

The Value Gap: An Examination of its Origins and the Current Situation in Latin America

Authors: **Caroline Fucci & Marcelo Goyanes**

22 General Overview of the Music Market in the Region

The digital music market is not new in Central and South America. In Brazil, around 1999 and 2000, the company iMusica started to sell music downloading with a very limited catalog, years before iTunes started to do business in the same country. In 2006, the company Terra Networks launched the service Sonora in Brazil. Sonora was responsible for more than 40% of the digital music market in Brazil and later on was classified as one of the four main platforms in the music industry worldwide, competing with Spotify, Napster International and Rhapsody, subscription services that were only available in the U.S and a few of other countries.

This may be considered one of the key factors that has contributed to the rapid expansion of the digital music streaming services in Latin America, together with the economic growth in some countries, especially Brazil, Mexico, Argentina and Chile. There is no doubt that Latin America is a big developing market, with a strong and intense youth population, heavy user of music, technology and Internet altogether.

In the last decade, debates over copyright law in Latin America's music industry were brought into attention, especially because of the growth of high-speed Internet penetration and many transformations caused by the dissemination and transmission of copyright protected content via digital media platforms.



The legal music streaming and downloading through the payment of corresponding fees that later on will be partially reverted to the right-owners of musical works (i.e., composers, publishers, performers, musicians, phonogram producers, etc.) plays a fundamental role in the business environment. Nevertheless, physical and digital piracy also needs to be taken into account as the triggering points to many judicial discussions and, consequently, the legal enforcement of copyright law.

Unfortunately, online piracy in Latin America is still very strong. The widespread popularity of piracy together with the rise of connectivity in the region poses an alarming challenge for the entertainment industry.

A transformation that started recently in Latin America and is developing year by year is the transition from illegal services to legitimate services, especially due to the growth of the digital music market. The improvement of such usage generates a completely new perception of the music industry in this region, as illegal free services are being transferred to paid or ad-supported services. In the meantime, the socio-economic scenarios of Latin America could actually explain the constant pursuit of free content online and, therefore, free streaming in comparison to the European and North American markets.

The latest financial and social studies show that Latin America is becoming a streaming powerhouse causing great impacts by the region's artists and repertoire.

In 2017, Latin America was, for the eighth consecutive year, the region with the highest level of growth in revenues arising from the global music business, with a 17.7% rise, up on 2016's increase of 8.5%. Digital revenue grew by 31.2%, driven by a surge in streaming revenue of 48.9% that helped offset a 41.5% decline in physical revenue. Peru (21.7%) and Chile (14.3%) had the most notable growth in revenues, while Mexico, the region's second largest market, grew only by 7.9%, when compared to 2016's 23.6% growth.

Meanwhile, Brazil, considered in 2017 as the largest market in Latin America and placed 9th in the whole world, comparing with U.S., U.K. and European countries such as France and Germany, returned to an impressive growth of 17.9% after a 3.08% decline in 2016, most likely caused by the political crisis that affected for the late years the economy of the country. In this regard, Brazil was considered a major provider of breakthrough international artists.

In Mexico, more than 60% of streaming music users are tuning in to Spotify, with Google Play making up 12.3% of the streaming music user share nationwide. Spotify really dominates the streaming market in Mexico, considering that over 25% of internet users in 2015 said they were Spotify users, the second highest figure in the world, behind Sweden. In 2017, Mexico has a music streaming market volume of approximately US\$ 90 million.

In Argentina, streaming is the market's largest segment in digital music, accounting for approximately US\$ 44 million in 2017.

Brazil had digital music revenue of approximately US\$ 111.7 million and a revenue of approximately US\$ 91 million streaming in 2016, with a 52.4% increase only in streaming compared to 2015. When talking about video, including music content, YouTube currently leads the position as the most used video platform in the country, comparing to other social media such as Facebook and WhatsApp.

It is clear that the impact of streaming is especially evident throughout Latin America. As a direct coincidence, 50% of the total music market is now digital. This growth in the streaming industry is motivated by highly recognized services, such as Spotify, Apple and Deezer.

In this regard, Spotify representatives have stated that Mexico and Brazil may probably overtake regions like UK and Germany in terms of number of users, mostly because of the great adoption of the smartphone use in these countries, which provides more access to digital music contents.

