

Assignment: Case Study

Legal & Business Affairs (BMTY7002)

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1. Introduction

YouTube has established itself into a potent sharing platform, which amplifies the word-of-mouth effect that executives have since achieved to harness (Divol, et al., 2012). The initial strategy of providing a yet so simple sharing platform for creators and consumers has evolved into a strategic cornerstone for creative businesses and individuals to increase their market reach and be recognised by potential customers of high magnitude; YouTube functions for 62% of businesses as means to distribute their content (Buffer, 2019). Car manufacturer Ford claims to see a causality between selling 10,000 cars in the first six days after its release and the related YouTube campaign, which accumulated over 6.5 million views (Divol, et al., 2012).

The scaling of businesses is primarily accompanied by higher capital requirements, revenues and expenses, where several past scenarios have shown to not be able to take every stakeholder's interests equally into account. While certain stakeholders of high leverage have experienced decisions made in their favour, opposing parties with less influence have missed out on equal opportunities (European Academics, 2018). While major labels and entities with a large following have accepted YouTube's partner program and successfully agreed on licensing terms, independent artists claim to have not yet experienced a fair remuneration in relation to the amount of revenue YouTube generates with their content.

Decisive for this case study are the stakeholder's different viewpoints of YouTube's disputed actions, which have led to an ongoing discussion in terms of adequate remuneration for content creators and their right to easily upload their content without risking being held liable for copyright infringement.

2. Research Context

Following a typical characteristic that is inherent to digital platforms, YouTube makes use of the crowd-based business model, where it achieves to provide a service for publishers to distribute their work to a wide audience and to provide a service for consumers to have access to an abundance of entertainment; ultimately, at no cost (NP, 2017). Therefore, the platform has equally simplified the distribution and consumption of media for both parties and has reduced associated costs of both processes drastically. As a result, increasing dependence on digital media and the simplification of distribution has manifested, which has enabled a lower barrier to entry and a democratisation of the whole inherent production and consumption process.

The digital age has induced a “winner-takes-it-all” situation, where “95 percent of economic profit is earned by the top 20 percent of companies” (De Smet, et al., 2021). Since its incorporation in 2005, YouTube has claimed second place in the largest social media platforms worldwide, while outpacing its competitors, such as Vimeo, Dailymotion or Twitch, to an extent of inheriting a monopolistic position (Mohsin, 2021). Currently, YouTube attracts a total of 2.3 billion active users; the platform is the most popular search engine after Google, which acquired YouTube one year after its incorporation for \$1.65 billion (Mohsin, 2021). This acquisition enabled businesses to analyse and interpret important user data from their videos, through which they started to efficiently target their content to relative interest groups.

Strategies to expand its business included, but were not limited to, YouTube’s partnership program (YPP), through which it enabled placing advertisements on uploaded content and split the respective royalty share between them and content creators (YouTube, n.d.). Hereby, the company achieved to partake in the revenue generated by its users through a loophole and attract increasingly large numbers of creators.

The assurance of recurring payments has established itself into a popular and sustainable revenue stream for media companies, where Alphabet (the mother company of YouTube) and Facebook have generated together almost \$900 billion in value between 2015 and 2019 (Bamberger, et al., 2020). Relevant to the case, YouTube ventured into paid subscription models, which included a fee of \$9.99 for users to consume ad-free music that challenged similar platforms, such as Spotify or Apple (Spangler, 2014).

As users expect original content from platforms they are paying for, it incentivised YouTube to launch their own, distinguished content. The addition of recurring payments to its net revenue enabled YouTube to invest in the production of its original content and “presupposes a longer-term client relationship”, through which it can expect a longer-term profit stream (Bamberger, et al., 2020).

3. State of Legal Affairs

Creatives, such as artists, songwriters or any individuals that have contractually agreed to receive a certain share of the potential revenue their work generates, will receive different types of royalties, depending on their position concerning the use or distribution of the piece of work. Songwriters are eligible to be remunerated in the forms of a share of the performance royalty for the broadcast of their piece of work (as it is publicly perceivable and, therefore, generates a public performance) and a mechanical royalty for interactive streams, which refers to the actual sale of a piece of work, through which a consumer can experience added value. Collecting societies, such as the national PRS in the United Kingdom, serve as fiduciary organisations that escrow the interests of their members collectively in terms of royalty remuneration and exercise their member’s rights that they have inherited through a collecting agreement (Touring Artists, n.d.). SRCOs and entities holding rights for the master recording, often labels, equally receive a royalty share through the monetisation of third-party videos that use a song or have the right to prohibit the use of their distinctive sound recordings.

