

meiea[®]

MUSIC & ENTERTAINMENT INDUSTRY
EDUCATORS ASSOCIATION

Journal of the
Music & Entertainment Industry
Educators Association

Volume 18, Number 1
(2018)

Bruce Ronkin, Editor
Northeastern University

Paul Linden, Associate Editor
Butler University

Ben O'Hara, Associate Editor (Book Reviews)
Australian College of the Arts

Published with Support
from



Content ID as a Solution to Address the Value Gap

Victoriano Darias de las Heras
*Berklee College of Music and
Universidad Internacional de La Rioja*

<https://doi.org/10.25101/18.4>

Abstract

In September 2016, the European Commission included in its Proposal for a *Directive on Copyright in the Digital Single Market* an obligation for user-uploaded content platforms to introduce effective content recognition technologies as a means to address the value gap. After describing the size and origin of said value gap, and taking YouTube's Content ID technology as a reference, the paper assesses the effectiveness of this technology in identifying sound recordings and musical works. It then analyses how rights holders are currently using Content ID and why they have not consistently applied it to block access to the content they own. The paper suggests that an agreement would have to be reached by a significant amount of record labels, most notably the majors, to act in unison and use Content ID to block their content on YouTube until it agrees to pay fair remuneration for the making available of their content. Such an initiative raises several questions. First, whether record labels would be able to stick to such an agreement and not be tempted to unblock access to their content to benefit from YouTube's promotional capabilities. Second, whether this form of cooperation among competing labels could be considered a concerted practice, potentially contrary to antitrust regulations. And third, whether any potential negative effects on competition could be outweighed by increased efficiency in the market and thus be authorized by antitrust authorities.

Keywords: Content ID, value gap, YouTube, Spotify, Digital Millennium Copyright Act, E-Commerce Directive, Copyright in the Digital Single Market, IFPI, music streaming, digital music, sound recordings, music copyright, recording industry, music industry

Introduction

The International Federation of the Phonographic Industry (hereafter IFPI) has described the value gap as “the biggest threat to the future sustainability of the music industry,” making it “the industry’s single highest legislative priority” (IFPI 2017, 24-25). IFPI is, however, not the only trade association to put the value gap high on its policy agenda. Albeit in some cases using different terminology,¹ the International Confederation of Societies of Authors and Composers (hereafter CISAC), the Independent Music Companies Association (hereafter IMPALA), the International Confederation of Music Publishers (hereafter ICMP) or, at domestic level, the Recording Industry Association of America (hereafter RIAA), to name a few, all have strategies in place in order to “bridge the value gap.”

The political debate has become particularly intense in Europe since September 2016, when the European Commission presented its draft *Directive on Copyright in the Digital Single Market*.² The bill covers a wide variety of subjects and was presented together with other proposals in what seemed to be the most ambitious copyright package in many years.

One of the most important aspects of the draft directive is its attempt to bring some clarity as regards the role played by user-uploaded content (hereafter UUC) platforms in the dissemination of copyright protected content. If adopted, it would therefore constitute the first piece of legislation in the world to address the value gap.

One of the most debated aspects of the bill is the obligation it imposes on UUC platforms to introduce content recognition technologies to help manage the copyright protected content that is made available. However, this type of technology has already been implemented by some UUC platforms, most notably YouTube, and, albeit helpful, has not completely solved the problem. This raises questions as regards the effectiveness of said technologies, the way they are used by rights holders, and ultimately asks if the obligation to introduce them is enough to address the value gap. But what exactly is the value gap?

The Value Gap

According to the IFPI, “The value gap describes the growing mismatch between the value that some digital platforms, in particular user upload services, such as YouTube, extract from music and the revenue returned to the music community—those who are creating and investing in music” (2018, 26). In other words, music rights holders consider that

the money paid by UUC platforms for the use of music does not reflect the true value of music.

Calculating the Value Gap

The question now is if we can actually quantify that mismatch, and while this is not easy, we can look at different sources. The IFPI itself provides some information (see Figure 1).

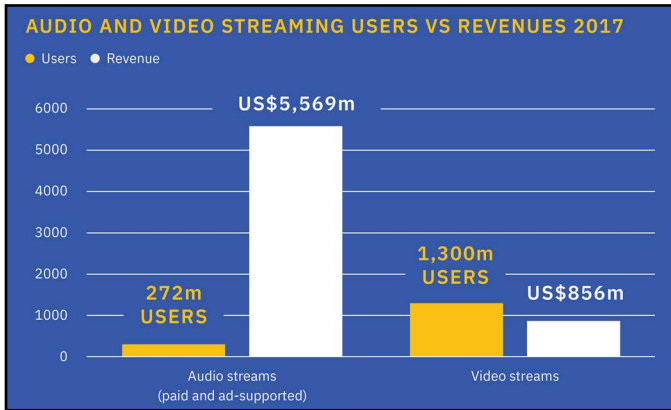


Figure 1. Audio and video streaming users vs. revenues 2017 (IFPI 2018, 27).

The IFPI also adds that the estimated annual revenue per user is US\$20 in Spotify and less than \$1.00 in YouTube. Moreover, it reports that video streaming makes up more than half of on-demand streaming time, YouTube alone accounting for 46% of that time (2018, 27).

On the other hand, Information is Beautiful compares the average artist revenue per play of the major music streaming services, coming to the following results (Table 1). However, calculating the value gap is not as simple as comparing YouTube payouts to those of other digital services, let alone other sources of revenue. First of all, because value gap claims are based on YouTube’s ad-based service, not on its newly created YouTube Music,³ whereas Spotify, Apple Music, Deezer, and other digital platforms generate most of their income, if not all, from subscriptions, which is a different business.

Some therefore argue that YouTube should be compared only to the ad-supported tier of those services. Yet, even if that comparison is made, YouTube seems to be paying less than Spotify (Table 2).

Service	Average Artist Revenue per Play
Napster	\$0.0190
Tidal	\$0.0125
Apple Music	\$0.0074
Google Play	\$0.0068
Deezer	\$0.0064
Spotify	\$0.0044
Amazon	\$0.0040
Pandora	\$0.0013
YouTube	\$0.0007

Table 1. Major music streaming services compared (McCandels 2018).

Service	Payouts per 1,000 Streams
Spotify (ad-supported tier only)	\$2.11
YouTube	\$1.20

Table 2. Payouts per 1,000 streams (Peterson 2017).

Liebowitz (2018) suggests further analysis. First, he looks at the percentage paid out by YouTube compared to the ad-supported tiers of music streaming services. He indicates that a service like Spotify typically pays out 70% of ad revenues to rights holders, whereas YouTube only shares 55% of said revenue.⁴ Therefore, according to Liebowitz, it appears that YouTube not only fails to generate as much revenue per stream as its competitors, but it also pays a smaller share of its advertising revenue to copyright owners (2018).

Finally, Liebowitz points out that the fact that YouTube is undermonetizing might have also had an effect in the ability of fully-licensed platforms to maximize revenue in three ways. First, because services like Spotify could be forced to lower their advertising intensity to compete with YouTube. Second, because they cannot fully match YouTube's low

advertising intensity, they might have reduced audiences in their ad-supported tier. And third, because low advertising intensity in ad-supported services disincentivizes users to switch to subscription ones (2018). In fact, some competing online music streaming services claim that YouTube has a fundamental impact on their business, even affecting their ability to increase artist payouts (Kharpal 2016).

Liebowitz, however, is not able to estimate the economic impact of these dynamic effects. Beard, Ford, and Stern (2017), on the other hand, apply economic modeling techniques and come to the conclusion that a more market-based royalty rate applied to YouTube could generate \$650 million to over one billion dollars a year in the U.S. alone, which is 11% to 17% of total recorded music revenue in 2017 (IFPI 2018). Finally, it seems that growth by video UUC does not translate in an equivalent increase in money being paid out to rights holders. According to the British Phonographic Industry, while YouTube and Vevo saw a rise of 88% in video plays, money collected by labels from ad-supported services grew by just 4% (Ingham 2016).