» The Downside of the So-called Streaming Revolution

In one sense, legitimate streaming has revolutionized the music market and helped to reduce piracy levels. Unfortunately, the business model adopted globally has created severe discussions among labels, platforms, performers and composers, the latter complaining in many territories about the payments received and the revenues split.

It is fair to say that the music consumption through streaming services derives more from ad-supported models and user upload services than from paid subscription services, which reflects the preference of audience for "free" content consumption.

This type of music consumption implies, on a larger scale, a threat to the long-term sustainability of the music and entertainment industries in these countries. Protecting music from being illegally distributed, and therefore undermining the recovering legitimate music market remains a key priority for the industry.

As expected, ad-supported models such as YouTube, which are mostly composed by content uploaded by third parties, affect in many senses multiple branches of the entertainment industry. At first, the music industry became concerned about the growing power that was YouTube. However, record labels, artists and many players of the music industry recognized that this platform was providing a user-friendly, browser based, fully-embeddable video tool that could be used to distribute and promote their own videos universally at minimum costs.

Although many music videos online have billions of views, which also generate huge traffic and ads, numbers of music consumption on YouTube are considered shockingly low. According to data released by San-Francisco based Pexeso, only approximately 4.3% of the content available on YouTube was a music video or a broader music-related content in 2016.

From publishers and labels to performers and TV channels, almost all the key players of the music market decided to do business with YouTube and launch its

branded channels. For instance, Vevo, the world's leading music video hosting service on YouTube, with more than 330,000 videos uploaded, makes licensed and legal music available online, together with major record companies.

However, with the growth of the legal music streaming platforms and paid subscription services, while YouTube continued to develop in number of users, the royalties paid to the music copyrights holders have not increased accordingly.

On subscription services such as Spotify, the payments often depend on the number of paid subscriptions and the artist's overall popularity compared to the rest of the service's catalog. YouTube's payments to rights owners are considered more volatile. The number of times a video is played, the amount of time spent by a user watching a video, the number of subscribers of a channel, and the number of comments of the video are all determining factors on the royalties paid by YouTube.

In short, the monetization of music content available online, including videos containing music and music videos themselves, is not especially restrict to official channels supported by major record labels. Every creator – and this means any owner of exploitation rights over a video – can monetize his/her own content on YouTube. The videos must comply with YouTube's copyright policies, besides the general requirements provided in the terms of use. The ads displayed with the videos are determined automatically based on a number of factors, e.g., categorization of the video. YouTube looks after the payments due on the song copyright via its deals with the music publishers and their collecting societies.

In view of the above, the mismatch between the value that user upload and ad-supported services such as YouTube extract from music and the revenue returned to the music community is referred to as "value gap". This growing mismatch describes how user upload video streaming services have been relying on online liability laws to claim that they are not liable for the music made available to the public on their platforms.

"With the growth of the legal music streaming platforms and paid subscription services on YouTube, the royalties paid to the music copyrights holders have not increased accordingly."

Bearing in mind the sustainability of the music industry, the value gap is considered to be one of the biggest threats existing today. In this context, this article will briefly address the relationship between the multiple agents and the current legislation existing in one of the most promising developing music markets of the world.

>> Copyright Legislation and the Value Gap

All over the world, today, the majority of new artists use YouTube and other user-generated platforms and social networking to promote their careers in a fast and inexpensive way. In the past, musicians would start their careers celebrating agreements with record labels and their payouts would be received through the sales of albums. The production of music videos, their releases and transmissions were the consequences of an artist's success in the industry.

In this digital world, many up-and-coming artists are being denied the chance to make a living when streaming companies do not pay them fairly. Nowadays, the *online persona* of artists plays a major role before their entrance in the traditional music market, which is still important to their career. This lack of fair compensation is crippling for new artists who depend on their earnings to stay in the business.

Inside this complex system, there are always two sides of the same phenomenon: on one hand, the advantages of the information technology era as the key tool to foster the dissemination of content, but on the other hand the risk of illegal or unpaid use of copyright material as a misappropriation of the rights-holders.

The main aspects of the applicable legislation of the key markers of Latin America will be analyzed as follows:

1) Brazil

In Brazil, the most relevant copyright law is the Law No. 9,610/1998 (the Copyright Act). Brazilian copyrights are split into patrimonial and moral rights. The patrimonial rights are the ones related to the economic uses of the work, while

the moral rights are related to protection of personal and reputational aspects of the work. The moral rights will belong in perpetuity to the author of the work, and as a general rule cannot be waived. Therefore, the Copyright Act protects economic rights and also ensures great recognition to the authors themselves.

