

MBO0123: Legal & Business Affairs (BMTY7002)**Lecturer: Ian Penman****Submission Element 1: Case Study**

According to the mission statement of the video broadcaster YouTube (YouTube, 2023), the people behind the platform have set it as their goal to “give everyone a voice and show them the world.” Nevertheless, since its inception, YouTube has been repeatedly criticised on various grounds – from the neglect of copyright responsibilities to the unethical exploitation of intellectual property rights (IPR) and the unfairly low royalties paid to the authors and creators of the works on its platform. However, it is almost impossible to imagine the music industry without YouTube, considering the whopping sum of \$6 billion US-dollars that the platform had reportedly paid music rightsholders between mid-2021 and mid-2022, according to its Global Head of Music (Ingham, 2022). Hence, the aim of this essay is to work out to what extent artists and authors actually benefit from publishing content on YouTube and what challenges and dangers exist around the topic of IP on the platform. At the same time, current developments will be included in the argumentation.

First, it is crucial to understand the concepts of intellectual property and the underlying copyright. According to the World Intellectual Property Organization (2023a), intellectual property relates to “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.” There are several different types of intellectual property, including trademarks, patents, and copyright (WIPO, 2023a). Copyright in specific refers to the different rights an author or creator has over their respective works (WIPO, 2023b). On the one hand, these include the economic rights in the work, which relate to the distribution of said creation and can also be transferred to someone, for example, through a sale. On the other hand, there are moral rights, which recognise the author of the work as such and thus, also have an impact on his or her reputation (WIPO, 2020, cited in Hasanovic, 2022, p.6). It should be mentioned that only an idea without proof (for example, in the form of a written record such as a drafted song lyric) is not protected by copyright law. One of the general problems already mentioned in earlier academic work on the copyright of intellectual property is that the laws on this vary from country to country and, except for the Berne Convention from the 19th century, there were no global agreements for a very long time (Cornish, 1989, cited in Pitcher, 2010, p.12). Generally spoken, copyright and other types of intellectual property are fundamentally about authors receiving fair compensation for their work (WIPO, 2020, cited in Hasanovic, 2022, p.7). Yet it is precisely this core issue that seems to be one of the biggest challenges for YouTube.

Looking at the most recent royalty rates from the year 2022, YouTube Music ranks behind the streaming platforms Tidal Music (\$0.01284 per stream), Apple Music (\$0.008 per stream), Amazon Music (\$0.00402 per stream) and Spotify (\$0.00318) with a rate of \$0.002 per stream. That means, in order to make a profit of one US dollar on YouTube Music, an artist would need 500 views. Of the best-known and most popular streaming services, only Pandora and Deezer have even lower rates. Irrespective of the streaming platform, it can be said that the current rates are generally quite low at the moment, considering that millions of people use these services

globally. In general, it is not so easy to determine how much creators can actually earn with their content on YouTube, since YouTube in specific allows video as well as music streaming. In terms of video streams, the creator of a recording receives \$0.00164 for each stream on his or her own channel. Accordingly, it is a bit more profitable for artists if users spend time on YouTube Music instead of the video platform in the browser. In this context, it is important to note that in Content ID cases, which include music played on other artist's videos and which will be discussed in more detail later in this essay, creators allegedly earn at least \$0.00069 per stream (Fitzjohn, 2022). Another aspect that should not be overlooked when it comes to generating profits via YouTube is the pay-out rates for advertising. Although these rates might vary, there is still money to be made – usually per "impression", i.e., how often an ad is viewed. The cost of an advertisement also varies depending on its type. Skippable in-stream ads, for example, prove to be the most expensive ones. Per 1000 impressions, it is possible for creators to earn about six US-dollars. The impressions are usually made up of 30 to 40 percent of the total views of the video, and YouTube itself deducts a share before paying out (AK Records, 2021). In addition to income from streams and advertising, special brand partnerships also prove to be profitable. These could be subtle product placements, jointly realised video or music projects, or other types of collaboration. The promotion and sale of own merchandise might also generate additional income. However, even if artists and creators make use of all those different income streams, the question remains open as to why or how such low royalty pay-out rates became established on streaming platforms and especially on a driving market force like YouTube.

