

**A CASE STUDY ON
INTELLECTUAL PROPERTY ON YOUTUBE**

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1. Introduction

This case study aims at analysing and reviewing how entities within the music and entertainment industry are able to leverage their intellectual property to generate revenue from on YouTube. The case study will discuss the complications that come with generating revenue from intellectual property in the digital age, the business strategies of companies using YouTube, legal challenges from both consumers and rights holders perspectives, the nature of copyright and how the process of protecting copyright is evolving.

Arguments include, is it beneficial for rights holders to allow commercial use of their content for free? Do NCS need to exclusively control their publishing? Who is affected the most by Article 13? Who should be liable for copyright infringement on YouTube?

2. Business strategies of companies operating on YouTube

2.1 NoCopyrightSounds

NoCopyrightSounds, stylised as NCS, is a record label and publisher founded in 2011 by Billy Woodford. The company releases royalty-free, free music targeted for independent content creators to use in their YouTube videos (NCS Music, 2019).

For works created after 1978, copyright protection in sound recordings and musical compositions lasts for 70 years after the author's death. Typically, if a creator wants to use a song in their YouTube video that is still protected by the copyright act, they must either purchase either a

master and synchronisation license or get permission from the owners of the song (Miks, 2014). Without obtaining permission, creators risk the master and publishing owners for that song making a claim on the video via YouTube's ContentID system, resulting in either demonetisation, blocking or removal (YouTube Help, 2020). While this is completely fair, it can be frustrating for independent creators as it hinders them from sharing and/or monetising their content. NCS saw opportunity in this, they became one of the first record labels/publishers to release royalty-free music for free on YouTube.

Aside from monetising their own YouTube channel, how does NCS make money from free music? As a result of releasing music for free, their music is used in a large amount of YouTube videos which increases the organic reach of their songs. NCS's usage policy states creators must include a link to the song on streaming services in the video's description box (NCS Music, 2019). Viewers of the video who like the song can then add it to their playlists on streaming platforms, thus generating revenue for NCS everytime the song is streamed. This has been a successful strategy as their music is now being streamed over 2 million times per day on Spotify alone (Lee, cited in Dredge, 2018). NCS require exclusive ownership of the master and publishing rights for the songs they sign, so artists must consider the pros and cons of signing away their intellectual property (appendix B). The artists will not earn any money from YouTube due to songs being royalty-free (except from the upload on NCS' channel) and will not have control over the type of videos their music is used in. However, as the majority of artists who sign songs to NCS are relatively unestablished and would find it difficult to get a record deal with another company, they may earn far more money from streaming than they would with another company due to NCS' large organic reach.

2.2 Funky Panda (and other promotional YouTube channels)

Funky Panda is one of many promotional YouTube channels that utilise their large YouTube following to showcase and curate music. Unlike NCS, Funky Panda does not own the rights to most of the music they upload and so the company needs to obtain a non-exclusive upload permission agreement from the master and publishing rights holders for the song. As seen in appendix A, this agreement grants Funky Panda the right to upload and monetise the song on their channel without the rights holders of the song making a copyright claim. The agreement does not grant Funky Panda any ownership of intellectual property and is non-exclusive, so the owners are able to send the song to other YouTube channels. Rights holders may want to work with promotional channels like Funky Panda as it can enable their music to be heard by a wider audience and have knock-on effects to plays on streaming services (Audiohype, 2020). However, rights holders must understand they are allowing another entity to profit from their intellectual property and need to weigh that against how much exposure the channel is really going to give the song.

3. Challenges

3.1 NoCopyrightSounds publishing difficulties on YouTube

It is standard industry practice for a record label to own 100% of the master recording rights either in perpetuity or for a set amount of time in exchange for a recoupable advance paid to the artist (AWAL, 2019). As for the composition, there are usually multiple songwriters credited on a song who's publishers own their intellectual property (Owsinki, 2019).

NCS has faced challenges related to publishing on YouTube due to the exclusivity it requires for ownership of both the master and publishing rights, without complete ownership third-party publishers would be eligible to make a claim on videos that feature NCS' music which would go against NCS' entire business model. Because of this NCS are unable to sign songs that have been written by songwriters signed to other publishers (Best, cited in Hu, 2017). As shown in appendix B, NCS paid the artist and songwriter of the song a fee in exchange for copyright ownership, without this consideration the contract may have been unenforceable unless stated that it is a deed (Kaydian-Maumeyer, 2020).