Critics of the Value Gap Claim

Not everyone, however, shares the view that YouTube is underpaying. YouTube itself obviously denies it, albeit providing little detailed information. In a 2016 blog entry, YouTube claimed to have paid the music industry over \$1 billion that year without specifying for which territory it paid that amount. Assuming it was for the entire world, which seems a likely assumption, that would amount to 6.25% of total recorded music revenue in 2016. Note however that part of that money was paid to the owners of the musical work. Therefore, we can estimate that YouTube payouts must have been between 4% and 5% of recorded music revenue in 2016. This is more than the amount collected for vinyl (3.6%)⁵—a surprisingly healthy market, albeit a marginal one—but less than half the revenue generated by public performance (13.7%), a non-interactive form of music consumption, and therefore likely to be less valuable for consumers (IFPI 2017).

Another figure was provided by YouTube's Global Head for Music, Lyor Cohen. He claimed that YouTube paid \$3.00 per thousand streams (CPM) in the U.S., more than other ad-supported services (Roettgers 2017).⁶ Jason Peterson (2017), Chairman of GoDigital Group, nuanced that figure. First, Peterson argues, the number refers to monetized video

streams, stressing that only 40% of YouTube videos have advertisements. If 60% of videos are not monetized the effective CPM (eCPM, in his own terminology) would be \$1.20, instead of \$3.00, less than Spotify's ad-supported eCPM of \$2.11, and much lower than the latter's subscription eCPM of \$6.19.

Peterson's estimate seems to be in line with calculations by the Recording Industry Association of America (hereafter RIAA). In a rebuttal statement to Cohen's blog entry, RIAA Chairman and CEO Cary Sherman stated that 2016's "payout per 1,000 streams was closer to half that [\$3.00] amount, according to industry data and Nielsen and BuzzAngle estimates" (2017).

Peterson adds that YouTube is part of a vertically integrated company (Google) with a 60.12% margin, compared to Spotify's 16% margin. Although he concedes that Spotify's margin is anemic, he underlines that a healthy one would be around 20% to 30%. He adds: "If Google was in line with music industry practices it would increase its advertising fill rate and pay through at least on par with Spotify at \$2.11 eCPM in the United States (\$3.51 CPM at a healthy 60% fill rate or \$5.28 CPM at today's 40% fill rate) and still have 53% to 30% margins from ad supported streaming, respectively" (2017, 2). Finally, he suggests that in any case the figure provided by Lyor Cohen is for the U.S. market, a particularly lucrative market. Global rates, according to Peterson are lower than \$0.50 eCPM (2017).

YouTube has also argued that the comparison between its service and audio streaming services like Spotify is unfair. Christophe Muller, YouTube's Global Head of Music Partnerships, understands that the service should rather be compared to radio:

Like radio, YouTube generates the vast majority of its revenue from advertising. Unlike radio, however, we pay the majority of the ad revenue that music earns to the industry. Radio, which accounts for 25% of all music consumption in the US alone and generates \$35bn of ad revenue a year, pays nothing to labels and artists in countries like the US. In countries like the UK and France, where radio does pay royalties, we pay a rate at least twice as high. (2016)

He also stresses YouTube's value as a platform that helps artists obtain greater exposure, claiming that the service "is one of the only platforms that allows anyone to get their music heard by a global audience of over one billion people" (2016). Muller's comparison of YouTube to radio seems strange, since one medium is interactive and the other is not. As indicated above, the value for consumers is therefore fundamentally different and a higher rate is probably justified. YouTube is more likely to be a substitute of at least ad-based audio streaming services and, as indicated above, the rates should be more in line with the latter.

As regards the promotional power, it is, as we will discuss below, undeniable. Having said that, it seems reasonable for rights holders to decide the value they attach to said promotion and adjust their tariffs accordingly. However, rights holders' claims as regards the value gap suggests that this does not seem to be something that they can negotiate.

Within the music industry there are also people who seem skeptical about the existence of a value gap. Denis Ladegaillerie, CEO of French aggregator, label services company, and parent company of TuneCore, Believe Digital Services, has expressed that he doesn't "see a YouTube value gap. No-one has been able to prove that you can successfully make users pay a few dollars a month to watch official music videos. When someone does that, I'll raise the issue of a value gap. Also, we don't see YouTube cannibalizing usage or money that we should be making on subscription services like Spotify or Apple Music" (Jones 2017).

Ladegaillerie seems unconvinced of the value gap claim. However, his statement merits some comment. First, as indicated above, YouTube seems to be underpaying, even in comparison to the ad-supported tier of streaming platforms. And second, his claims that no one has been able to make users pay to watch official videos sounds like a self-fulfilling prophecy. It is not easy to show that users might be willing to pay money to watch official videos (or videos of any kind) if that option cannot be exercised. Maybe consumers are not really that interested in the audiovisual aspect of YouTube's videos and they just use it as an online music service. In any case, for reasons that we will discuss below, rights holders claim that they cannot negotiate at an arm's length with UUC platforms. But even if they were, that would not necessarily mean that rights holders would impose a pay-per-play tariff on UUC platforms. There are many examples of licensing models that are not based on the final user paying a fee, for example PRO licenses to radio broadcasters.

The question therefore is, why are rights holders not able to negotiate with YouTube and other platforms in the same way they negotiate with other users of their repertoire? And the answer lies in the safe harbor provisions introduced by the Digital Millennium Copyright Act in the U.S. (hereafter the DMCA) and the E-Commerce Directive in the European Union.^{7 8}

UUC Platforms and Safe Harbor Provisions

Rights holders claim that UUC platforms such as YouTube take advantage of a legal loophole to avoid paying for the making available of copyright protected content, or to pay less than what they consider to be the market value of music. This loophole was created by the safe harbor provisions included in legislation all over the world, such as the 1998 DMCA in the U.S. or the 2000 E-Commerce Directive in the European Union. Said provisions were introduced to facilitate the development of the internet by protecting intermediaries from, among other things, copyright violations committed by users of their services.

Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) had raised the possibility that certain types of Online Service Providers (OSPs) could, under certain circumstances, be held liable for contributory or vicarious copyright infringements. The DMCA (and later on, the E-Commerce Directive) was an attempt to provide legal certainty as to the specific circumstances under which different types of intermediaries would benefit from liability limitations for third party copyright infringement. §512 (c) of the U.S. Copyright Act⁹ deals with providers of storage services on the internet. At a time when these services included mostly website and chatroom hosting, the DMCA created a liability safe harbor for these OSPs if three cumulative conditions are met:

First, the OSP cannot have “actual knowledge that the material or an activity using the material on the system or network is infringing,” or be “aware of facts or circumstances from which infringing activity is apparent.” Also, “upon obtaining such knowledge or awareness,” it must act “expeditiously to remove, or disable access to, the material.” The second condition to be eligible for the §512 (c) liability limitation is absence of “a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” Finally, upon notification of claimed infringement the OSP has to

respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”¹⁰

The balance achieved by the DMCA and the E-Commerce Directive worked well in the first years of the internet. Copyright holders felt they had the necessary tools to take down unlicensed services, be they commercial platforms like MP3.com,¹¹ or small websites of fans with a reduced number of songs available for download. The procedure was simple. As soon as a service was big enough to be noticed, the copyright holder had two strategies at hand. It could sue the service directly or, if it was just a random website with some music, send a take-down notice to the provider of the hosting service. Once the hosting service received one such notice, it would be considered to have actual knowledge of the infringing activity and could therefore no longer be exempted from secondary liability under the DMCA (and E-Commerce Directive) safe harbor provisions if it did not disable access to the infringing content.

Safe Harbor Provisions and UUC Platforms in the U.S.

This legal framework started to be tested in the late 1990s. By that time, unlicensed services were usually small, dispersed, and with very limited content, and they could be easily taken down by copyright holders. Contrary to some misconceptions, there were also a bunch of licensed online music services available (i.e., eMusic, IUMA, Ritmoteca, etc.), but they, too, would only offer limited repertoire.

