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YouTube Case Study :

Youtube and online service providers require a change in law, in order to better protect copyright owners from infringements on their platforms.



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ABSTRACT

YouTube is a global company that owns a majority share of the video and music service provision market (*IFPI 2018*). Over the past 15 years YouTube has continued to grow in popularity and revenue. Across the same time period the laws that govern digital distribution of content to protect copyright owners have not undergone the same evolution. The current legal climate is biased towards the service providers and those who would advertise on platforms like YouTube. The freemium business model and lack of legislative incentive for change due to safe harbour provisions has led to an environment where copyright owners are neither prioritised or adequately protected. A change in legislation as laid out by the European council's Directive for Copyright in a Single Market, is the first step in correcting the disparity between YouTube's advertising revenue and royalty payouts to copyright rights holders.

INTRODUCTION

The music industry, like all industries, requires the rule of law to be able to function properly and fairly. These laws unpin the relationships between the various entities and organisations within the music business. In the case of digital service providers (DSPs) of which Youtube is the largest including both video and music users. (*Ingham 2020*), (*Iqbal 2020*). The laws to be considered are namely the Intellectual Property Act 2014 (IPA) and the Copyright Design and Patents Act 1998 (CDPA) in the United Kingdom (UK) and the Digital Millennium Copyright Act 1998 (DMCA) in the United States of America (USA).

The CDPA came into effect in 1988 to protect the rights of original creators and copyright owners. Original creators in the music industry refers to the composers of the music and the owners of the copyright licenses also refer to the composers but often includes Labels and Publishers. The CDPA classes the "showing, communicating, making adaptations available to the public" without the consent or the license of the copyright, as a primary copyright infringement. The law also deems "providing an opportunity to make or sell an infringing copy, providing a means of making an infringing copy, transmitting a copyright work over telecommunication, and possessing or dealing with an infringing copy" as Secondary infringement.

YouTube is a digital service provider that works to distribute intellectual property across digital mediums. The position in which YouTube functions is intrinsically linked to copyright law. Without original creators making the intellectual property that YouTube distributes on their platform there would be no content for YouTube users to consume.

At the time the CDPA received royal assent on 15th Nov 1988, YouTube had not yet been founded and the technology that ushered in the digital streaming age, namely the mp3, was still being invented by Karlheinz Brandenburg. The CDPA 1988 has been amended most recently in 2006 and the first ever YouTube video was posted on April 23rd 2005 (*Karim 2005*).

The above illustrates that the landscape of the music industry has experienced seismic shifts that have far exceeded the rate of change in the parallel legislation. Arguably the evolution of

the music industry makes it increasingly difficult to apply the laws outlined in the CDPA to the current digital climate. This tension has been noted with the recent European effort to modernise copyright laws with the introduction of Article 13 (now Article 17) in the recent Directive on Copyright in a Single Digital Market. These efforts to update legislation have received mixed reviews but my opinion is that the Law must be guarded from abuses that lead to rights holders having an unfair disadvantage in the monetization of their intellectual property.

The enforcement of legislation is a key factor in the discussion of copyright infringements. In the case of *Microsoft vs Plata Technology LTD* [1999] we see that damages do not have to be paid in the event that the defendant is 'innocent' or unaware that the work in question was under copyright. This is the basis on which Youtube and other digital service providers can assert ignorance until notification of a copyright infringement and thus not be liable for the infringement themselves (*Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006)*). The service providers have what is known as a safe harbour provision. The European Electronic Commerce Directive 2000 mirrors this element of the DMCA in that articles 12-14 also limit the liability of 'intermediaries' from third party copyright infringements. With more people creating digital content and becoming copyright owners and potential copyright infringers, such protections create an environment where the service providers have little incentive to minimise copyright infringement on their platforms before content is uploaded. YouTube's unique pull for creators is the ease of which you can publish content at the click of a button, however disputing the copyright of said content is not nearly as easy for the average user who does not understand copyright law. Additionally the legal fees associated with preparing to go to court for a copyright infringement case, often makes such an endeavour impractical for the average content creator on YouTube who uses the site free of charge. The costs not including legal fees in the *Williams vs Gaye* case amounted to over 7 millions USD (*Williams v. Gaye, no. 15-56880 (9th cir. 2018)*). The public nature of some of these copyright court cases may also discourage the average user from pursuing a copyright infringement case in the courts.

The Directive on Copyright in a Single Digital Market has now been approved and European member states must introduce national laws in support of the Directive by 7th June 2021. These new laws increase the level of responsibility that online service providers like YouTube have over the content on their sites. The Directive states that "online content-sharing service providers shall be liable for unauthorised acts of communication to the public" unless there is adequate proof of best practice in acquiring the necessary authorisation prior to the content being uploaded.

As is the case with most DSPs, Youtube functions as an intermediary between Copyright owners/licensees and consumers. (*POOW, 2020*)

Youtube currently has the largest number of active users compared to all DSPs, with 1 Billion users compared to Spotify's 285 Million users (*Musically 2020*). Susan Wojcicki, CEO of Youtube recently estimated that 500 hours of video is uploaded onto Youtube every minute during 2020 (*Wojcicki 2020*). The notable change in the music business is that there are more

composers able to compose and distribute music independently than ever before. This means that there are more copyright owners than ever. Therefore in the current digital age we have more access to more intellectual property than ever before yet the Laws that govern this new landscape have not evolved at the same rate. In my opinion the enormity of YouTube's consumer base and user content creation rate ought to be matched by it's implementation of protection for the copyright owners. However my argument to be outlined in this essay, is that YouTube has little incentive to protect the rights of creators from copyright infringements and the abuses of the laws that were designed to protect them.