In 2015, NCS sublicensed their song "Spectre" by Alan Walker to MER and Sony Music Entertainment who released a vocal version called "The Spectre", a new master was created but most of the composition was kept the same. Creators who had used the original NCS version in their videos were receiving composition copyright claims from Sony, claiming the new version had been used, when in-fact this was false (Curiosity, 2019). One way NCS could work with external publishers is by issuing a waiver agreement which would need to state that the external publishers waive their right to make copyright claims on YouTube.

3.2 Article 13 and the Directive on Copyright

The Directive on Copyright is the EU's strategy to update copyright laws to be fit for the modern day and to put a restraint on how content that is copyrighted is used on online platforms. Article 13 is part of the Directive on Copyright and is the part that will obligate YouTube to heavily filter or take down copyrighted content. It also focuses heavily on making platforms like YouTube liable for any copyrighted content they host, and

increasing revenue payouts for those who own the copyright (Reynolds, 2019). This case study will focus on how the Directive on Copyright affects YouTube.

Before the passing of Article 13, it was the creators who uploaded copyrighted material that were liable for any infringement that arose from uploading it as YouTube argued that it was just a neutral hosting provider (Ernesto, 2018). Rights holders then needed to flag the copyright violation and request take down if there was a breach of copyright. The responsibility now lies with YouTube to detect any copyright violations, and as a result they will put detection filters in place that are far more strict than the current content ID system (Browne, 2019). While this could be viewed as a good thing for those any rights holders who are against creators using their content, 90% of rights holders would prefer to share revenue from the video rather than it being removed from the platform (Kyncle, cited in Sands, 2019). However, it is the content creators on YouTube who will be most affected by Article 13 as it is likely they will not be able to realistically use any form of content in their videos that is owned by anyone other than themselves without their video being removed. Furthermore, if creators cannot upload content this would result in a decline in viewers using YouTube as they would not be able to watch some of their favourite content.

Another aspect of the Directive on Copyright is removing the “value-gap”. The value gap is belief that online platforms such as YouTube are at a large financial advantage when hosting copyrighted content, whilst the owners of the content are paid less than adequate funds in comparison (Osborne Clarke, 2019). Article 13 aims at solving this issue by increasing payouts to rights holders. This is within great interest of the rights holders

as it would result in them being paid a higher per-stream royalty. However, even if YouTube has to pay a higher licensing fee initially, Article 13 may not actually solve this problem. The main outcome of Article 13 will be a reduction in competition of content sharing platforms, which will result in the larger companies such as YouTube having more power over the market as it may make it harder for smaller platforms to grow (Doctorow, 2018). YouTube may then be in an even better position to control the environment, as what needs to be remembered is that many rights holders, especially of music, want their content to be available on YouTube due to ability of large audiences discovering their content, so YouTube may have more authority than what the Directive on Copyright recognises.

4. Revenue Mechanisms

4.1 YouTube Partner Program

The main way content creators generate revenue on YouTube is via the YouTube Partner Program (YPP). The YPP works by placing advertisements over videos, these advertisements come in the form of display, overlay, midroll, sponsored cards, skippable and non-skippable TrueView advertisements. Content creators are then paid every time a viewer watches or clicks on an advert that is on their video, they are also paid for views by viewers who have a YouTube Red subscription, YouTube's advertisement-free tier (Swanston, 2019). In order to join the YPP, creators must meet the requirement of 4,000 watch hours over the past 12 months and at least 1,000 subscribers. The creator must be in

good standing with YouTube, meaning they have not infringed anyone's copyright (Swanston, 2019).

As for intellectual property rights, the YPP states creators must ensure they have commercial use rights for their content and must have rights for both audio and visual content. When monetising third-party owned content creators must be adding value to the content, and in order to be acceptable must have significant original commentary, educational value or an editorialised statement (Support.google.com, 2020). This can be compared to fair use, fair use is a legal doctrine that enables a creator to use a piece of copyrighted material without obtaining permission from the rights holder. In order to qualify for fair use, the content must be used in a transformative manner by adding new expression or meaning to the original (YouTube, 2020). Channels that are eligible for the YouTube Partner Program may also face demonetisation if they upload content that includes nudity or sexual scenes, hateful and violent content. This is due to it potentially damaging an advertisers brand if they are seen in a controversial video.