That changed in 1999, when Shawn Fanning, a 19-year old Northeastern University student, and his friend Sean Parker created a platform that would shake the music industry. Fanning and Parker realized that the aggregate musical repertoire stored in the hard drives of hundreds of thousands of people was much bigger and potentially more attractive to music lovers than the existing online offer at the time, and they found a way to connect that supply with a growing demand for online music.¹² Basically the formula was convincing people to share their music through a common hub.

The p2p version of Napster did not remain open for long—among other things because they could not benefit from any form of §512 liability exemption¹³—but the concept was so powerful that it is still one of the drivers of the internet. YouTube, Facebook, Uber, AirBnB..., these are all platforms that allow individual users to share something: content, rides, rooms, private information, etc. Through these platforms, the users there-

fore become the actual distributors or service providers. However, there's a little difference between a service like AirBnB and one like YouTube. AirBnB users share something that they own, whereas YouTube's ones, at least some of them, share somebody else's property. The difficulties that the music industry has had in past years to enforce copyright on the internet therefore do not come from primary liability for copyright infringement, but rather from the difficulty in establishing a secondary one.

Many UUC platforms actually have copyright policies in place, which include having users accept the terms of use agreement, in which it is clearly specified that they will not upload copyright protected material unless he or she is the copyright owner or has permission from the rights holder. Additionally, these platforms will usually take down any specific copyright protected content if properly notified by the rightful owner, in order to continue benefiting from the DMCA liability exemption. However, given the large scale of uploads, rights holders usually claim this option to be costly and ineffective.¹⁴ Additionally, they consider that UUC platforms should not be able to benefit from the DMCA liability exemption because they have actual knowledge of the copyright infringements that take place.

This controversy has been addressed in a number of cases both in the U.S. and in Europe. In *Viacom Int'l, Inc. v. YouTube, Inc.*,¹⁵ the United States District Court for the Southern District of New York identified the issue at stake:

[T]he critical question is whether the statutory phrases “actual knowledge that the material or an activity using the material on the system or network is infringing,” and “facts or circumstances from which infringing activity is apparent” in §512(c)(1)(A)(i) and (ii) mean a general awareness that there are infringements (here, claimed to be widespread and common), or rather mean actual or constructive knowledge of specific and identifiable infringements of individual items. (*Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010))

The District Court held that “the phrases ‘actual knowledge that the material or an activity’ is infringing, and ‘facts or circumstances’ indicating infringing activity, describe knowledge of *specific and identifiable*

infringements of particular individual items (emphasis added).” The fact that YouTube was generally aware of prevalent infringement on its platform was therefore not enough to prevent the application of the liability exemption.

The case was appealed before the United States Court of Appeals, 2nd Circuit, which confirmed with certain nuances the District Court’s opinion. However, it remanded the case back to the District Court “to brief [among other things] [...] (A) Whether, on the current record, YouTube had knowledge or awareness of any specific infringements; (B) Whether, on the current record, YouTube willfully blinded itself to specific infringements; [and] (C) Whether YouTube had the ‘right and ability to control’ infringing activity within the meaning of § 512(c)(1)(B).”¹⁶

The District Court, once again, decided in favor of YouTube, and granted a motion for summary judgment.¹⁷ Viacom could have appealed again and gone all the way to the Supreme Court, but instead a settlement with YouTube was reached. The terms of the agreement were however not disclosed (Stempel 2014). The court’s decision might be hard to understand, especially if we take into account the evidence provided by Viacom, including:

- Website surveys conducted by YouTube employees estimating that 75-80% of all YouTube streams contained copyrighted material.¹⁸
- A report by Credit Suisse acting as financial advisor to Google, estimating “that more than 60% of YouTube’s content was “premium” copyrighted content—and that only 10% of the premium content was authorized.”¹⁹
- A 2007 email from Patrick Walker, director of video partnerships for Google and YouTube, requesting “that his colleagues calculate the number of daily searches for the terms ‘soccer,’ ‘football,’ and ‘Premier League’ in preparation for a bid on the global rights to Premier League content.”²⁰
- A request by Walker for any “clearly infringing, official broadcast footage” from a list of top Premier League clubs—including Liverpool Football Club, Chelsea Football Club, Manchester United Football Club, and Arsenal Football Club—to be taken down in advance of

a meeting with the heads of “several major sports teams and leagues.”²¹

- A 2006 report prepared by YouTube founder Jawed Karim which stated that, “As of today[,] episodes and clips of the following well-known shows can still be found [on YouTube]: *Family Guy*, *South Park*, *MTV Cribs*, *Daily Show*, *Reno 911*, [and] *Dave Chapelle* [sic],” and that, “although YouTube is not legally required to monitor content...and complies with DMCA takedown requests, we would benefit from preemptively removing content that is blatantly illegal and likely to attract criticism.”²²
- A 2005 email by YouTube founder Chad Hurley to his cofounders with the subject line “budlight commercials,” which stated, “we need to reject these too.” Steve Chen responded, “can we please leave these in a bit longer? another week or two can’t hurt.” Karim also replied, indicating that he “added back in all 28 bud videos.”²³
- Another 2005 email exchange, in which Hurley urged his colleagues “to start being diligent about rejecting copyrighted / inappropriate content,” noting that “there is a CNN clip of the shuttle clip on the site today, if the boys from Turner would come to the site, they might be pissed?” Chen replied: “but we should just keep that stuff on the site. I really don’t see what will happen. what? someone from CNN sees it? he happens to be someone with power? He happens to want to take it down right away. he gets in touch with CNN legal. 2 weeks later, we get a cease & desist letter. we take the video down.” And Karim added that “the CNN space shuttle clip, I like. we can remove it once we’re bigger and better known, but for now that clip is fine.”²⁴

As we can see, Hurley was actually in favor of rejecting copyright protected and inappropriate content. YouTube has indeed adopted measures as regards the second issue, which have been quite effective. In fact, YouTube’s Community Guidelines are quite strict and the platform does “not allow pornography, incitement to violence, harassment, or hate

speech. [YouTube relies] on a combination of people and technology to flag inappropriate content and enforce these guidelines” (Google 2018). Google’s *Transparency Report on YouTube Community Guidelines Enforcement* indicates the source of first detection of the videos removed: 71.8% of videos were flagged automatically and 28.2% by users and members of the Trusted Flagger program (individual trusted flaggers, NGOs and Government agencies). This shows that YouTube plays an active role in developing technology that detects certain types of content and applies it unilaterally.

Yet, as regards copyright, the approach has been different and YouTube only acts if so required by the copyright holder of specific videos. As discussed above, and although the issue has not been settled by the U.S. Supreme Court, existing jurisprudence seems to indicate that YouTube is not legally required to act—nor prevented from doing so—even if it has generalized knowledge of copyright infringements. Also, under §512(m), it is not required either to “monitor [...] its service or affirmatively seek [...] facts indicating [copyright] infringing activity.” However, there does not seem to be an obligation for YouTube to act unilaterally in the identification of the above-mentioned non-copyright related content and yet it does, which indicates that YouTube has for a long time had the means to adopt a more proactive role in the prevention of copyright infringing activity.

The reason for these different approaches lies in the value of the content for advertisers. This became particularly evident last year when certain companies pulled their ads after they were found to be appearing next to videos promoting extremist views or hate speech (Solon 2017). The situation as regards copyright protected content is, however, quite different. In fact, YouTube’s value to advertisers is to a great extent due to the availability of such content, thus the lack of incentive to remove it unless required by law.

History Repeats Itself

As we discussed above, it is not easy to understand how current legislation allows companies that rely on massive copyright infringements to operate. However, if we look back in history we realize that it is not the first time that courts of justice have applied copyright law in a manner that, in retrospect, illogically favors the development of business models that rely on content “free-riding.”

