bilateral agreements; **2.** No territorial segmentation for satellite and online transmissions insofar as this is the result of (unlawful) concerted practices

Case T-442/08 CISAC v EU Commission (2013): upheld only a half of the CISAC decision (economic residence) annulling the portion on the European CMO's "cartel"

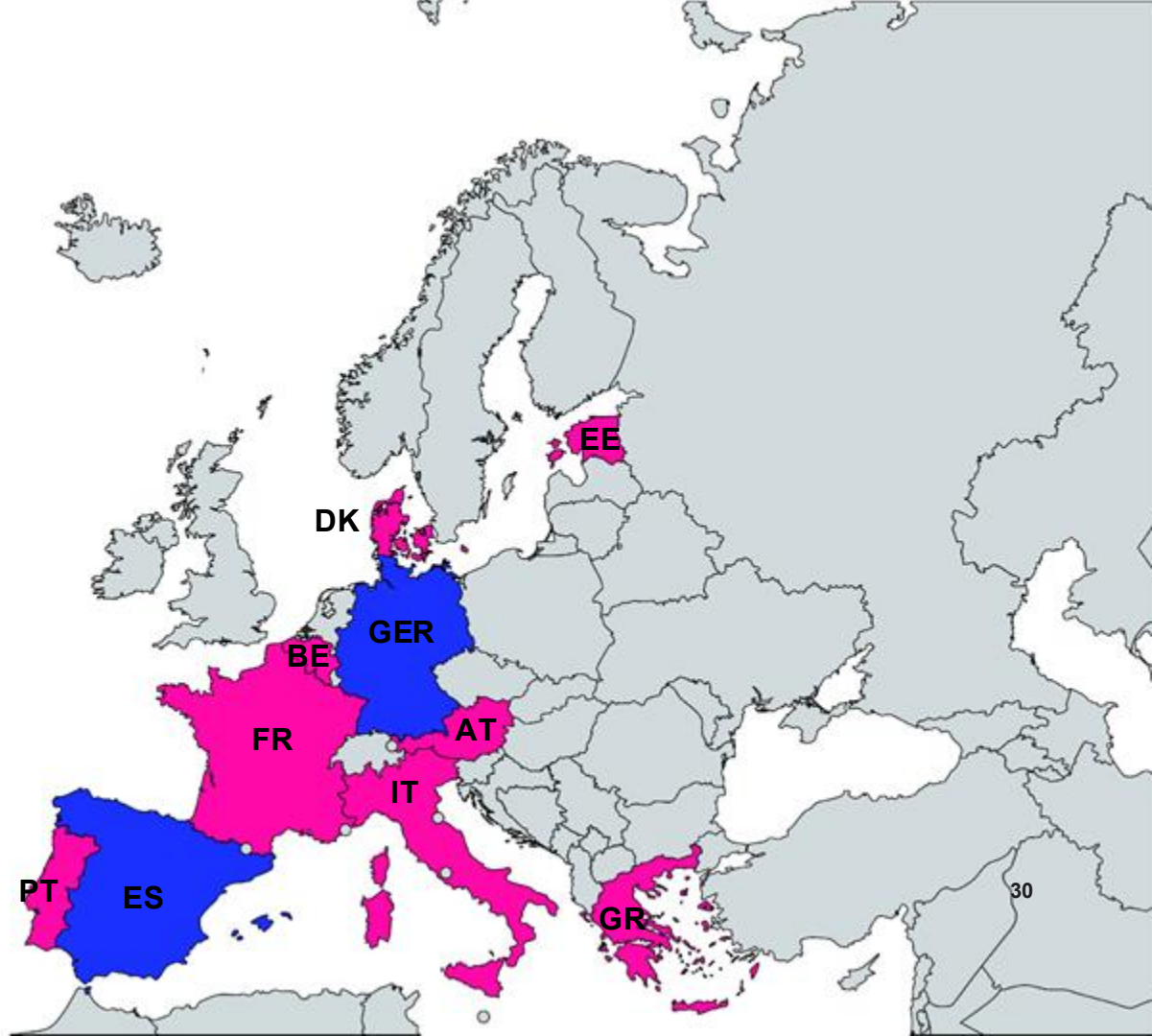
Initial responses from CMOs and publishers

- Major music publishers established **new licensing bodies** such as CELAS (EMI+GEMA+PRS) and DEAL (SACEM+UNIVERSAL MUSIC)
- CMOs formed “regional” **joint ventures** of aggregating national repertoires such as ARMONIA (SACEM+SGAE+SIAE+SPA) and Scandinavian + Baltic CMOs (Nordic Copyright Bureau)

Right-holders' freedom of choice in Europe: Directive 2014/26 - Article 5

- Right-holders shall have the right to choose the rights and categories of rights to confer to CMOs (5.2)
- Unless a CMO has objective reasons *not* to accommodate the request of rights holders, it shall be obliged to manage their rights, categories of rights or types of works
- Termination/withdrawal of rights (5.4 – 5.5)
- Right to grant licences for non-commercial uses (5.3 and 5.8)
- Specific consent for each type of right managed (5.7)
- Info to right-holders on each right managed (5.8)