4.2 Content ID

Rights holders of audio and visual content can generate revenue on YouTube every time their content is used by a creator on YouTube. Owners must submit their content into YouTube's Content ID system which then manages and identifies the content. YouTube then scans all videos that are uploaded against their Content ID database and any video that uses copyrighted content will be flagged. From here, the owners have the option of placing advertisements on the video which they then collect the revenue from (YouTube Help, 2020). Content ID can be seen in a very

positive light by rights holders as it enables them to be paid for the use of their work and helps reduce the amount of copyright infringement. However, some creators argue that it is unfair that the rights holders receive all the revenue for a copyright claim, as in some cases the copyrighted content may only be used for a short period of time in the video. The usage of copyrighted content may even be unintentional, a creator may have filmed a clip in a shop where there was background music playing, and then receive a Content ID claim on the video (Sine, 2019). To combat this, YouTube created the ability of revenue sharing, where revenue is split between the creator and the rights holder. This could be seen as a much fairer approach for monetising copyrighted material as everybody is being paid.

5. Conclusion

These cases shows how many elements there are that go into the process of monetising intellectual property from music and entertainment content on YouTube. Those who own copyrighted content and those who use copyrighted content come from two very different perspectives when viewing what is right or wrong. While it makes sense that YouTube wants to be in-charge of how copyrighted content is used on the platform and how much they pay in license fees, they need to understand that the power lies within the hands of the rights holder, who should be entitled to charge their own prices for the use of the content that they own. Content creators must take the same approach by understanding that it is also up to the rights holders to decide if they want to monetise or take down a video that uses their content without permission.

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7. Appendix



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Upload Permission Agreement

I [REDACTED] (Rights holder legal name) as the master rights holder of and/or acting on behalf of the legal entity [REDACTED] (Provider), to which asserts exclusive rights over the master sound recording found within [REDACTED] (Track Title), with the ISRC code [REDACTED] and represented by the publisher [REDACTED], hereby provide to www.YouTube.com/funkyyypanda & www.SoundCloud.com/fnkypanada, which are owned and operated by [REDACTED] of Funky Panda (Promoter), a non exclusive, limited and perpetual permission, right, consent, and royalty free license worldwide to host, publicly broadcast, stream, claim, monetize, promote, synchronise to a visual work, and dispute any/all conflicting ownership or third party claim of the track uploaded to the YouTube and SoundCloud accounts mentioned above.

The Provider warrants and guarantees, through execution of this permission agreement that, it a) is legally authorized to enter this agreement, b) that the aforementioned content does not contain third party copyrighted material, or material that is subject to other third party proprietary rights that may impact this permission agreement, and c) that the Provider shall indemnify and forever hold harmless Promoter over any and all instances of conflicting ownership of any material found to be infringing on any and all parties' rights.

Appendix A: Upload permission agreement obtained from Funky Panda showing non-exclusive upload terms.

2. Rights	
2.1.	In consideration of our payment to you of the Fee, you hereby grant to us an exclusive, transferrable, sub-licensable, royalty-free right (but not the obligation) and licence to exploit the Recordings and Compositions throughout the Territory for the applicable Exploitation Term as follows:
2.1.1.	On, through or via the Basic Platforms (" Basic Platform Exploitation "); and
2.1.2.	On, through or via the Other Platforms (" Other Platform Exploitation ").
2.2.	The rights granted pursuant to Clause 2.1 include but are not limited to the right to (and permit others to) edit, modify, reproduce, distribute (in both physical and digital form), include a compilation, sell, monetise, exhibit, perform, transmit, communicate to the public, make available and synchronise the Recordings and Composition detailed at Schedule A (either together or separately from each other, and whether in whole or in part) with moving images and stills, for exploitation on the Basic Platforms and Other Platforms.
2.3.	The consideration payable under this Agreement includes a payment in respect of the rental and lending rights which represents adequate and equitable compensation for the assignment of the rental and lending rights and save for the payments specifically referred to herein, you shall not be entitled to any further sums whatsoever from us by reason of our exploitation of the Content.
2.4.	You consent to all forms of exploitation now existing or created in the future of the Rights and you agree that you will not do anything that may prevent NCS or any person authorised by NCS from exploiting the Rights, including the exercising of so-called moral rights.
4. Fee	
4.1.	In consideration for granting us the Rights, we agree to pay to you the Fee (the sufficiency and receipt of which is hereby acknowledged).
4.2.	We shall be exclusively entitled to collect all income derived from exploitation of the Recordings and Compositions via the Basic Platforms and the Other Platforms (including any collection society payments, other than in respect of your share which is paid directly by a collecting society to you (if any)).
4.3.	NCS shall not be responsible for any bad debts and Net Revenue shall only include revenue actually received by NCS and which NCS is entitled to retain.

Appendix B: The “fee” and “rights” section from NCS’ standard recording and publishing contract, obtained from an artist signed to NCS.