Take the arrival of recording technology, for example. Before 1909, only reproductions of sheet music (that could be read) were considered “copies” of musical compositions within the meaning of the law (Gorman, Ginsburg, and Reese 2011, 636). As held by the U.S. Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.*,²⁵ piano rolls were excluded and could therefore not be subject to a license of the copyright owner of the musical composition. In its decision, the Supreme Court quotes the Court of Appeals of the District of Columbia in an opinion by Justice Shepard, which by analogy also excluded wax cylinders and phonograph records from the obligation to pay royalties:

We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the appellants, as the copy or publication of the same within the meaning of the act. The ordinary signification of the words “copying,” “publishing,” etc., cannot be stretched to include it. It is not pretended that the marks upon the wax cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph. (*Stern v. Rosey*, 17 App. D. C. 562)

It now seems odd that the law of the time would grant authors a copyright over sheet music, but not over phonorecords. As it is the case with UUC platforms now, the situation generated a growing discontent within the rights holders community. John Philip Sousa was particularly active in defending composers’ rights and in demanding a change in the law: “You can take any catalogue of records of any talking machine company in this country and you will find from 20 to 100 of my compositions. I have yet to receive the first penny for the use of them” (Rosenlund 1979).

Following the suggestion of the Supreme Court at the end of its opinion, and the growing discontent of composers like Sousa, the U.S. Congress introduced the mechanical right in the Copyright Act of 1909,²⁶ albeit subject to compulsory license, a solution that was continued in the Copyright Act of 1976.^{27 28}

In most cases, these types of situations, in which the law favored business models based on content free-riding, were generated by the slow adaptation of copyright laws to technological developments. To a certain

extent, however, the internet was an exception at the beginning. Lawmakers in the U.S., the European Union, and other parts of the world were actually surprisingly quick in trying to adapt existing copyright laws to the new internet reality. The DMCA and the E-Commerce Directive are good examples. In fact, one could argue that these lawmakers might have rushed to enact legislation and did so before we could be aware of the true possibilities of this new medium. What is true is that this initial impulse disappeared and no further significant amendments were introduced to update the protection of copyright when new unanticipated online services were brought to the market.

Safe Harbor Provisions and UUC Platforms in the European Union

The application of the E-Commerce safe harbor provisions to YouTube has also been challenged in a number of European jurisdictions. In general, European courts of justice have often found that UUC services are covered by the safe harbor provision for storage providers included in article 14 of the E-Commerce Directive. However, in some cases courts have deemed these platforms to be more than just storage providers. Particularly interesting have been the developments in German speaking countries.

In Germany, YouTube and GEMA, the German collecting society of songwriters and music publishers, had had a long legal battle when in the end of 2016 it decided to settle. At that point, the Higher Regional Court of Munich (Oberlandesgericht or OLG) had ruled in favor of YouTube, arguing that the platform was not liable for the upload of GEMA's repertoire by its users.

The legal battle had generated a great deal of frustration among German YouTube users, which got accustomed to the message, "This video is unfortunately not available in Germany, because it might contain music the rights of which have not been licensed by GEMA."²⁹ While GEMA got all the blame for the blocking of the videos, the fact of the matter was that it was YouTube, which unilaterally decided to block music videos in Germany, thus de facto confirming that it had the means to block copyright protected content.

YouTube's and GEMA's settlement will, however, not prevent the Federal Court of Justice (Bundesgerichtshof or BGH), the highest judicial instance in Germany apart from the Federal Constitutional Court, from settling case law. In fact, it might in the end be a lawsuit filed by

an individual producer—Hans Peterson—that might provide some clarity as to YouTube’s liability status. In a 2015 opinion on this case the OLG Hamburg established that, while YouTube might not be directly liable for copyright infringement, it could be subject to secondary liability.³⁰ The court confirmed that, following the implementation of the E-Commerce Directive into German Law, providers of storage services did not have an obligation to monitor uploaded content. Having said that, the OLG Hamburg understood that, due to its size and popularity, YouTube is not a storage provider in the classic sense and that to a certain extent it was required to adopt preventive measures, albeit only when notified of the copyright infringements. This translates as an obligation to prevent future uploads of the identified content (Merck 2018). As indicated above, the decision has been appealed before the BGH, which will determine the extent of YouTube’s control obligations.

In a more recent case in Austria, however, YouTube was indeed held directly liable for copyright infringements committed by its users. In a decision, which will probably be appealed by YouTube, the Vienna Commercial Court found that the UUC platform could not benefit from the storage provider safe harbor provision because it did not play a neutral role. In particular, the Court held, YouTube sorts, filters, and links content, “in particular by creating tables of contents according to predefined categories,” which has a fundamental impact in the way users access content (Rosborough 2018). This was confirmed by Lyor Cohen during his 2018 South by Southwest keynote speech, noting that eighty percent of all watch time on YouTube is recommended by a recommendation engine (Rys 2018), generating doubts as regards YouTube’s alleged neutral role.

These are all very recent and, in some cases, yet unsettled cases. However, the most important development as regards YouTube’s liability status and obligations vis-à-vis copyright protected content in the European Union will come from the new Directive that was proposed by the European Commission in September 2016.

The Draft EU Directive on Copyright in the Digital Single Market

As indicated above, the draft Directive on Copyright in the Digital Single Market is a bill that addresses many different aspects of copyright in the European Union. One of its goals, and probably the most controver-

sial one, is to bring clarity as regards the role UUC platforms play when their users upload and make available copyright protected content.

As such, this bill is the first attempt in the world to address the above-mentioned value gap and therefore merits a careful analysis. At the moment of writing this paper, the legislative process was still ongoing. The European Parliament had supported the approach taken by the European Commission, albeit somewhat amending the Commission's proposal. The final text was, however, still to be agreed upon between the Commission, the European Parliament and the European Council. In our analysis we take the wording of the Commission's proposal as a reference.

The Problems Identified by the European Commission

In the complex balance of power of the EU institutions, the European Commission is considered the executive branch. As such, it is in charge of proposing legislation. However, before making any proposals, the European Commission has to conduct a thorough analysis of the issues at stake, which involves extensive formal and informal stakeholder consultations, and takes around two years. If the European Commission decides to propose legislation, it has to present an Impact Assessment, which describes the Commission's analysis, including data and the positions of stakeholders, as well as a list of the policy options considered and a justification of the one chosen.

The Impact Assessment of the draft Directive³¹ (hereafter the Impact Assessment) describes two problems to be addressed by the proposed legislation:

- The presence of large amounts of user-uploaded copyright protected content in the internet; and
- The fact that legal uncertainty hampers the rights holders' negotiation of agreements with UUC platforms.

Recital 37 of the draft Directive goes along the same lines:

Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to copyright protected content uploaded by their users without the involvement of right holders have flourished and have become main sources of access to content online. This affects rightholders' possibilities to determine whether, and under which conditions, their

work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.

In fact, the Impact Assessment reflects the difficulties that rights holders face “when wanting to negotiate licenses or reach agreements,”³² indicating that “Rightholders [...] [describe] their negotiation relationship with certain of these platforms as a ‘take it or leave it’ situation: they must either accept the terms offered by the service or continue to send notifications for each individual content which can be infringed thousands of times,”³³ and warns that these problems risk “constraining the sustainable growth of digital content markets and future investment in content creation and production.”³⁴

The Impact Assessment also includes an analysis of available content recognition technologies, notably watermarking and fingerprinting, describing how these are applied by services like YouTube, SoundCloud, Vimeo, or Dailymotion,³⁵ and confirms that these technologies are “generally available and deployed”³⁶ and that “licensing and partnership agreements [are] being struck between rightholders and online services that had so far refused to conclude agreements.”³⁷ However, it also indicates that “Even if major user uploaded content services have put in place measures such as content identification technologies, their deployment remains voluntary and is subject to the conditions set by the services,”³⁸ and that there might still be situations in which “services operate without the rightholders’ agreement and build an audience before agreements are concluded.”³⁹ Note how this pattern seems to reflect YouTube’s strategy when it began operating, as described by Jawed Karim in the exchange of emails mentioned above.

In order to address the described issues, the Commission proposes in its Impact Assessment to introduce “[a]n obligation on [UUC services] to put in place appropriate technologies and to increase transparency vis-a-vis rightholders.”⁴⁰ However, the draft Directive goes a little bit further than that.