4. Legal Implications

The EU directive 2019/790 on copyright in the digital single market, enforced in mid-2019, expects thereof digital platform providers to carry out the responsibility of assuring rightsholders to receive an adequate share of potential royalties generated with their protected work. The value gap between the revenue that platforms generate with uploaded content and the extent to which rightsholders are being remunerated for their content has been the catalyst for this proposal. The recently impressed obligation to obtain licenses from creators forces online platforms to prevent their availability through filtering each upload, resulting in strong intervention in the freedom of speech and press.

As the liability for unlawful distribution of copyright-protected work is now under YouTube's responsibility, the concern of implementing upload filters (through which YouTube would decrease the risk of being held liable for copyright infringement) rose quickly in media companies and content creators. YouTube had to deal with disputes with collecting societies, such as the GEMA, as to the definition of the platform and what service it provides. The collecting society has shared the viewpoint of categorising YouTube as a broadcast provider similar to TV or radio, which have to pay royalties to artists and rightsholders. Prior to finding a common ground in favour of collecting societies, a large amount of content was not available in certain territories, since YouTube did not define itself as a DSP and could not influence the content that is being uploaded (Hanfeld, 2016). While the agreement has most certainly benefited users, evidently, the amount paid to rightsholders that the GEMA has tried to enforce has not been met, which resulted in what can be considered as a pyrrhic victory.

The EU directive claims that SRCOs (sound recording copyright owners), and authors in general, will receive higher remuneration after its implementation. However, the federation of "European Academics" has claimed that this guaranteed increase in remuneration only benefits major rightsholders and neglects individual creators. The synonymous "ALLEA", which represents institutions researching IP and innovation law, argued against the implementation of Articles 11 and 13, as they fear that a growing "hindrance in digital innovation and user's participation" could emerge (CREATe, 2017).

5. YouTube's Justification

The filtering technology "ContentID" used by YouTube allegedly resolves 99.5% of all copyright issues related to music. Therefore, only 0.5% of all cases have to be performed manually. The effectiveness of the technology speaks for itself and is being implemented at its fullest potential. According to a research paper conducted by Midia, only 2% of all music videos are unauthorised (infringing copyright) (Resnikoff, 2016). Consequently, the technology eliminates the use of DMCA procedures to a great extent. YouTube appeals to the user's initiative to remove their upload if they don't want to impose risks of it being unlawfully distributed. This has prompted the question of why the majority of artists and labels don't act according to the aforementioned statement. Especially career-building artists rather take

advantage of the potential audience they can reach with their uploads than expect large amounts of royalties. This value that YouTube offers to creators is being adopted unmistakably and is used by a noticeable amount of consumers: about 32% of all views in 2019 have been music-related (Ingham, 2020).

According to YouTube, they have distributed over \$3 billion to rightsholders operating in the music industry, where the monetisation of uploaded content has accounted for 50% of the net revenue that the music industry generated with the platform in 2019 (Ingham, 2020). However, the amount a creator receives from an upload is 45% of the rate advertisers pay to YouTube. Content creators can expect a pay-out between \$0.01 and \$0.03 per ad stream, depending on several factors, such as the number of views and ad clicks. (Mint, 2021). While YouTube has seen an increase in viewership of 15% as a consequence of the COVID-19 pandemic, the average advertising rates have dropped by 50% (Stokel-Walker, 2020). Some predict the falling ad revenue to not negatively impact the amount of content produced, as several jobs were forced to be completed remotely from home. The increase in content has led low advertising prices to fall in an increasing trend, resulting in a lower bidding war for advertising (Stokel-Walker, 2020). The evident volatility and disproportionate low amount of remuneration for content have forced creators to diversify their digital presence simultaneously to other ISPs.