In this context, two case studies should serve as attempts to push those in charge to pay more generously or fairly. In his research paper, Scott Hiller (2016) examined whether the absence of digital content on YouTube had any impact on album sales figures, referring to the nine-month period during which all of Warner Music label's content was removed from the platform. Back in 2007, all major labels at the time had put licensing agreements in place with YouTube in order to monetize their content. However, they restarted negotiations one year later since the pay-outs for video streams as well as the shares of the revenues created through advertising were too low and therefore not satisfactory for the labels. Until September 2009, Warner and YouTube did not come to an agreement, which is why all content related to artists represented by Warner was taken down from the platform. The licensing deals with Universal Music, Sony BMG, and EMI, however, remained in place and no further discussions were sparked, even though Warner allegedly managed to obtain a larger share in advertising revenues (Scott Hiller, 2016, pp. 18-19). Interestingly enough, in his paper, Scott Hiller (2016, p. 25) concluded that removing Warner's content from YouTube had a positive effect on album sales. A similar discussion also took place a few years later between YouTube and the German collection society GEMA. Between 2009 and 2014, they too failed to reach an agreement on appropriate streaming pay-outs, which is why YouTube blocked numerous videos in Germany. Users of the platform allegedly saw GEMA as the "culprit", which in turn resulted in a hail of criticism for the company, even though it was reportedly only advocating for higher payments. YouTube, on the other hand, positioned itself as a neutral intermediary that could not be responsible for the entire content that is uploaded to its platform. The representatives stressed the unrestricted nature of the internet and repeatedly referred to their agreements with numerous collection societies in other countries (Stade, 2014). But how is it that a platform as influential as YouTube

nevertheless prefers to devote itself to legal and potentially reputation-damaging discussions instead of giving in to calls for higher streaming rates?

Looking at Spotify, one might argue, that even though it is one of the biggest players in the music streaming industry, it would need to increase their own profits first in order to be able to pay out more to the artists and authors. This would have to be achieved, for example, by increasing the service's subscription fees or its advertising revenues. YouTube, on the other hand, may not have been in the paid music streaming service for that long, and whether the paid variant of YouTube Premium will gain widespread acceptance is also still questionable. Nonetheless, the platform has been generating very high revenues through advertising for many years, even before streaming platforms such as Spotify and others were on the market. In addition, YouTube is also increasingly concentrating on live streaming of major events – especially from the news and sports sectors. Considering that the platform is owned by media giant Google, it is almost inconceivable that there are not enough financial resources for fair remuneration (Colbjørnsen, Hui, and Solstad, 2021, p. 161). Furthermore, Colbjørnsen, Hui, and Solstad (ibid.) argue that established video streaming services such as Netflix also manage to rely on „up-front licencing agreements” whereas content creators in the music streaming industry “only ever see royalty payments from song plays, a very partial view of the streaming business model.” At this point it should be mentioned that the question of sustainability of the said business model was pointed out as well.