The Solutions Proposed by the European Commission

A careful analysis of the draft Directive shows that the proposal of the Commission has in fact three interesting provisions:

- An obligation for UUC services to put in place content recognition technologies;

- An obligation for these technologies to be put in place in cooperation with rights holders, for the latter to provide the necessary data for the content to be identified, and for UUC services to be transparent as regards the functioning of these technologies; and
- An interpretation of the E-Commerce Directive safe harbor provision applicable to providers of storage services.

Article 13.1 of the draft Directive is the key provision and states that UUC services “shall, in cooperation with rightholders, take measures [such as the use of effective content recognition technologies] to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.”

Additionally, the same article confirms that these service providers “shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.” Recital 39 further clarifies this obligation, and underlines the importance of rights holder cooperation for content recognition technologies to work:

Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders’ content. Those technologies should

also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.

Finally, the draft Directive includes a clarification in Recital 38 that is probably as important as the above-mentioned obligations:

Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public,⁴¹ *they are obliged to conclude licensing agreements with rightholders*, unless they are eligible for the liability exemption [for providers of storage services] provided in Article 14 of [the E-Commerce Directive]. (emphasis added)

In this respect, the same recital clarifies that, in order for any such service to be eligible for the E-Commerce Directive liability exemption, “it is necessary to verify whether the service provider plays an active role, *including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor*” (emphasis added).

This means that a UUC platform, which sorts, filters, links, and/or recommends content might be considered to have an active role, thus losing safe harbor protection. This, in turn, would force these platforms to acquire licenses like any other content provider. As mentioned above, courts of justice and executives of some services, notably YouTube, have actually confirmed that these kinds of activities do take place. This interpretation of the safe harbor provisions would therefore change their status.⁴²

Note also that Recital 38 specifies that the obligation for UUC services to put in place content recognition technologies also applies “when the information society service providers are eligible for the liability exemption provided in Article 14 [...]”

Criticism Received of the Draft Directive

As expected, given the magnitude of the changes proposed, the draft Directive has received extensive criticism by different interest groups. In

particular, the lobby by technology companies reached unprecedented levels,⁴³ invoking very noble goals, namely the need to protect fundamental rights. This is odd, particularly given how reluctant these same companies were in the past to accept legislation that increased privacy protection. As such, the main criticism the proposal has received is that the obligation to put in place content recognition technologies could have a negative impact on the freedoms of expression and information and on the exercise of copyright exceptions and limitations.

This aspect is addressed by the European Commission in the Impact Assessment, indicating that “as content recognition technologies are already applied by the major user uploaded content services, it is likely that this option would not lead to significant increases in unjustified cases of prevented uploads compared to the current situation.”⁴⁴

Additionally, it should be pointed out that article 13.1 of the draft Directive imposes the obligation to put in place said technologies only on “[i]nformation society service providers that store and provide to the public access to *large amounts* of works or other subject-matter uploaded by their users (emphasis added),” and that application of such measures, “shall be appropriate and proportionate.” A website occasionally posting videos or links would therefore be excluded from the obligation. Therefore, in a way the Commission is just regulating the application of technologies that have already been put in place and which apply, as discussed above, not only to copyright protected, but to a variety of, content. The obligation is thus not really creating a fundamentally new reality.

On the other hand, the extent to which copyright protection may have an impact on freedom of expression is a common subject of discussion. However, oftentimes the relationship between one and the other is misunderstood. Copyright can rarely be an obstacle to freedom of expression for one simple reason: copyright protects a certain expression of ideas, but never the ideas themselves.⁴⁵ Therefore, copyright can only prevent freedom of expression if, in order to express our ideas, we use content created before by others, like when a meme is created.

We find a similar situation as regards freedom of information. A conflict with copyright can only appear when content owned by others is used and this is only justified to the extent that the use of said content is necessary to inform adequately about an event. In both cases, however, any potential conflict can be overcome by the application of copyright exceptions and limitations.⁴⁶ It is important to point out, however, that the appli-

cation of copyright exceptions is subject to the three-step test included in a number of international copyright treaties,⁴⁷ namely that they may only be applied (i) in certain special cases, (ii) which do not conflict with a normal exploitation of a work or other subject matter, and (iii) do not unreasonably prejudice the legitimate interests of the right holder.

A simple look at YouTube or similar services that make available large amounts of works and other subject matter will show that the amount of videos with copyright protected content, the purpose of which is the dissemination of ideas or information, is rather limited compared to those in which said content has a purely entertainment purpose. Therefore, preventing rights holders from enforcing their rights just because their content might have been used for non-entertainment purposes would be totally disproportionate and would deprive them from the benefits of this intellectual property protection.

There is an additional issue to be taken into account. The conflict between copyright enforcement and the freedoms of expression and information in UUC platforms seems to assume that content recognition technology is going to be used to block works and other subject matter. There is little reason for rights holders to adopt such a strategy. As discussed below, rights holders rarely use content recognition technology in that manner.

Taking into account that, as discussed above, YouTube has had no problem in unilaterally blocking certain types of content, the true reason for this level of opposition might actually therefore come from a change in its bargaining situation.

Contrary to what was the case until now, the measures proposed by the European Commission shift the bargaining power in a negotiation between a UUC platform and rights holders and might therefore have important financial consequences for these services. This, and not the protection of fundamental freedoms, seems to be the real reason behind the opposition to the initiative. Note that the entire business model of YouTube so far has been based on the possibility to rely on the safe harbor provisions included in the DMCA and the E-Commerce Directive. Any change in the legal framework would have a fundamental impact on said business model and its bottom line.

YouTube's Content ID

As indicated above, and as confirmed by the European Commission in its Impact Assessment, many UUC platforms already have content rec-

ognition technologies in place. The best known of them all is YouTube's Content ID. Content ID was first introduced by YouTube in 2007 and is a tool that helps rights holders manage their content on the platform. However, Content ID requires active participation of rights holders. As such, in order for a rights holder to claim a certain content, she will have to submit a video containing said content to the Content ID database.

YouTube scans all the past and future videos uploaded by users against the Content ID database. Therefore, rights holders have to indicate what they want YouTube to do if a match is found. YouTube gives rights holders three options:

- *Block* a whole video from being viewed;
- *Monetize* the video by running ads against it, in some cases sharing revenue with the uploader and with other rights holders; or simply
- *Track* the video's viewership statistics (YouTube 2018).

Rights holders may combine different options, for example monetizing copyright protected content available in one video, while blocking any other video with that same content, and they can also have different strategies depending on the territory. Although, there are isolated cases of rights holders that have opted to block videos—Garth Brooks and Prince have been notable examples—in most cases, rights holders choose to monetize. When that happens, the split of a music video is more or less as follows:

- 40% of the revenue goes to the owner of the sound recording;
- 15% goes to the owner of the musical work;
- 5% to 10% goes to the video creator; and
- YouTube keeps the remaining 35% to 40%.

As indicated above, there is some controversy as to how much a video with one thousand views can generate for the owner of both the sound recording and the musical work. In fact, not all one thousand views generate the same. Revenue grows exponentially because the more views a video gets, the more valuable it is for advertisers. As such a video with 100,000 views could generate fifty times more money than one with 10,000.

Drawbacks of Content ID

Although most people agree that Content ID is a very powerful tool, it also has some drawbacks.

- *Content ID is Not Available to Every Rights Holder*

YouTube indicates that only rights holders fulfilling certain criteria can qualify for Content ID. In reality, YouTube can determine who can and who cannot use the tool. For the most part, only record labels and aggregators as regards sound recording, and music publishers and collecting societies as regards musical works get the YouTube certified agent status. Individual rights holders would have to request the services of aggregators or a collecting society to be able to use Content ID. Note also that rights holders can lose their Content ID certified agent status if they do not comply with YouTube's guidelines, for example if they repeatedly make erroneous claims.

- *Content ID has Varying Degrees of Success Rate in Recognizing Content*

A second drawback is Content ID's varying degrees of effectiveness in identifying content. YouTube does not provide information on the technology success rate in recognizing content. Rights holders, on the other hand, have different opinions on the effectiveness of Content ID's technology.

