

Legal & Business Affairs (BMTY7002)

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Element 1 (Case Study)

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A Critical Analysis of the Business Strategies, Challenges and Revenue Mechanisms of the Commercialisation of Music and Entertainment on YouTube.

An effective analysis of YouTube can be split into two topics of investigation. The first section of this essay will focus on YouTube's revenue mechanisms and the way in which the company remunerates artists for their work. It will illustrate the positive steps which have been taken in recent years, subsequently demonstrating that low remuneration remains a pervasive problem across DSPs. Sections two and three will look at YouTube's response to copyright infringement. These sections will critically evaluate the effectiveness of 'safe harbour' protections enjoyed by YouTube, as well as article 13 (now 17), the most controversial section of the EU's copyright directive.

The Remuneration of Creatives

One significant element of the prevailing discord between YouTube and the music industry has been the industry's criticism that YouTube's remuneration of artists for their work is insufficient. In a damning report, Digital Music News claimed that YouTube pay-outs remained lower than any other platform in 2019 at an average of \$0.0006 per play. They went on to reveal that creators need to generate 2,133,133 total plays to make the US national minimum wage (Sanchez, 2020). There have been a number of disputes over the years. In 2014, Irving Azoff spearheaded a major effort to increase royalty payments for his clients. As YouTube announced its subscription-based platform, Azoff suggested that his 41 clients (including the likes of Pharrell Williams and the Estate of John Lennon), were unlikely to participate. Azoff stated that "the trampling of writers' rights in the digital marketplace without any regard to their contribution to the creative process will no longer be tolerated" (Faughner & Martens, 2014).

Whilst it is undoubtable that royalty payments remain insufficient, YouTube has taken tremendous steps over the last few years. Furthermore, it cannot be denied that YouTube makes a substantial contribution to the music industry and the careers of its most valuable assets - its creators. YouTube has always been heralded as a vital tool for artist promotion (Ingham, 2016a), boasting the "world's largest audience for popular music" (Faughner & Martens). YouTube has been celebrated as a key component in the growth of K-Pop in western populations as early as 2012 (Ingyu & Park, 2012). YouTube has retained its importance to the success of an artist. Nowhere is this clearer than in a Nielsen study which found that on average, an artist who uploads a music video to YouTube sees a 40% increase in streaming across platforms (Rys, 2020). YouTube runs two artist development

programmes. Foundry is YouTube's programme for breaking artists. Foundry's inherent value is clear in its former participants. These include Dua Lipa, whose most recent release, 'Future Nostalgia', earned her a Mercury prize nomination (Mercury Prize, 2020), as well as rising stars Beabadoobee and Arlo Parks (Dredge, 2020b). YouTube's support is not limited to emerging artists. During the countdown to the release of Taylor Swift's single, 'ME!', YouTube set up a digital waiting room. Fans were encouraged to interact with one another as the release approached. This was employed as a method to build anticipation for 'ME!'. Its implementation helped Swift to "break the record for most views in a 24-hour period among solo or female artists: 65.2 million" (Rys, 2020).

It would be unfair to suggest that YouTube contributes a significant amount less to the music industry than the other streaming sites. YouTube argues that it is not possible to make a direct comparison between themselves and services like Apple Music and Spotify, who make their money through subscriptions (Kharpal, 2017). This argument is weak as critics will point out that their pays per stream remain 6 times lower than Spotify's freemium equivalent (Jayson, 2016). A much stronger argument is to note the inadequacies of the data that is often used to demonise the platform. YouTube has a broad usership. 80% of YouTube views come from outside the US (MerchDope, 2020). YouTube's most significant growth is visible in new markets like India, with 325 million people accessing the site each month (Dredge, 2020c). Global figures are distorted by the smaller contributions made by these developing markets. YouTube's global head of music, Lyor Cohen, indicates that in the U.S., the streaming giant pays upwards of \$3 per thousand streams, exceeding the rates of other ad supported services (Ingham, 2020a). Although analysis shows that the worth of each Spotify user to music rights holders is about \$18.23, compared to the YouTube equivalent of \$1.50, Music Business Worldwide (MBW) estimates that Apple Music contributed \$0.2 billion less than YouTube's \$3 billion to the music industry in 2019 (Ingham, 2020a). This has been largely driven by an increase in subscribers to YouTube Music, which saw an influx of 10 million users between Q4 of 2019 and Q3 of 2020 (Ingham, 2020b).

One final strength of YouTube's platform is that it has developed a diverse, monetised ecosystem which creators are free to exploit. YouTube continues to develop tools which allow creators to generate new or accentuate existing streams of revenue. In 2019, YouTube partnered with Ticketmaster, See Tickets and Eventbrite to allow artists to add ticket links to their profiles and videos (Cooke, 2019). Cooke (2019) points out that this could be viewed as a gesture to get creatives to stop complaining about royalty rates, however their continued experimentation with monetisation tools suggests that they have a genuine commitment to making YouTube a sustainable investment for artists. As Livestreams surged over 200% since the start of 2020, Reol utilised YouTube's new 'super chat' and 'super stickers' features to earn more than \$130,000 from one livestream (Dredge, 2020f). The use of these monetisation features has grown by 40% in 2020 (Dredge, 2020d), which is

indicative of the success YouTube has had in creating a diverse ecosystem of monetisation through ancillary tools.