Circling back to Scott Hiller's (2016, p. 18) analysis of Warner's content removal on YouTube, there is another important aspect that needs to be considered during the time of the Google takeover. While on the one hand the acquisition in 2007 led to agreements with major labels as well as increased advertising revenues, instead of an increase in pay-outs for authors, the decision was made to introduce the YouTube content ID system. Prior to this, the authors, and creators themselves were responsible for having unlawfully published content removed in accordance with the Digital Millennium Copyright Act (Scott Hiller, 2016, p. 18). This is fundamentally a database of content that has been handed over to YouTube by the respective creators. Said authors themselves can define, directly in this system, what should happen to the content that belongs to their intellectual property. Possibilities would be, for example, complete blocking, partial restrictions or the placement of advertising, the revenue from which goes to creators instead of the uploading party (Hasanovic, 2022, p. 18). The introduction of this system, however, raises some questions. While the implementation of the content ID system can be seen on the one hand as YouTube finally acknowledging that it is indeed a content platform with some responsibility, it remains questionable why it nevertheless so often tries to wriggle out of that very obligation. Whereas the German collection society GEMA rather accused the company of a lack of transparency when it comes to financial details such as sales figures or negotiated rates (Stade, 2014), Pitcher (2010, p. 59) also argues that YouTube is not responsible for checking whether users have permission or a license for the content they upload but instead, this falls under the obligations of the users themselves. At the time of the debate between GEMA and YouTube, Spotify, on the other hand, was also said to be still very opaque with its entire system of royalty distribution, which did not earn the streaming service much trust (Marshall, 2015, pp. 9-10). What is also often criticised about platforms such as YouTube and generally seen as a major challenge for the music industry is the increasing value gap

between the profits that streaming platforms generate with music and the income that the authors actually receive for their creations. Lawrence (2016), for example, refers to Digital Millennium Copyright Act of 1998, issued by the U.S. Copyright Office as follows: “More specifically, the DMCA added § 512 to the U.S. Copyright Act (Copyright Act), which implements liability-shielding safe harbors for online service providers that store information posted by users” (U.S. Copyright Office, 1998, cited in Lawrence, 2016). This, in turn, once again supports the argument that large streaming platforms take advantage of the legal circumstances to avoid having to take responsibility.

Another issue that comes up again and again in the copyright and intellectual property debate on platforms such as YouTube is how to deal with so-called “derivative works” (e.g. remixes, mash-ups, parodies, or satire). In the early days of YouTube, users uploaded mostly home-movie style content, with only a few coming up with the idea of using their own artistic talent to create new works with existing videos. Soon, however, it became more common for online users to start creating their own versions of popular film trailers, music videos or other content using different sound and visual material. The increasing popularity of such content then triggered the ongoing copyright debate (Pitcher, 2010, p. 102). Since it is almost impossible to check such a large amount of content manually for possible copyright infringements, systems such as content ID rely on automated processes. Accordingly, it can happen that content is marked as problematic, although it is actually a legitimate use (Hasanovic 2022, p. 2). Ten years ago, a scientific paper on the subject already emphasised that the respective extent to which a certain work was taken over or adapted plays an important role in parodies and similar forms (Erickson and The Intellectual Property Office, 2013, p. 30). Of the three different ways authors can respond to copyright infringement that Alston (2020, cited in Hasanovic, 2022) offers, Hasanovic (2022) considers the so-called fair use policy, which is described in the United States Code §107, to be the most relevant in relation to derivative works. Even if there is reportedly no direct equivalent in European law, “a similar concept to fair use can be found in the exceptions and limitations of Article 17(7) of the Directive on Copyright in the Digital single Market, also known as the DSM Directive” (Hasanovic, 2022, p. 3). This again points to the fact that basically every single claim of intellectual property rights requires an individual review in order to determine whether the work in question was actually used in a problematic manner (ibid., p. 4).

Finally, considering that large corporations can shield themselves behind safe harbour provisions and content creators wishing to generate their own artistic works with uploaded content might invoke the fair use policy, it remains questionable whether the implementation of systems like YouTube’s content ID is the only way for authors to deal with (potential) copyright infringements on the platform. In terms of revenues generated on YouTube one might argue that the additional incentives of the platform, such as the structure encouraging interaction between consumers and artists, or the opportunity for new, emerging talent to receive attention from a potential audience of millions, make up for the low royalty pay-outs. The latter is also confirmed by Scott Hiller (2016), who concluded that especially those albums benefit from an additional presence on the platform YouTube that are not assumed to be very successful in the first place. Nonetheless, if the individual parties involved in the debate on copyright of intellectual property on (video) streaming services and on sustainable and fair business models