For the most part, Content ID seems to be very effective in identifying sound recordings in music videos because it has a perfect fingerprint to match against. However, the IFPI reported in 2016 that Content ID failed to spot 20% to 40% of sound recordings (Ingham 2016). These could refer to videos in which the sound recording is in the background. Also, YouTube seemed to apply Content ID in a more relaxed way on videos on YouTube channels, although that situation might have changed.

According to Coco Carmona, at the time Director General at the International Confederation of Music Publishers, the situation is somewhat more challenging for music publishers given the amount of live performances and covers available on YouTube. Each version can sound completely different, and music publishers are unable to provide fingerprints on the scale covered by YouTube's user community. "If 10 people sing the same song and upload it, then it is likely that YouTube's technology will identify only 6 of them, at the most" (Carmona 2018). Although it might be true that Content ID is not 100% effective, a question that could be asked is how much money do these unspotted videos really generate compared to the cost of identifying them. Then again, when a video is not identified, YouTube keeps 100% of the revenue it generates.

- *Content ID Management Requires Dedicated Human Resources*

A third drawback is the resources that rights holders have to dedicate to manage Content ID. In a 2016 report, Google indicated:

Over 98% of copyright issues are resolved via Content ID. Looking at the music industry specifically, 99.5% of reported sound recording copyright claims are automated through Content ID—meaning that Content ID automatically identifies the work and applies the copyright owner’s preferred action without the need for intervention by the copyright owner in all but 0.5% of cases. (Google 2016)

Note that this figure does not indicate the success rate of Content ID, just the percentage of claims that need to be resolved manually. Although in relative terms this may look like a low figure, in absolute terms this might amount to thousands or tens of thousands of claims, which requires that rights holders have a dedicated workforce to deal with them. These claims usually come from disputed ownership, for example when two people claim to be the owner of the content. When that happens, the dispute needs to be resolved and in the meantime the money generated by the video is put in escrow. Note that when that happens, YouTube keeps the interest.

The origin of a dispute is not always a fraudulent appropriation of the content by someone who is not the rightful owner. Such a dispute can also come from lack of understanding of how the system works. It is, for example, not unusual that artists entrust the management of their music to two different aggregators, which then claim on their behalf to be the owners of the content. Aggregators therefore need to be particularly vigilant for artists in their roster that wrongfully claim to own rights over a certain content, since, they can be penalized and even have their Content ID access disabled for repeated erroneous claims.

- *YouTube Alone Determines the Functioning of Content ID*

Another drawback of Content ID is the fact that YouTube alone determines its functioning. While YouTube seems to be receptive to requests of rights holders, it needs to strike a careful balance between them, channel owners with high audiences, and advertisers. Although the situation has improved, videos available in certain highly popular channels were

unclaimable for a long time. Having said that, Content ID is described as a very powerful tool that is constantly being improved by YouTube.

Exploring the Option of Blocking Videos With Content ID

If Content ID works relatively well, at least as regards music videos other than live performances and covers by individual users, and if rights holders are not happy with payments made by YouTube, one could argue that they could use the option to block the videos until YouTube agrees to better terms. However, this is not that simple.

A Single Label Blocking its Content on YouTube

YouTube is not only regarded by rights holders as a source of income, but also as a tremendously powerful promotional tool. In 2013, 72% of Americans reported that they learned about new music on AM/FM radio and 77% on YouTube. By 2017, radio had fallen to 50% while YouTube had increased to 80% (different sources cited by Liebowitz 2018).

Even if it is temporary, the decision by an individual label to block the availability of its catalog on YouTube might have a tremendous impact. First, it could face internal and external opposition. While the business and legal affairs department might see the long-term merits of the strategy, the marketing department might see it differently. They will lose one of the most important promotional tools to market albums. This in turn could negatively affect promotional campaigns of individual artists within the label's roster, generating frustration and even anger with the artists and their teams. The pressure from the artists' managers and the label's marketing department not to adopt such a drastic measure could therefore be very strong.

Additionally, one single label acting individually might suffer from a tremendous impact that its competitors might be able to take advantage of. Labels therefore face a dilemma that is not new. In fact, the current relationship of labels with YouTube resembles the one they had with independent promoters in the 70s and MTV in the 80s and 90s.⁴⁸

A Common Approach: Incentives to Break the Ranks

One could argue that the only way labels could exercise some kind of pressure on YouTube would be if they adopted a common approach. This common approach would imply that all labels (and/or publishers) use

Content ID to block their content on YouTube until fair remuneration was agreed upon. However, this, too, creates some problems.

First of all, there would be big incentives to break ranks. It would be very tempting for a label to cheat on its competitors, be the only one to be on YouTube and, thanks to its promotion, increase its market share. In his book *Cowboys and Indies: The Epic History of the Record Industry*, Gareth Murphy explains how in 1980 Warner started a boycott against independent promoters, which were costing WEA \$6 million a year. CBS joined the boycott and MCA was considering joining, too. However, Capitol decided not to follow Warner's lead. Even Atlantic Records, part of WEA, was secretly continuing to use independent promoters. Murphy reports how the boycott failed to a great extent due to the pressure exercised by artists and managers (2015). A similar outcome in a potential industry-wide boycott of YouTube would definitely not come as a surprise.

A Common Approach: Antitrust Issues

Another, and probably more difficult problem to overcome, is the fact that such an approach would be tantamount to creating a cartel to fix prices, which would raise concerns from antitrust authorities. Rights holders would have to convince said agencies that such concerted practice would generate economic efficiencies. A case could be built around the following arguments:

- *YouTube Holds an Enormous Buyer Power*

Buyer power is concerned with how downstream firms can affect the terms of trade with upstream suppliers (OECD 2008). The OECD Competition Committee debated monopsony and buyer power in October 2008 and came to a number of conclusions that could be applicable to this case. Note, however, that within the concept of buyer power the OECD report makes the distinction between monopsony and bargaining power, each one with different welfare implications. Bargaining power, which is likely going to be the type of power exercised by YouTube vis-à-vis rights holders, generates a reduction in input prices, which can in fact have pro-competitive effects. It is therefore also necessary to show to what extent the bargaining power of YouTube would have welfare-reducing instead of welfare-enhancing effects.

In the case of YouTube, it is also important to analyze the origin of said bargaining power, which comes from the fact that rights holders

cannot adequately exercise their intellectual property rights due to safe harbor provisions. This situation is tantamount to power being generated by regulation.

Additionally, YouTube took advantage of this situation to grow to a point where it became the leading video streaming platform. In fact, according to the IFPI, YouTube holds a substantial market share, as it makes up 46% of all on-demand streaming time, the rest of the time being shared between other on-demand video streaming platforms (9%), paid audio streaming (23%), and free audio streaming (22%). YouTube's market share would therefore be bigger if our market definition would be limited to free streaming services, and even bigger if we limited to just on-demand video streaming sites (IFPI 2018). YouTube's power is also evident when looking at the differences in payments made by YouTube versus other platforms that were discussed above.

As regards the welfare-reducing effects of YouTube, one could point to the following ones:

- A decrease in the profitability of YouTube's competitors may lead to their exit (or to a lack of entry of newcomers), and a subsequent increase in YouTube's market power, harming final consumers.
- The exercise of buyer power may affect dynamic efficiency by reducing the incentives of rights holders to invest in new content, a natural consequence of reduced copyright protection.

Note also that the OECD report points out that "Bargaining power may be a countervailing factor that mitigates the possibility of an increase in market power from a merger" (OECD 2008, 12). If that is the case, one could argue that the market power acquired through a concerted action by rights holders would be mitigated by YouTube's bargaining power.

- *The Practice Might be the Only Way to Protect Intellectual Property Rights the Way They are Intended to be Protected*

The second argument would come from the concerted practice being crucial to the protection of the copyright of rights holders. As indicated above, the market structure prevents an individual rights holder from being able to enforce its copyright. Therefore a common approach seems the only way to achieve an outcome that guarantees a high level of protection of the rights holder's assets. A reduced level of intellectual property rights

protection would have the anticompetitive effect of reducing incentives for innovation.