The Copyright Act does not expressly regulate the online environment, it deals with new technologies (for 1998), and it is fairly understood that the same authorization process to use and exploit work of art in the physical world is also applicable to the digital exploitation, if desired by the parties.

In Brazil, the current discussions about digital music platforms are directed to streaming services business models, which are divided into two general categories:

- i) non-interactive and interactive services, and
- ii) music downloads. Although user upload video streaming platforms such as YouTube are classified as streaming services, YouTube has actually some *sui generis* characteristics. Nevertheless, there is still an analytical struggle in YouTube's understanding as a device for access to culture or as simply a productive practice, which functions together with different agents and has its own activities and source of income.

Public performance rights are covered by copyright law in streaming services as well, allowing the rights holders to authorize or to prohibit royalty-free or for compensation commercial use of their works and performances. The rights holders have the ability therefore to make their work available to the public in a manner that any person can access at a time and place of their choice.

ECAD (the Central Office for Collection and Distribution) is the sole institution responsible for the collection and distribution of music public performance rights. ECAD is managed by seven national music associations, in other words, collective management organizations, representing thousands of national and international right-owners of musical compositions and sound recordings.

In 2017, ECAD distributed more than US\$ 300 million to approximately 259,000 artists and associations in Brazil. This figure demonstrates an increase of 36,7% compared to 2016, and also establishes the importance of streaming as a contributor to the distribution of royalties regarding public performance rights.

The collective management of musical rights is therefore the exercise of copyright and related rights by organizations acting in the interest and on behalf of the rights owners. Individual management of rights is virtually impossible for many commercial uses of music. For instance, an author would not be able to contact every single radio, television stations, music streaming platforms to negotiate licenses and royalties for the use of his/her works. Licenses for music public performances are, therefore, commonly administered by performing rights societies.

As a civil law country, Brazil does not have provisions akin to those of fair use or fair dealing. However, the Copyright Act brings an exhaustive list with limitations on the rights of the authors that can be raised as a potential defense.

Even though Brazil does not expressly have a safe harbor legislation for copyrights, as we see as a specific law or regulation regarding fair compensation and the value gap issue, there are legal provisions applicable when it comes to protect musical works available online.

The Law No. 12.965/2014 (the Brazilian Internet Act) sets forth principles, guarantees, rights and obligations for the use of the Internet in Brazil. The Law establishes the respect for freedom of expression and access to information and culture as key principles, and also introduces a liability exemption for Internet access providers and a safe harbor provision for other Internet service providers (although not applicable to copyrights).

Significant restrictions to the widely recognized digital removal mechanisms known as notice and takedown were applied after the Internet Act became in force in the Brazilian jurisdiction. This law states that, in order to ensure freedom of expression and prevent censorship, an Internet service provider shall only be

subject to civil liability for damages caused by virtue of content generated by third parties if, after specific court order, it does not remove the infringing content.

Copyright infringement was exempted from the referred court order requirement to the safe harbor of Internet service providers. Therefore, the liability of the Internet service providers for damages arising out of content generated by third parties, in the case of infringement of copyright or related rights, continue to be governed by the copyright legislation and the case law (for instance, Superior Court of Justice: *Google v. Botelho Indústria e Distribuição Cinematográfica Ltda.*).

This means that today, in Brazil, the international known notice and take down mechanism is applicable for copyright owners to try to control the illegal exploitation of their work on the web.

Although indiscriminate content removal from websites may be detrimental to fundamental Constitutional rights, such as access to information and freedom of expression, and the notice and take down mechanism seems burdensome to the authors' and rights owners' perspective, it can actually bring some legal certainty to the copyright environment. This discussion is rather still incipient in Brazil and it is fair to say that global tendencies that comes from U.S. and Europe are mostly followed locally.

Another mechanism that is becoming useful in Brazil is the site blocking or blocking injunctions, which was applied in one of the most famous police operations regarding illegal downloads: the "Barba Negra" operation. Upon an investigation led by the Federal Police, the Federal Court took down four big illegal film downloading websites. Those websites received more than 100 million monthly visitors.

Although blocking injunctions have already been applied by some courts in Brazil, there is still controversy about the validity of this type of action. Given this scenario, there are two Bills under discussion in the Congress and the Senate expressly allowing the use of this court action:

Moreover, many composers have also recently argued that they were not receiving proper payment from YouTube, which led to one of the most discussed cases about music royalties in Brazil lately.