5.1 DMCA

As a result of the “Digital Millennium Copyright Act” (DMCA) from 1998, online platforms and service providers, with the likes of YouTube, are exempt from potential copyright infringements to a certain extent. Service providers can take advantage of this “safe harbour” statute, as long as they immediately remove problematic content after they have informed those responsible about their alleged infringement (AMD, 2021). In order to seek exemption of liability under the DMCA act, YouTube utilises said “notice-and-takedown” principle and is forced to withdraw accounts from their platform, that have repeatedly performed infringements (Electronic Frontier Foundation, 2017). Content creators view YouTube’s current approach to DMCA regulations as critical. The increasing number of ungrounded and questionable takedown notices is a major concern for them, in which they see a failure in the DCMA’s approach to “sufficiently address the continued proliferation of online infringement” (Copyright Office, 2016).

6. Susceptibility to Error

6.1 Adaptation

In terms of the “adaptation and transformation right”, a piece of work is always affected when reproductions or adaptations alter the intellectual and aesthetic content that it originally wants to convey (Touring Artists, n.d.). Entering into force after the implementation of EU directive 2019/790, the law states that no consent of the originator is necessary to reproduce or adapt a body of work, on condition that it keeps a sufficient distance to the original. Therefore, the distribution of altered versions of published and copyrighted work is permitted (but presumably limited to no monetisation options). However, this premise conflicts with the objective of upload filters, which seek to prevent alterations of copyrighted work being uploaded, even if relatively small amounts of this content are being used. This poses a risk for content creators, as it has become increasingly difficult for them to be certain that their content is not infringing copyrighted work; no matter whether the use of said prohibited content was intentional or not.

According to a study conducted by (Urban, et al., 2017), approx. 30% of all copyright claims are questionable. As a result, content creators have experienced improper notices and have suffered under the “ContentID” technology, whose algorithm can’t distinguish between infringements and original content entirely. Google, which acts as the parent company of YouTube, claims to have calculated that 99.95% of URLs that noticed suggestions for DMCA takedown processed from their TCRP (Trusted Copyright Removal Program) have not appeared in their search index in January 2017 (Google Inc., 2017). The majority of these questionable URLs have been created by illegal bots, which potentially seek to discredit competitors through “bombing” at a large scale.

6.2 Fair Use Act

The distinction between what is considered to be an adaptation or interpretation has remained to be obscure and continuously pushes the boundaries of copyright law. Remixes or other reproductions of copyrighted content are given the title of being “unauthorised”, which YouTube’s filtering technology will specifically prohibit from uploading or monetising. Some uploaded content that includes copyrighted material may fall under the “Fair Use” law, which states that, in some cases, the use of copyrighted material is not prohibited, as long as it acts as a commentary, critique, research or report (YouTube, n.d.). The bureaucratic process of examining each of such cases makes the use of copyrighted material, justified by the “Fair Use” law, impractical and does not resolve the issue on a macroscopic scale.

In contradiction to the aforementioned objective that the copyright reform follows, content creators are still left with either requesting the rightsholder’s permission for reproduction or facing the risks of not being able to monetise or being forced to remove their content. Hence, it is in the creator’s and artists interest that the already implemented European directive should be reformulated.

7. Conclusion

Although reforms, in terms of how copyright should be dealt with in the digital era have been attempted to implement, their consideration of all stakeholders and the adequate payment for those investing time into creating content could be questioned in light of the findings displayed in this case study. The definition of what an actual interactive stream or view is and what value it inherits, has forced the debate to produce a variety of conflicting viewpoints among all relevant stakeholders.

Although YouTube has been forced to opt into incurring more liabilities, it has continuously sought to avoid these as much as possible through the use of DMCA regulations as an excuse to keep royalty payments as low as possible. While the platform pays out relatively large amounts of generated revenue back to rightsholders, its distribution is not being considered fair amongst all rightsholders. The equilibrium between the amount of revenue that stakeholders receive and the amount YouTube generates, that should have been achieved through copyright

reforms, is being criticized, as only little improvement for content creators has been created. In contrast to what is being considered as disproportionate remuneration for the content that is being created, YouTube still offers the potential for all stakeholders to reach a wide audience, which is an opportunity that is being valued more from time to time than the amount of revenue that they can generate.

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