The economic rationale would be similar to that applied to justify the collective management of rights by PROs, and which has been cleared by antitrust authorities both in the U.S. and the European Union for the efficiencies it generates in terms of reducing transaction costs—not necessarily applicable in this case—and protecting intellectual property rights—very relevant in this case. In the U.S. the landmark case was *Broadcast Music, Inc. v. CBS, Inc.*:

The blanket license [...] is not a “naked restrain[t] of trade with no purpose except stifling of competition,” [...], but rather accompanies the integration of sales, monitoring and *enforcement against unauthorized copyright use*. (emphasis added) (*Broadcast Music, Inc. v. CBS, Inc.* - 441 U.S. 1 (1979))

A similar approach was followed in Europe:

For legal reasons, as far as the royalty in respect of equipment is concerned, and also for practical reasons in the case of claims for payment of royalties in respect of secondary exploitation, *it is practically impossible for artists themselves effectively to assert such rights*. Any attempt to do so is bound to fail because the individual artist is not able to verify and prove in individual cases whether, when, by whom and how often his performance has been broadcast or otherwise made public. *He would, moreover, as an individual in an economically weak position, have to enter into contractual relations with a multitude of economically strong users* (e.g., broadcasting companies), from whom he is entitled to claim only the payment of a reasonable royalty, and *whom he may not prohibit from using his performance*. (emphasis added) (Commission Decision No. 81/1030/EEC (GVL), 1981, O.J. L 370/49)

As we can see, in both jurisdictions the protection of copyright seemed to outweigh the potentially anticompetitive behavior of a collective man-

agement of rights. Having said that, and although a case could in fact be built to justify a common approach, the latter would have to be cleared by antitrust authorities and could, if not, even result in the imposition of fines.

Conclusion

Whether we agree or not that there is a value gap in the music market generated by UUC platforms, it is undeniable that the DMCA and E-Commerce Directive safe harbor provisions create a distortion in the market, rendering the enforcement of copyright extremely difficult for rights holders and unreasonably granting services like YouTube the upper hand in negotiations. The European Commission's proposal to make the use of effective content recognition technologies compulsory is therefore a step in the right direction for copyright to be protected in the way it was intended to be protected. However, as we have seen in this paper, this alone might not be enough.

That is why, regardless of the controversy generated by Article 13 of the draft Directive, probably the most important provision included in the bill is the interpretation it makes of the application of safe harbor provisions to UUC platforms, making sure that whenever their role as storage service providers ceases to be of a purely technical and neutral nature, they need to clear rights for the content they make available.

At the moment of writing this paper the legislative procedure is ongoing and it is unclear what the outcome is going to be, especially taking into account the polarized nature of the debate and how deep-pocketed tech giants like Google might be able to influence it. The European Parliament has already showed support for the Commission's approach. It remains to be seen what position the European Council, in which the different EU member states are represented, takes. What is certain is that the debate alone might already be a victory for rights holders, since it acknowledges that there is a problem in the way UUC platforms operate.

In any case, YouTube was extremely smart in offering rights holders agreements when it was not really required to. By doing so at a moment in time when its bargaining power was at the highest point, it was able to impose the most beneficial terms for its interests, and create a standard for the future. It also allowed YouTube to present itself as a responsible operator before the public opinion and the lawmakers, willing to recognize the need to share the revenues generated thanks to the content owned by others. That alone is an extremely useful card in the lobbying game. One

may be tempted to think that the price paid for a favorable PR position before the American and European administrations might have been too high. However, we should not forget that, as indicated above, YouTube's entire business model depends on safe harbor provisions to be applied in the same way they have been applied until now. YouTube's strategy was forward looking and it might prove critical in maintaining the current status. YouTube's current strategy, notably by launching YouTube Music, a service similar to Spotify and Apple Music, might be equally forward looking. It secures the platform a place in the music streaming market, regardless of any change of its safe harbor status.

Endnotes

1. Note that CISAC, for example, uses the term “transfer of value,” whereas the RIAA speaks of the “value grab.” We will, however, stick to the term “value gap” throughout this paper to avoid confusion.
2. Proposal for a *Directive of the European Parliament and of the Council on copyright in the Digital Single Market*. COM/2016/0593 final - 2016/0280 (COD).
3. YouTube Music was launched in June 2018. According to the information that we have had access to, it is a fully licensed service similar to Spotify or Deezer.
4. Despite Liebowitz’s doubts as to whether this 55% includes payments to composers and publishers, we can confirm that it does.
5. Note, however, that these are worldwide figures. There might be variations by country. For example, in its 2016 report, the British Phonographic Industry confirmed that vinyl sales had generated higher revenue than YouTube (Plunkett 2016).
6. Oddly enough, Cohen admits having been one of the critics of YouTube before joining the company, considering that it did not pay enough for ad-supported streams compared to Spotify or Pandora.
7. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter the E- Commerce).
8. Safe harbor provisions also exist in many other countries.
9. 17 U.S. Code.
10. Art. 14 of the E-Commerce Directive is worded in similar terms.
11. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).
12. Whether there was a demand for online music services at the time is debatable, but Napster’s pricing policy (free) was unbeatable.
13. In this case, the defense argued that Napster should benefit from the liability exemption for information location tools included in §512(d).
14. See the *European Union Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy* (European Commission 2016), as well as the re-

- plies of the music community to the U.S. Copyright Office related to the section 512 study (Rosenthal and Metalitz 2015).
15. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010).
 16. See *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) at 89.
 17. See *Viacom Int'l Inc. v. YouTube, Inc.*, 07 Civ. 2103 (S.D.N.Y. April 18, 2013).
 18. See *Viacom*, 676 F.3d at 50.
 19. *Ibid.*, 50.
 20. *Ibid.*, 51. Note that the Football Association Premier League was part of the plaintiff.
 21. *Ibid.*, 51.
 22. *Ibid.*, 52. Note that some of the television shows mentioned were owned by Viacom.
 23. *Ibid.*, 53.
 24. *Ibid.*, 53, 54.
 25. See *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908).
 26. *An Act to Amend and Consolidate the Acts Representing Copyright.*
 27. 17 U.S. Code.
 28. Internationally, the right was recognized in the 1908 Berlin Revision of the Berne Convention. See Article 13 of the Berlin Act, 1908: Revised Berne Convention for the Protection of Literary and Artistic Works of November 13, 1908: “The authors of musical works shall have the exclusive right of authorizing: (1) the adaptation of those works to instruments which can reproduce them mechanically...”
 29. Translation by the author. The original text reads: “Dieses Video ist in Deutschland leider nicht verfügbar, da es möglicherweise Musik enthält, für die die erforderlichen Musikrechte von der GEMA nicht eingeräumt wurden.”
 30. The German term used is “Störerhaftung”, which translates as liability for breach of care of duty, thus similar to a vicarious liability.
 31. “Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal

for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.” SWD/2016/0301 final - 2016/0284 (COD).

32. Ibid., 143.
33. Ibid., 142.
34. Ibid., 144.
35. Ibid., Annex 12A.
36. Ibid., 144.
37. Ibid., 144.
38. Ibid., 142.
39. Ibid., 144.
40. Ibid., 146.
41. Communication to the public is the equivalent to public performance in European copyright law.
42. It is also important to point out that in the above-mentioned German cases, in which YouTube was involved, the OLG Munich and OLG Hamburg ruled that the platform did not carry out acts of communication to the public.
43. UK Music reports that Google has spent €31 million in lobbying to prevent changes in copyright regulation in Europe (Smirke 2018).
44. Ibid., 154.
45. §102(b) of the U.S. Copyright Act (17 U.S. Code).
46. Note that in Europe, there is no fair use. All exceptions and limitations are statutory.
47. See for example Article 13 of the WTO TRIPS Agreement, Article 10 of the WIPO Copyright Treaty (WCT) or Article 16 of the WIPO Performances and Phonograms Treaty.
48. Could playlists be Spotify’s leverage in future negotiations?