Google, representing YouTube, filed a complaint in court against ECAD and UBEM, the association of music publishers and composers, seeking a court order determining the terms of a license agreement between the parties in order to make the payment of copyrights related to content available on YouTube to both entities. In order to satisfy those rights, Google also asked for the complete list of works that are part of ECAD's and UBEM's catalog.

It was found by the first instance court that the amounts owed by Google to ECAD for the performance of works cover only the live streaming on YouTube. Therefore, the streaming of music videos by users should be identified as individual performances, thus not public performances and also not chargeable by ECAD.

The lower Court found that the royalties previously charged by ECAD and UBEM were excessive, denoting abuse of rights, in terms with Article 187 of the Civil Code. Additionally, the parameters established by the Copyright Act should be considered in regards to the charge of licensing fees, such as reasonableness, good faith and local customs.

In conclusion, the Court held that Google should pass a percentage of the advertising income from the music videos directly to the music publishers and not to ECAD. The percentage due to ECAD is of the advertising income regarding live streaming (recognized as public performance) on YouTube. Google, ECAD and UBEM appealed to higher courts and are pending judgement before the Court of Appeals of Rio de Janeiro.

Nevertheless, the parties are negotiating an agreement in order to extinguish the ongoing lawsuit.

In this regard, Google and ECAD have requested the dismissal of the case due to the signing of an agreement between both parties. This request was followed by Google and IUBEM's pleading demanding the suspension of the case for 90 days, giving more time for their negotiations. The Court has not issued a final decision about the parties' requests yet.

This case is an indication of the situation of composers in Brazil and therefore illustrates the value gap issue in Brazil.

ii) Chile

In Chile, the relevant copyright legislation is the Chilean Intellectual Property Law, Law No. 17,336, which regulates the nature, duration, ownership and exceptions of copyrights works, permitted acts in relation to such works, including moral rights, and provides for civil remedies and criminal offences for copyright infringement, neighbouring rights of artists, interpreters and performers, of phonogram producers and broadcasters. Although it is not explicitly stated, it also regulates digital rights management, such as streaming and digital media, and Internet service provider limitation of liability.

Fair use was introduced in the law by the 2010 copyright amendment, in order to comply with one of the commitments resulting in the signing of Free Trade Agreement with the U.S. and to reflect the changes in the music provided by technological and digital innovations. There are the standards used in determining whether a particular use is fair or not.

The limitation of liability for Internet Service Providers (ISP) is now part of Chilean copyright legislation, determining that an ISP is exempt from liability if infringing copyright content is removed as soon as the content is detected in their systems. The ISP must be officially notified through a legal notice issued by a court.

The Law acknowledges a series of neighbouring rights to artists and performers (actors, singers, dancers, musicians, among others), empowering them to authorize or forbid their broadcasting and to receive payment for their public use, notwithstanding copyrights.

Collective management of copyrights and neighbouring rights may be conducted in Chile by non-profit corporations that have the sole purpose of managing collectively copyrights and neighbouring rights, and that have obtained authorization to operate from the Ministry of Education. Said entities are obliged to accept the management of copyrights and other intellectual property rights that have been entrusted to them.

In the case of use of phonograms or their reproduction for radio or television broadcasts, or any other public form of communication, the user is obliged to pay remuneration to the artists, performers and to the producers of phonograms, and the collection of the phonogram performance rights must be carried out by performing right society representing them. However, in no event may the authorizations granted by said performing right society limit the power of the copyright holders to manage their works individually in the case of single uses.

The key players consist of creators, music labels and collecting societies. Traditionally, the market was entirely dominated by the local branches of international labels, such as Sony Music, Universal and Warner. However, overtime many independent record labels, communications agencies, online stores and digital distribution platforms associated to form IMI Chile - Association of Independent Music Industry of Chile, whose aim is to encourage the production, promotion, marketing and export of Chilean artists and their phonographic productions.

The collecting societies have become increasingly aware of the diversity of digital platforms available online and have issued updated taxes to reflect the new means of making available copyrighted works. In this context, the Sociedad Chilena de Derecho de Autor (SCDA) and Sociedad de Productores Fonográficos y Videográficos de Chile (PROVOFI) remain as the main collective management organizations.