This section does not argue that YouTube's payments and contributions to artists is at a sufficient level. It is clear that there has been significant progress made with regards to remuneration, however NMPA CEO/President David Israelite points out that there is still some distance to go to ensure that artists get a fair deal (Rys, 2020). The evidence suggests that the issues surrounding remuneration are systemic and pervasive across streaming platforms. It is the responsibility of YouTube to find ways to increase their own revenue so that payments can be distributed more fairly. Passman (2019, p.238) highlights that because the user base of YouTube is so broad, it is difficult to target ads, therefore ad revenue remains relatively low. YouTube should invest money into increasing the efficiency of systems like this to stimulate growth and reimburse creators accordingly.

The DMCA and the 'Safe Harbour' Policy

As technology has developed, copyright law has become increasingly complex. YouTube has come under scrutiny for its exploitation of legal loopholes and the insufficient protection that it provides for copyright owners. The DMCA and the 'safe harbour' policy that it entails is at the forefront of this debate. Here, I will demonstrate that the DMCA is not fit for purpose and is a policy which is outdated and most damaging to the lowest earners of the music industry. In addition, this section will illustrate that the DMCA stifles musicians by removing their bargaining power when negotiating licenses for their music.

The Digital Millennium Copyright Act was developed in the U.S. and was passed in 1998 (Spinello, 2020, p. 121). The heart of the DMCA was its 'safe harbour' protection. As the DMCA came into being, European countries were also manufacturing safe harbour provisions (Malt & Cooke, 2019). Safe harbour protection prevents online platforms from being held liable for the copyright infringement of their users (Spinello, 2020, p.122). At the time it was introduced, the safe harbours were a necessary step to "allow nascent digital services to thrive while simultaneously protecting creators' rights" (Ingham, 2016b). If a copyright owner were to find content on YouTube which infringed on their rights, they would issue YouTube with a DMCA takedown request. Once YouTube has been made aware of the infringing material, they are required to remove the content from its platform (Bailey, 2017, p.5). In 2007, the English Premier League lost a lawsuit in which they argued that YouTube deliberately encouraged the circulation of infringing materials to boost traffic. Google, who had acquired YouTube, successfully rebuked the suits, which they said misunderstood the protections of the DMCA (Auchard & Kahn, 2007).

The DMCA was a progressive and forward-thinking act (Malt & Cooke, 2019) which helped to drive down the levels of piracy that had been plaguing the music industry (Marshall, 2015, p. 187).

However, the act removes all incentive for YouTube to actively look for infringing content (Bailey, 2017, p. 5), placing an unmanageable burden on copyright owners in a digital world with well over a billion websites (Ingham, 2016b). The RIAA declared it not fit for purpose as early as 2013 (Cooke, 2013), although pressure has continued to mount. In 2016, 186 artists and trade bodies signed an open letter, appealing to congress for reform (Ingham, 2016c). It is interesting to note that while many of those who signed this letter would be classed as top earners (Taylor Swift, U2), lower income artists and companies are most hampered by safe harbour protection. A survey conducted by the Future of Music Coalition found that 30% of indie labels did not actively search for infringing materials, citing a lack of resources as a common reason for this (Cooke, 2017). The DMCA is outdated and fails, in particular, to ensure that independent creators are sufficiently protected from copyright infringement.

Another interesting discovery of the aforementioned survey was that 68% of respondents complained that shortly after issuing a takedown request, the infringing content they had removed reappeared on the platform (Cooke, 2017). In what Passman (2019, p. 318) describes as a ‘whack-a-mole’ situation, copyright owners retain no power to negotiate licence fees. Creators can choose between removing their content from the platform (in which case infringing content would be uploaded anyway, yet they would receive nothing), or accept the price that YouTube offers them (Rys, 2020). This is an untenable balance of power which facilitated YouTube offering Danish songwriters a 70% pay-cut under threat of the removal of their content from the service (Dredge, 2020a).

This analysis shows that reform is necessary to ensure that the rights of creators and copyright owners are protected. The DMCA is now outdated and creates a power imbalance in which artists have no leverage in licensing negotiations. YouTube, however, can only be expected to operate within the bounds of the law. It is therefore the responsibility of lawmakers to enact change which forces YouTube to take more responsibility for the content which its users upload.