stick to their respective interests and the whole music industry and new technologies will continue to evolve, the constant back and forth seems to be ongoing in the foreseeable future. Or as Stade (2014) aptly summarises it, “musicians ask for better revenues out of streaming, music labels call streaming a ‘bridge to legality’, enterprises [...] try to pay as little as possible for copyright licenses, and consumers ask for cheap and convenient services.” Regardless of which stakeholder group one belongs to, there should be no question that an author's work must always be recognised and rewarded both economically and morally, and that in the future at best in higher proportions.

Bibliography

- AK Records (2021) *How to make money on YouTube: A guide for music artists* [blog]. Available at: <https://akrecordsal.com/how-to-make-money-on-youtube-a-guide-for-music-artists/> (Accessed: 3 April 2023).
- Colbjørnsen, T., Hui, A. and Solstad, B. (2021) ‘What do you pay for All you can eat? pricing practices and strategies in streaming media services’, *Journal of Media Business Studies*, 19(3), pp. 147–167. DOI: 10.1080/16522354.2021.1949568
- Erickson, K. and The Intellectual Property Office (2013) ‘Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube’, *SSRN Electronic Journal*, 22. DOI: Available at: <https://doi.org/10.2139/ssrn.4093789> (Accessed: 3 April 2023).
- Fitzjohn, S. (2022) ‘Streaming payouts per platform & royalties calculator’, *Producer Hive* [blog]. Available at: <https://producerhive.com/music-marketing-tips/streaming-royalties-breakdown/> (Accessed: 3 April 2023).
- Hasanovic, A. (2022) *How can online creators with derivative creative works on YouTube protect themselves from questionable usage of Intellectual Property Rights?* Available at: <http://arno.uvt.nl/show.cgi?fid=157488> (Accessed: 3 April 2023).
- Ingham, T. (2022) ‘YouTube says it paid the music industry over \$6bn in the past year – with around \$2bn coming from UGC’, *Music Business Worldwide* [blog]. Available at: <https://www.musicbusinessworldwide.com/youtube-says-it-paid-the-music-industry-over/> (Accessed: 3 April 2023).
- Lawrence, D.L. (2019) ‘Notes: Addressing the Value Gap in the Age of Digital Music Streaming’, *Vanderbilt Journal of Transnational Law*, 52(511), pp. 511-543. Available at: <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/78/2019/05/25124350/9.20Lawrence.pdf> (Accessed: 4 April 2023).
- Marshall, L. (2015) ‘“Let's keep music special. F—spotify”: On-demand streaming and the controversy over artist royalties’, *Creative Industries Journal*, 8(2), pp. 177–189. DOI: 10.1080/17510694.2015.1096618
- Pitcher, S. (2010) *The Mass Collaboration of Digital Information: An Ethical Examination of YouTube and Intellectual Property Rights*. Master's Thesis. University of KwaZulu-Natal.

Scott Hiller, R. (2016) ‘Sales displacement and streaming music: Evidence from YouTube’, *Information Economics and Policy*, 34, pp. 16–26. Available at: <https://doi.org/10.1016/j.infoecopol.2015.12.002> (Accessed: 3 April 2023).

Stade, P. (2014) ‘“This video is not available in Germany”: Online discourses on the German Collecting Society GEMA and YouTube’, *First Monday* [Preprint]. Available at: <https://doi.org/10.5210/fm.v19i10.5548> (Accessed: 3 April 2023).

World Intellectual Property Organization (2023a) *What is Intellectual Property?* Available at: <https://www.wipo.int/about-ip/en/> (Accessed: 3 April 2023).

World Intellectual Property Organization (2023b) *Copyright*. Available at: <https://www.wipo.int/copyright/en/> (Accessed: 3 April 2023).

YouTube (2023) *About YouTube*. Available at: <https://about.youtube> (Accessed: 3 April 2023).