From a legal point of view, the value gap issue has not been a priority in the Chilean legislative agenda. However, it is worth mentioning that in 2015 a law Bill was approved that made it mandatory for broadcasters to reserve, at

least, 20% of their musical repertoire to Chilean artist or works, becoming in effect a legal quota on the percentage of music they could broadcast.

Although this does not tackle the issue of the difference in value among the different digital platforms, it did intend to fight the perceived inequality between foreign-created and local works.

iii) Argentina

In Argentina, the value gap issue has reached a significant discussion. The music industry's efforts to tackle the unauthorized use of music have so far proved unsatisfactory and it therefore complains that unlike subscription services, like Spotify, the contribution of other internet services in royalties is significantly low, despite of the high number of consumers listening to music through Internet.

Argentine legislation has no provisions applicable to the content uploaded by users or safe harbors. However, there are judicial actions and agreements that help to try to keep unauthorized content off the platforms.

The main players involved are the collective societies AADI (i.e. Asociación Argentina de Intérpretes) and CAPIF (Cámara Argentina de Productores de Fonogramas) and the intermediaries, who are all facing a different arena where rules are unclear. In Argentina, the law establishes that collective societies have the power to represent and collect for all national performers and phonogram producers, and said law is mandatory. However, the "making available to the public" is not within the fields for which the societies can collect and is therefore, in principle, an area where performers and intermediaries are free to work out agreements. The fact that the "making available to the public" has not been, so far, assimilated to the right of communication, remains a debatable issue and may change if the courts have the chance to study this issue and voice a different opinion.

In Argentina, the liability of ISPs is a matter that is still under discussion. Despite several attempts to regulate this issue, there is no legislation in Argentina which addresses ISP liability. Currently, there are three Bills on the subject before Congress. In this context, when considering this matter, the courts have applied the principles of general civil law:

The decisions issued by the courts are central to understanding ISP liability in Argentina. Though originally discussions focused on whether strict liability or a standard of fault should be applied, in its latest related decision (Argentine Supreme Court, "Gimburas, Carolina v. Google, Inc.", 2017) the Supreme Court confirmed the decision of the lower court, and reaffirmed that ISPs are only liable for third-party contents once they have actual knowledge of illicit contents and fail to act diligently.

In addition, it also specifically stated that an ISP may also be liable if they act as more than mere intermediaries and take an active role in connection with the third-party contents. The definition as to implication of "active role" are still under discussion.

The Argentine Copyright Law dates from 1933. Although it has been amended since then, it is still outdated. Nevertheless, there is a current possibility of amending the Copyright Law according to experts' debate. Some of the aspects of the Copyright Law that have been raised in this context include the need to update regulations to respond to new technologies and to have clearer rules on collecting societies.

The current and challenging issues brought by the digital era will definitely facilitate the development of policies that may help bridge this gap.

iv) Mexico

The interpretation of the term right of communication/making available to the public within Mexico is based on the Mexican Copyright Law (MCL). Of note however, is that the term communication to the public can mean only a communication to persons not present, however, the term in Mexico has a broader meaning and communication to the public can be seen in a public communication to persons who are present.

When interpreting the term communication to the public, the Mexican courts must always remain within the scope of articles 4 and 27 MCL, which illustrates, among other parameters, the different methods for which an author (or the holder of the economic rights) may communicate (encompasses any transmission of protected works or performance irrespective of the technical means or process employed) to the public (unspecified number of potential addressees and for profit-making purposes) the protected works indicating the below classification:

- Art. 4. The works qualifying for protection may be:
- a) in terms of their communication:
 - i) disclosed works: those that have been brought to the notice of the public for the first time in any form or medium, either entirely or in part, in their essentials or by means of a description thereof
 - ii) unpublished works: those that have not been disclosed;
 - iii) published works:
 - b) those that have been issued, regardless of the method of reproduction of the copies, provided that the number of the said copies made available to the public reasonably meets the exploitation requirements of the said work, estimated according to the nature thereof;
 - c) those that have been made available to the public through storage in electronic media that allow the said public to obtain hard copies thereof, regardless of the nature of those copies;

As in any other country the 'making available' right is exclusive for authors, performers, publishers and 'phonogram producers as well as broadcasting organizations' to authorize or prohibit the dissemination of their works and other protected material through interactive networks or any other media.

MCL also foresees that all the aforementioned, which may have respectively effected the first fixing of their performances, public communications, first fixing of the sounds of their performances or the images on their audiovisuals or their

broadcast communications outside of the Mexican territory, shall benefit from the protection accorded by this law and the international treaties on copyright and neighbouring rights signed and ratified by the country, which may allow (also sensu) both, local and foreign record producers, to have an exclusive right to cover the use of their phonograms in the Mexican digital environment.