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Role and regulation of 'Independent Management Entities' (IMEs)

- IMEs were **not contemplated in the original proposal** of the European Commission. It was during the parliamentary discussions that including IMEs in the CRMD scope of application was discussed
- **IMEs** differ from CMOs:
 - 1) neither owned nor controlled, directly or indirectly, wholly or in part, by right-holders; and,
 - 2) organised on a for-profit basis (Article 3).
- Now, IMEs shall be subject to regulation to the extent they carry out the same activities as CMOs (**Recital 15**)
- Thus, IMEs should be subject to specific obligations:
 - good faith in licensing activities;
 - transparency of information provided to right-holders, other licensing entities and users upon request;
 - disclosure of information to the public (including membership and termination rules, standard contracts, tariffs and amounts due to right-holders);
 - compliance with the Directive, under the control of the supervisory authorities appointed by Member States; and
 - the processing of personal data in accordance with EU law (**Article 2(4)**)



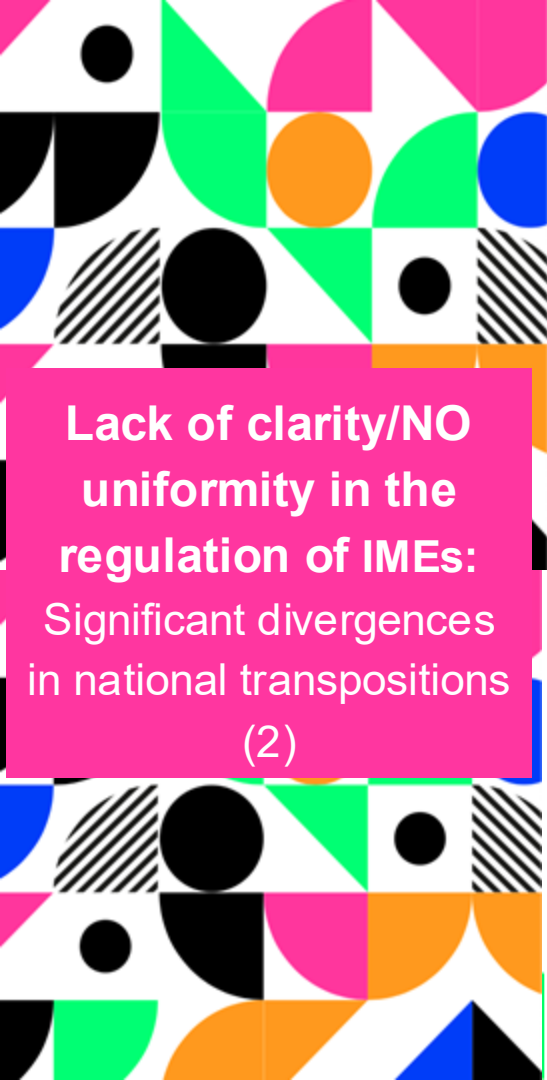
Italy

Lack of clarity/NO uniformity in the regulation of IMEs:

Significant divergences
in national transpositions

(1)

- Italian law granted SIAE a **legal monopoly** on collective copyright management, even after the transposition of 2014/26 Directive via Legislative Decree 2017/35 (Art. 180 of the Italian Copyright Law)
- Subsequently, an amendment to Art. 180 eventually **repealed** SIAE's monopoly by reserving copyright's intermediation (just) to **CMOs**. This solution still prevented IMEs from operating in Italy (Art. 19, Law Decree 148/2017, converted with Law 172/2017)
- This anomaly led to 2 cases before the Court of Rome:
 - 2018 C-781/18:** SIAE objected to UK-based IME Soundreef's eligibility to operate in Italy → case was settled out of court
 - 2022 C-10/22:** LEA (Liberi Editori Autori) sued Jamendo (Luxembourg-based nonprofit organisation licensing works under Creative Commons) arguing that Jamendo, as an IME, was not permitted to operate under Italian law. In March 2024, the CJEU held that prohibiting IMEs from offering their services on a EU-wide basis (i.e. across borders, including Italy) is incompatible with EU law



Lack of clarity/NO uniformity in the regulation of IMEs:

Significant divergences in national transpositions

(2)

Spain

- **Unison Rights** (Spain-based IME) has been active against CMOs' practices impeding new competitors from entering national markets
- In May 2019, the Spanish Competition Authority (CNMC) sanctioned SGAE for abuse of dominant position (S/DC/0590/16) consisting, among other conducts, of imposing statutory and contractual restrictions on its members' freedom to partially withdraw their rights from SGAE (decision appealed and annulled)
- Following another complaint by Unison, CNMC kept scrutinising SGAE's operations and sanctioned it again in June 2024 (S/0641/18) for having distorted competition through misleading "flat" licensing fees and the offering of a supposedly "universal" rights clearance and tariffs service to users

Greece

- **'Simple'** IMEs vs IMEs with a **dominant position** (Greek Law 4481/2017, Art. 32 and 50)
- Issues: Lack of definition of 'dominant position'; Non-dominant IMEs cannot manage rights under mandatory collective licences