DISCUSSION

YouTube is a subsidiary of Google and functions as an online service provider allowing users to generate content on their platform for public consumption. The majority of the content on YouTube is user generated and available to view without cost to the consumer however there are also subscription-based options available for premium content and advert-free streaming.

The platform YouTube provides for its users is unique in its accessibility. Unlike the major music digital streaming services, YouTube is a platform on which users can upload their content directly without a need for an intermediary. This creates a free market where users are given the freedom to share and express themselves creatively in an environment where such content has the possibility to go viral. For music creators YouTube provides the opportunity for visual expression, the ability to engage with an audience that can join the creative process in using one's music as the audio for their own content and thus market the music to new audiences. The problem with the user generated model is that in an environment of complete freedom there is space for said freedom to be abused. The aim for the user is popularity and to create content that will resonate with viewers and in turn gain subscribers who will view future videos. Therefore, arguably the primary goal for both the user and YouTube is not the sharing of content in a free market but the sustained engagement of the viewers. When considering the nature of viral videos, there is a tipping point where group theory suggests that other people will look for the trending video, not because of the content therein but to be included in and aware of, the cultural trend. Considering the inevitable scenario occurs that a trending video contains uncleared content but also generates a considerable amount of traffic, the only party incentivised to issue a takedown notices is the copyright owner. Firstly the service provider is protected from liability due to safe harbour provisions (*Music Business Worldwide 2017*) and the increased traffic generates advertising revenue directly and indirectly due to a surge in engagement. Secondly the user that made the content is likely to have grown their followership on the platform and thus benefits in the future and thus become more valuable to the service provider whilst still generating income for themselves, either from the video in question or other collateral views on other videos. Thirdly the copyright owner will likely experience an upsurge of engagement on other platforms by virtue of 'going viral' on YouTube and is therefore disincentivised from issuing a take down notice as that may impair their own progression from opportunities related to the video in question. Lastly the advertisement companies would still receive their results from the consumers of these videos being targeted with their advertising content.

The main body of Youtube's revenue comes from advertising revenue and subscriptions, YouTube also has the option for premium content to be purchased on the platform such as films to rent. This model of business is commonly called 'freemium'. Freemium describes the tiered approach of having some content available at no charge to the consumer whilst having an additional option available with a cost and incentive. The incentive is usually the ability to consume the content without advertisements.

Most users across various DSPs opt to use the free service with adverts. For example spotify (who in Q3 2019 had more subscribers than Youtube at 130 million compared to 20 million respectively) have more than twice the amount of users choosing to use the free tier including Ads over paying for the ad-free premium option (*Musically 2020*).

YouTube has an extremely appealing platform for advertising companies with 2 billion people coming to YouTube each month to experience music (*YouTube Internal Data, Global, 2020*).

YouTube is also the second most visited website after google (*Alexa 2020*) with each user spending 16minutes and 50seconds on average per day on the website.

In this way YouTube is able to monetize both tiers of the freemium business model. The advertising revenue continues to increase year on year for Youtube with projected income of \$18 billion in 2020 (*Ingham 2020*).

Advertising revenue is generated by YouTube selling video space to advertising agencies for targeted advertisement. Brands are able to align themselves with creators and content to boost sales. With the \$3 billion per annum that is received from YouTube subscribers in view compared to the \$18 billion generated from advertising revenue, it is rational to infer that YouTube's business model favours the advertisers.

Youtube's premium content available to subscribers lays the foundation for future revenue growth, though at present YouTube's revenue model is most definitely centred around Ad revenue.

CONCLUSION

YouTube and other intermediaries require incentive to change the way that copyright owners are both paid and protected on such platforms.

It is my assertion that a change in the laws surrounding digital distribution is the first step towards providing incentive for online service providers to better remunerate and protect copyright owners on their platforms. At present the legislation is outdated and is not easily enforceable. This is then compounded by the lack of accountability that YouTube and other online service providers are afforded by safe harbour provisions. The lack of liability has led to copyright owners being inadequately protected from copyright infringements (with the exception of large scale companies that can afford the financial cost of legal enforcement of copyright infringement cases). The Directive on Copyright in a Single Digital Market, is the first sign of this shift as it introduces legislation that moves DSPs away from the reactive stance of the safe harbour provisions to a more proactive approach to preventing improperly licensed music to be uploaded onto digital platforms like YouTube. The US and UK should join the European Union in the implementation of such laws to allow for a global shift in the landscape pertaining to digital copyright laws (*Stassen 2020*).

It is unsurprising that YouTube is resistant to such laws (*Wojcicki 2018*) as to date online service providers have enjoyed the bliss ignorance that is upheld by safe harbour provisions. It is worth noting that most of the industry led organisations including; IMPALA, AIM, CISAC, BASCA, IMRO, PRS and BPI are in favour of article 17 and the global legislative changes to better protect creators and copyright owners alike.

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