- Article 27 of the MCL vests owners of economic rights (author or holder of the economic rights) with the legal ability to authorize and/or forbid the public communication of their works to be protected under this law, either by
- a) public presentation, exhibition, recitals or public performances or else through telecommunication public access (including the transmission or retransmission of the works by:
 - b) cable;
 - c) optic fiber,
 - d) microwaves;
 - e) satellite;
 - f) any other comparable means)

We may then conclude that MCL recognizes that the dissemination of phonograms in digital networks such as the internet, constitutes a primary form of exploitation of music, and therefore should be subject to the control of the rights owner. Furthermore, as foreseen in Art. 8 WCCT and Art. 10 of WPPT, Mexican provisions can be also understood in the sense that it is the accessibility of the phonogram or work—the potential for it to be received or perceived by members of the public—that is the decisive factor to be considered available to the public.

MCL provides limited scenarios to establish liability exemptions on economic rights, which should also be applied to music matters. Under this scenario, already disclosed works may only be used in the following cases without the consent of the owner of the economic rights and without remuneration, provided that the normal

exploitation of the work is not adversely affected thereby and provided also that the source is invariably mentioned and that no alteration is made to the work:

- i) quotation of texts, provided that the amount quoted may not be considered a substantial simulated reproduction of the contents of the work;
- ii) reproduction of articles, photographs, illustrations and commentary relating to current events that have been published in the press or broadcast by radio or television, or any other communication media, unless it has been expressly prohibited by the owner of the rights;
- iii) reproduction of parts of the work for the purposes of scientific, literary or artistic criticism and research;
- iv) On time reproduction of a literary or artistic work as long as it is
 - i) in a single copy,
 - ii) for user's personal and private use, and
 - iii) without gainful intent. Legal entities may not avail themselves on the provisions of this subparagraph unless it is an educational or research institution, or if not devoted to commercial activities;
 - v) Archive or Library one single copy reproduction of works for exclusive security and preservation reasons, if the work is out of print, no longer catalogued and liable to disappear;
 - vi) reproduction for the purposes of evidence in a judicial or administrative proceeding;
 - vii) reproduction, communication and distribution in drawings, paintings, photographs and audiovisual processes of works that are visible from public places.

This said, use of performances, phonograms, audiovisuals or broadcast materials shall not constitute a violation of the rights of the performers, phonograms and/or audiovisuals producers or broadcasting organizations where:

- i) no direct economic benefit is sought;
- ii) only short fragments are used for information on current events;
- iii) the use is made for educational or scientific research purposes;

It is clear that Mexican law does not have legal provisions comparable to E-commerce Directive and/or US safe harbor US for the content uploaded by users, but only the provisions mentioned above based on the MCL and new Supreme Court's rule in which right to freedom of expression and copyright on the Internet converged, based on which we may predict and/or anticipate the future legal expectations Mexico will have in this special matter.

On June 2017, Mexico's Supreme Court ruled in a case in which the right to freedom of expression and copyright on the Internet converged. There has been some legal proceedings initiated in Mexico against the administrator of websites focused in the public communication of music works and phonograms without the authorization of the right holders. During such proceedings, the claimants (right holders) requested the implementation of preliminary injunctions against the administrator of the websites and the Internet service providers asking for the total blocking of such infringement websites.

One of the ISPs filed a Constitutional procedure against the official action issued by the Mexican Trademark Office (MTO) ordering the blocking of the website, arguing the violation to constitutional rights of freedom of expression and access to information.

A Federal Court issued a ruling invalidating MTO's official action containing the order to block the website by stating that such official action was not the result of a proportionality analysis. Due to the important consequences to be decided in this case, Mexico's Supreme Court exercised its power to rule in this case considering the relevance of the same.

In this context the Supreme Court of Justice in Mexico recognizes that the Internet is a fundamental mean to exercise the freedom of expression and opinion. In this sense, the Court stated that the flow of information through the Internet must be free and thus limited as little as possible, which means that it can be restricted under exceptional and limited circumstances and only as foreseen in applicable laws.

The Supreme Court pointed out that restrictions to freedom of expression on the Internet will be legal only if meeting the following scenarios:

- i) it must be provided by law,
- ii) it must be based on a legitimate purpose, and
- iii) it must be necessary and proportional.