The EU Copyright Directive – Article 13/17

The EU copyright directive was particularly controversial, primarily because of its contentious ‘Article 13’ (later revised to article 17). Article 13 “intends to hold user-content reliant services such as YouTube legally responsible for copyright infringement on their platforms” (Stassen, 2019). This means that the ‘safe harbour’ protection that YouTube currently enjoys would no longer apply in

Europe. The bill was passed in its entirety in March 2019, allowing member states a period of two years to phase in stricter provisions (Collins, 2019). The proposals were the cause of celebration across the creative industries. Over 200 organisations signed an open letter calling for the article to be implemented (Dredge, 2019a). The article is an absolutely vital piece of legislation which will have a positive impact on the creative industries. YouTube will need to be more diligent to ensure that copyright infringing content is not uploaded to their platform (Dredge, 2019b). Like DSPs such as Spotify, YouTube will now need to negotiate deals with rights holders, or else be prevented from displaying their content on the platform. This is a victory for rights owners, who will see their positions in negotiations strengthened, increasing the chances of securing a fair deal (Oron, 2019). The EU passing article 13 is a globally significant development, which could enable rights holders to secure better terms worldwide (Passman, 2019, pp. 319-20).

It is interesting to note that even a number of music rights organisations opposed the bill. They believed that what was eventually passed did not accurately resemble what they had initially wanted from the legislation, expressing concern that creators would actually be made worse off by tougher restrictions (Stassen, 2019). A number of nations including Poland and Italy opposed the bill (Dredge, 2019b). However, this may have been a product of ‘carpet bombing propaganda’ techniques which BPI accused YouTube of employing (Ingham, 2019). I have argued that YouTube’s only responsibility is to act in accordance with laws set out by the nations in which they operate. Their intensive lobbying against article 13 is, however, an extremely disappointing display from the platform, which heavily contradicts many statements they have issued arguing that they fully support artists and rights owners. Critics of article 13 argue that it threatens the ‘open internet’ and presents a direct threat to freedom of speech (Rys, 2020). This is misleading. Rather than curtailing freedom of speech, the article helps to ensure proper remuneration of creators for their original works (Dredge 2019b). There are no changes to nations definitions of ‘fair use’, so fears of a ‘meme ban’ are exaggerated (Oron, 2019). Even one of the open internet’s greatest supporters, Larry Lessig, reminds us to “not lose sight of the creator... who still deserves limited property rights for his efforts” (Spinello, 2020, p. 112). A particularly bizarre criticism was offered by the CIAA, who claim that the article places unreasonable expectations on a variety of services (Dredge, 2020e). It is illogical to argue that a company like YouTube, which it is estimated could be worth \$300 billion (Strauss, 2019) should be exempt from responsibility, and that this should instead be placed on rights holders, the lowest earners of which, I have shown are the most negatively impacted by current provisions.

YouTube believe that they already do enough to combat copyright infringement. Their Content ID feature is available to artists, utilising AI technology to detect infringing content. It is estimated that this system misses between 20-40% of music recordings (Ingham, 2016). While the platform has a team dedicated to ‘improving’ the content ID system (Cooke, 2016), these improvements often favour

those who are the subject of infringement claims (Dredge, 2020h). In 2019 YouTube announced that claimants would need to timestamp exactly where in the UGC that copyright infringement had occurred when manually claiming (Dredge, 2019c). Moreover, Content ID is only made available to a select group of rights holders. YouTube rightly points out that the system is vulnerable to abuse as users are currently allowed to manually claim infringement and swiftly begin generating revenue from another user's content regardless of whether the claim is valid or not (Cooke, 2020). Nevertheless, article 13 remains a crucial check on the balance of power between artists and OSP's. It provides a legal incentive for YouTube to invest in improving the effectiveness and accessibility of its content ID tool.

Conclusion

YouTube has taken positive steps over the years. The increased revenue being syphoned into the music industry runs parallel with improved relations between the two (Rys, 2020). They have developed a thoroughly evolved, monetised ecosystem for artists through tactical partnerships and ancillary features such as 'super chat'. In addition to this, YouTube remains an inherently useful promotional tool which effectively breaks new artists and provides continued support for established artists and the catalogues of rights holders. Remuneration has remained low. However, this essay has demonstrated this to be a systemic issue which can be addressed by streaming services finding ways to increase their overall revenues. The responsibility of ensuring a level playing field between artists and online platforms remains with lawmakers. Positive steps have been taken here, with the EU replacing the outdated 'safe harbour' protection previously enjoyed by YouTube with tougher provisions for ensuring the rights of rights holders through article 13/17. This action is a necessary step to incentivise YouTube to develop previously neglected copyright ID systems and to take more responsibility for the content its users upload. This in-depth analysis suggests that YouTube should invest in two areas. They should invest in better ad targeting to increase their own revenues, thereby increasing the revenue of creators. They should also invest more heavily in Content ID tools to better protect the rights of copyright owners. These are necessary steps to ensure the fairness and sustainability of the symbiotic relationship between YouTube and the music industry.

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