Portugal

- **IMEs** in Portugal **can still be owned by right-holders** (cf. Art. 3(b)(i) and (ii) of Portuguese Copyright Law) in contrast with Recital 15 of the Directive 2014/26

EU multi-territorial licensing rules ("Passport" system)

- Capacity to process multi-territorial licences (Art. 24)
- Transparency of information (Art. 25)
- 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 CMOs for multi-territorial licensing (Art. 29) and "tag-on" regime (Art. 30)

Achievements and failures of the “Passport” system

Achievements:

- Modernisation of collective rights management
- Incentives to CMOs to significantly invest in their data processing capacity and the development of the necessary infrastructures
- Greater transparency towards right-holders, other CMOs and online exploiters

Failures:

- Too much inequality among right-holders: creation of a two- or three-tier licensing market favourable to big publishers → this is a clear threat to cultural diversity (being detrimental to small/local repertoires and new/small DSPs)
- Inconsistent enforcement of the “Passport” rules at national level → This does not help digital music licensing become more modern, transparent and fair

Evolution of music licensing hubs



Legal issues raised by licensing hubs

- **Withdrawal of online rights:** (i) mechanical rights: “easy” for publishers of the Anglo-American music repertoire; (ii) “performing” rights still based on traditional CMOs’ or their joint ventures’ infrastructures (i.e. cost-saving for the hubs)
- **Split copyright:** multiple right-holders with possibly distinct representatives increase the number of licences needed by a DSP or a social media platform
- **Legal status:** limited transparency; conflicts of interest; no control by right-holders; separate licensing of mechanical and performance rights questionable in terms of validity
- **Suitable for publishers:** purely for-profit; no contribution to the CMOs’ mission

Repertoire
fragmentation

Data
fragmentation

Which data are we talking about?

- **Musical work** identification - **ISWC** (International Standard Musical Work Code)
- Interested Party Information (IPI) numbers assigned to songwriters, composers and music publishers (An IPI is a unique, international identification number, usually 9–11 digits long).
- **Sound recording** identification - **ISRC** (International Standard Recording Code)
- Links between musical works and sound recordings: DDEX reporting formats
- Identity and other data of relevant right-holders, including shares and mandates to a given CMO or an IME → ICE Copyright Database, URights, etc.
- Other data & metadata providing details such as modes and length of exploitation

Data interoperability and standardisation are limited

Publishers' and composers' rights:

- Existing standard (ISWC)
- From GRD's failure to Cis-Net, ICE and URights

Social media services:

- Both professional and amateur works (hybrid)
- Repertoire data from the music industry (Art 17 DSM Directive) - Usage data from platforms (Art 17 CRM Directive)

DSPs:

- Record labels share usage data with DSPs using DDEX reporting standards
- Professional music

Publishers and composers

Record labels

Performers

Social media services

DSPs

Record labels' rights:

- Existing standard (ISRC)
- Alignment of these rights with publishing rights
- DDEX manages several metadata standards that are built into standard messaging protocols

Performers' rights:

- Missing data because of (i) contractual buyouts (ii) non-harmonisation of remuneration rights and (iii) non-standardised practices
- SCAPR's International Performers Database (Comparable to CISAC's Cis-Net)

Should not interoperability be boosted or at least improved by (existing) transparency obligations?

CMOs' obligations (Directive 2014/26):

Transparency & Reporting obligations towards their members, other CMOs and users (Arts. 18 - 20) as well as the general public (Arts. 21 - 22)

Counterparts of individual creators (Directive 2019/790): Up-to-date, relevant, and comprehensive information to authors and performers on the exploitation of their works and performances **at least once a year, i.e. in an active way** (Art. 19)

DSPs and social media services (Dir. 2014/26): Users are obliged to disclose essential data to CMOs for collection of rights revenue and distribution and payment of amounts due to right-holders (Art. 17)

Policy suggestions for the future (1/2)

- Even if reporting and transparency obligations are currently targeted at both CMOs and DSPs/OCSSPs, these users are not specifically obliged to
 - Identify the unmatched tracks - seeking to allocate this “black box” money on fair and transparent grounds, with the help of CMOs;
 - Not accept music content without important metadata, including ISWC, IPI and names of authors and artists;
 - Not remove metadata from uploaded music and/or to substitute them with their own metadata.
- ISRC submissions without ISWC should not be acceptable
- Licensing hubs co-created by CMOs and music publishers should be legally treated as CMOs (accountability, tariffs, duty to represent)

Policy suggestions for the future (2/2)

- Supervision and enforcement of the “Passport” system for CMOs should be EU-wide, i.e. not national
- Since CMOs have no effective capacity of monitoring online uses, including this capacity in the EU Passport system would give them an incentive to invest in partnerships with data providers (e.g. BMAT)
- Regulation of IMEs should be clearer and uniform at EU level
- Statutory remuneration rights for online exploitations for performing artists could be harmonised across the EU if supported by adequate data and metadata