On the other hand, the Supreme Court emphasized that content in the Internet must be categorized in three different aspects, which are:

- i) those that constitute a crime,
- ii) those that are not punishable as a crime, but can justify a restriction and a civil suit, and
- iii) those that do not give rise to criminal or civil penalties, but which cause problems in terms of tolerance, civility and respect for others.

This said, each of the referenced categories will require different legal and technological solutions. Only for the first category of content (those that constitute a crime), generic restriction on websites will be justified (blocking). In the other two cases, restrictions must refer to a specific content.

Nonetheless, it is worth mentioning that the Court failed to consider the technical problems as it is impossible to block specific contents on a website.

We may deduct from the latest Mexico's Supreme Court herein mentioned rule that Mexico might be considered to be promoting safe harbor formulated with the vague standards of the referred three categorized aspects mentioned as Internet contents. Moreover, by privileging the exercise of freedom of expression over copyrights, although the Supreme Court has not yet ruled anything regarding the ISPs obligation to adopt and reasonably implement policies which may provide for the termination of subscribers and account holders of such ISP's who are repeat infringers (as foreseen, for instance, in the EU directive or in the Digital Millennium Copyright Act (DMCA) and the US Patent and Trademark Briefing on ISP Liability in the US).

However and on the other hand (almost simultaneously to the issuance of the aforementioned Mexico's Supreme Court rule), on August 2017, in a rather uncommon turn of events, the Mexican Trademark Office instituted ex-officio claims for copyright and trademark infringement against Mexican company "Sportlix", on allegations of broadcasting content allegedly owned by other media companies (such as Televisa, TV Azteca, Fox Sports, ESPN, TNT and Univision) and of using a number of trademarks registered to a number of media and news companies, without authorization. Oddly enough, "Sportlix" does not appear to have commenced to operate while their webpage advertises the services yet clearly indicates that they will only be available soon.

The fact that the Mexican Trademark Office has instituted legal proceedings against this company is surprising to say the least and raises questions on the reasons behind the decision to file suit ex-officio, as well as concerns on the outcome of the cases on at least two considerations: Does the Mexican Trademark Office have sufficient legal standing to institute the claims when the potential affected parties are private companies? And, could violations to third party's rights be demonstrated when the alleged services are yet to be available to consumers? Until today, no rules had been issued in this case and will have to wait for final resolutions in this case.

This can be considered the first steps in Mexico to start discussing and regulating about total and/or partial website blocking in Mexico and to analyze the positive or negative impact to the efforts of copyright holders to fight illegal contents in the Internet.

» Conclusion

The history of digital music market in Latin America dates back the late 1990's. Today Latin America stands as a key market, with a heavy use population for music, technology and Internet consumption. It is clear that the impact of streaming is especially evident throughout Latin America. As a direct coincidence, more than 50% of the total music market is now digital.

Debates over copyright law in Latin America's music industry were brought into attention lately, especially because of the growth of the high-speed Internet penetration and dissemination of copyright content via digital media platforms.

It is fair to say that the lack of a proper regulation in relation to the value gap issue makes the discourse even more wide and open to many interpretations. However, the technological advances and the music industry's own flow towards the attempts to regularize the payments made to the right-owners regarding revenues from ad-supported platforms reinforces the idea that Latin America follows the global trends.

The ongoing discussions about the subject still bring several questionings and unanswered queries, but this will definitely be useful for the development of new policies and adoption of measures in the near future.

After all, the exponential economic growth of Latin America just evidences its search for music content through streaming. In this context, it is highly likely that music will not, under any circumstances, be forgotten in the gap.

[11] For the purposes of this article, Central and South America will be categorized as Latin America
 [12] PEREZ-SOTO, Alonso. *Interview: Alfonso Perez-Soto – Streaming Music in Latin America: The Emerging Revolution in the Entertainment Industry*. International Association of Entertainment Lawyers – IALIL. 2015. Edited by Marcelo Oymanis and Jeff Lieberman. Page 310

[13] *Ibid.* Page 310.
 [14] *Op. cit.*

[15] SCHOON, Robert. *Dance Party in Latin America: Part of South American Internet Users Seek Media: Report*. LATIN POST. January 27, 2016. Available at: <http://www.latinpost.com/articles/118279/20160127-online-party-in-latin-america-half-of-south-american-internet-users-wish-media-report.htm>
 [16] MULLINGAM, Mark. *YouTube and Latin America are taking over the world*. July 26, 2017. Available at: <https://www.industrysearch.com/blog/youtube-and-latin-america-are-taking-over-the-world/>

[17] GLOBAL MUSIC REPORT 2017. ANNUAL STATE OF THE INDUSTRY. Global Market Overview. Page 14

[18] GLOBAL MUSIC REPORT 2018. ANNUAL STATE OF THE INDUSTRY. Global Market Overview. Page 11

[19] Spotify Stands Tall in Mexico: Nearly two-thirds of all streaming users in Mexico are on Spotify. July 12, 2016. Available at: <https://www.marketer.com/Article/Spotify-Stands-Tall-Mexico/1014198>

[110] MERCADO SONORIBATICO MEXICAL F. BRASILEIRO EM 2016. Pro-Música Brasil Producers Patrocinators Associaçoes. Page 7.

[111] Google Video Viewers 2017. *Cinco insights sobre consumo de vídeos no Brasil*. Available at: <https://www.thinkwithgoogle.com/pt-br/advertising-channels/vs/C3&A/D/adv-requests-video-viewers-2017-cinco-insights-sobre-consumo-de-video-no-brasil/>

[112] GLOBAL MUSIC REPORT 2017. ANNUAL STATE OF THE INDUSTRY. Global Market Overview. Page 23

[113] *Ibid.* Page 37.

[114] PLESNIKOFF, Paul. *Music Is Just 4.3% of YouTube Traffic*. Research Shows. August 16, 2016. Available at: <https://www.digitalmusicnews.com/2016/08/16/music-5-guano-youtubv/>

[115] Available at: <http://92news.com/>

[116] Artists Claim YouTube Pays Them Less Than Spotify. Are They Right? September 5, 2016. Available at: <https://www.latourcompany.com/2016/09/05/artists-claim-youtube-pays-artists-less-than-spotify-are-they-right/>

[117] More information at: https://www.youtube.com/account_monitization

[118] For the purposes of this article, copyright will be always defined as author rights and neighbouring rights, even though the existing differences between civil law and common law systems.

VALENTE, Marlene Gergenti, FRANSISCO, Pedro Augusto P., IONACIO, Eliseu A. Relatório do ECAD sobre as Mídias Digitais: Do Rádio ao Streaming. ECAD, Direção Autoral e Artística no Brasil. Rio de Janeiro: Livro do Acervo, 2016. Page 247.

Ibid. Page 248.

Op. Cit.

BART, Andrew H, ENGLUND, Steven R and KOHLMANN, Susan J Getting the deal through. Copyright. GOLDFART, Joaquina, GORNEL, André and TORRES, Fernando De Assis, Brazil. Law Business Research. London, 2015. Page 29

Ibid. Page 23

Article 46. The following shall not constitute violation of copyright:

V. the use of literary, artistic or scientific works, programmes and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers,

provided that the said establishments market the materials or equipment that make such use possible;

VI. stages and musical performances, where carried out in the family circle or for exclusively teaching purposes in educational establishments, and where devoid of any profitmaking purpose. (our emphasis)

Superior Court of Justice. Google Brasil Internet Ltda. V. Resolva Indústria e Distribuição Cinematográfica Ltda. Special Appeal No 1512647/MO, 2nd Section, Handled down on March 25, 2015.

Google Inc. v. ESCRITÓRIO CENTRAL DE ABRECADANÇA E DISTRIBUIÇÃO - ECAD and UNIAO BRASILEIRA DE EDITORAS DE MUSICA - UBRM. Court of the de Janeiro. Case No. 0116365-13.2016.8.19.0091. Handled down on November 22, 2016

Oscar Molina, Esq. from the law firm Albagli Zelasnik, in Chile, contributed to this chapter.

Internet Service Provider (ISP) is the company that provides Internet connections and services to individuals and organizations. In addition to providing access to the Internet, ISPs may also provide software packages (such as browsers), e-mail accounts, and a personal Web site or home page. ISPs can host Web sites for businesses and can also host the Web sites themselves. ISPs are all connected to each other through network access points, public network facilities on the Internet backbone.

Veronica M. Casares, Esq., from the law firm Marval, O'Farrell & Marval in Argentina, contributed to this chapter.

This information was provided through a collaboration with Patricia Courreas from the law firm Calderon & De La Sierra, in Mexico.