References

- Beard, T. Randolph, George S. Ford, and Michael L. Stern. "Safe Harbors and the Evolution of Music Retailing." *Phoenix Center Policy Bulletin No. 41* (March 2017). <https://doi.org/10.2139/ssrn.2963232>.
- Carmona, Coco (Director General of ICMP). Email exchange with Victoriano Darias, February 16, 2018.
- European Commission. "Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy." Brussels: European Commission, 2016.
- Google. *How Google Fights Piracy*. Mountain View: Google, 2016.
- . "Transparency Report - YouTube Community Guidelines Enforcement." *Google.com*, March 2018. Accessed June 28, 2018. <https://transparencyreport.google.com/youtube-policy/overview>.
- Gorman, Robert A., Jane C. Ginsburg, and R. Anthony Reese. *Copyright Cases and Materials*. New York: Thomson Reuters/Foundation Press, 2011.
- IFPI. *Global Music Report 2017: Annual State of the Industry*. London: International Federation of the Phonographic Industry, 2017. <https://www.ifpi.org/downloads/GMR2017.pdf>.
- IFPI. *Global Music Report 2018: Annual State of the Industry*. London: International Federation of the Phonographic Industry, 2018. <https://www.ifpi.org/downloads/GMR2018.pdf>.
- Ingham, Tim. "YouTube is Paying Less than £0.0009 per Stream to UK Record Labels." *Music Business Worldwide*, May 20, 2016. Accessed June 28, 2018. <https://www.musicbusinessworldwide.com/youtube-is-paying-less-than-0-0009-per-stream-to-uk-record-labels/>.
- . "YouTube's Content ID Fails to Spot 20%-40% of Music Recordings." *Music Business Worldwide*, July 13, 2016. Accessed June 28, 2018. <https://www.musicbusinessworldwide.com/youtube-content-id-fails-spot-20-40/>.

- Jones, Rhian. "I Don't See a YouTube Value Gap. Over 45% of Our Revenue From the Platform is from UGC." *Music Business Worldwide*, March 9, 2017. Accessed June 28, 2018. <https://www.musicbusinessworldwide.com/over-45-of-our-youtube-revenue-is-from-user-generated-content-i-dont-see-a-value-gap/>.
- Kharpal, Arjun. "Blame Taylor Swift, YouTube for Low Artist Pay From Streaming: Deezer CEO." *CNBC*, April 19, 2016. Accessed June 28, 2018. <https://www.cnn.com/2016/04/19/blame-taylor-swift-youtube-for-low-artist-pay-from-streaming-deezer-ceo.html>.
- Liebowitz, Dr. Stan J. "Economic Analysis of Safe Harbor Provisions." *CISAC* (March 19, 2018). <https://doi.org/10.2139/ssrn.3143811>.
- McCandless, David. "Money Too Tight to Mention? Major Music Streaming Services Compared." *Information Is Beautiful*, March 3, 2018. Accessed June 28, 2018. <https://informationisbeautiful.net/visualizations/spotify-apple-music-tidal-music-streaming-services-royalty-rates-compared/>.
- Merck, Johann. "Bundesgerichtshof: Haftet Youtube für Urheberrechtsverletzungen von Uploadern?" *LHR Rechtsanwälte*, March 14, 2018. Accessed June 28, 2018. <https://www.lhr-law.de/magazin/urheberrecht/bgh-youtube-urheberrecht>.
- Mueller, Christophe. "YouTube: 'No other platform gives as much money back to creators'." *The Guardian*, April 28, 2016. Accessed June 28, 2018. <https://www.theguardian.com/music/musicblog/2016/apr/28/youtube-no-other-platform-gives-as-much-money-back-to-creators>.
- Murphy, Gareth. *Cowboys and Indies: The Epic History of the Record Industry*. London: Serpent's Tail, 2015.
- OECD. *Policy Roundtables: Monopsony and Buyer Power*. Paris: Organisation for Economic Co-operation and Development, 2008. <http://www.oecd.org/daf/competition/44445750.pdf>.
- Peterson, Jason. *Closing the Value Gap: Recommendations on how copyright owners and advertising supported platforms can come together to find market equilibrium*. Beverly Hills: GoDigital Media Group, 2017. <https://www.hypebot.com/Solutions%20to%20the%20YouTube%20Value%20Gap%20v4.2.pdf>.

- Plunkett, John. "Vinyl sales bigger than YouTube for British artists." *The Guardian*, May 19, 2016. Accessed June 28, 2018. <https://www.theguardian.com/music/2016/may/20/vinyl-sales-bigger-than-youtube-for-british-artists>.
- Roettgers, Janko. "YouTube Exec Lyor Cohen: We Pay More in the U.S. Than Other Ad-Supported Music Services." *Variety*, August 17, 2017. Accessed June 28, 2018. <https://variety.com/2017/digital/news/lyor-cohen-youtube-streaming-royalties-1202531070/>.
- Roxborough, Scott. 2018. "YouTube Liable for Copyright Infringement, Austrian Court Finds in Preliminary Ruling." *The Hollywood Reporter*, June 6, 2018. Accessed June 28, 2018. <https://www.hollywoodreporter.com/news/youtube-liable-copyright-infringement-austrian-court-finds-1117828>.
- Rosenlund, Paul S. "Compulsory Licensing of Musical Compositions for Phonorecords under the Copyright Act of 1976." *Hastings Law Journal* 30, no. 3 (1979): 683-703. https://repository.uchastings.edu/hastings_law_journal/vol30/iss3/7/.
- Rosenthal, Jay, and Steven Metalitz. "Joint Comments of the American Association of Independent Music et. al. in the matter of Section 512 Study: Notice and Request for Public Comment." Washington D.C., 2015.
- Rys, Dan. "Lyor Cohen Says We're Entering 'Golden Era of the Music Business' in Career-Spanning SXSW Keynote." *Billboard*, March 14, 2018. Accessed June 28, 2018. <https://www.billboard.com/articles/events/sxsw/8247169/lyor-cohen-sxsw-2018-keynote-youtube-def-jam-simmons>.
- Sherman, Cary. "Five Stubborn Truths About YouTube and The Value Gap." *Medium*, August 18, 2017. Accessed June 28, 2018. <https://medium.com/@RIAA/five-stubborn-truths-about-youtube-and-value-gap-4faff133271f>.
- Smirke, Richard. "Music Chiefs Slam Google Lobbying Spend Ahead Of EU Copyright Vote." *Billboard*, July 3, 2018. Accessed July 3, 2018. <https://www.billboard.com/articles/business/8463917/google-lobbying-dollars-eu-copyright-vote-uk-music>.
- Solon, Olivia. "Google's bad week: YouTube loses millions as advertising row reaches US." *The Guardian*, March 25, 2017. Accessed June 28, 2018. <https://www.theguardian.com/technology/2017/mar/25/google-youtube-advertising-extremist-content-att-verizon>.

- Stempel, Jonathan. "Google, Viacom settle landmark YouTube lawsuit." *Reuters*, March 18, 2014. Accessed June 28 2018. <https://www.reuters.com/article/us-google-viacom-awsuit/google-viacom-settle-landmark-youtube-lawsuit-idUSBREA2H11220140318>.
- YouTube. "A billion reasons to celebrate music on YouTube." *YouTube Official Blog*, December 6, 2016. Accessed June 28, 2018. <https://youtube.googleblog.com/2016/12/a-billion-reasons-to-celebrate-music-on.html>.
- . "How Content ID works." *YouTube Help*. Accessed June 28, 2018. <https://support.google.com/youtube/answer/2797370?hl=en>.

VICTORIANO (TANO) DARIAS is a music industry veteran from Spain who has worked for the International Federation of the Phonographic Industry (IFPI) and the European Grouping of Societies of Authors and Composers (GESAC). While he stills consults and provides legal advice to a variety of clients, including songwriters and artists, trade associations, and content producers, he has developed in the past five years a career in academia. He currently combines his role of Director of Academic Affairs at Berklee College of Music (Valencia campus) with the teaching of courses



es on the music industry, its legal aspects, and music and the media. He is also the program director of the Master in Intellectual Property & IT Law at Universidad Internacional de La Rioja (UNIR), Spain. Darías holds a Ph.D. from Universidad de La Laguna (Spain), a Master in Music Business (M.A.) from New York University, and another one in European Union Law (LLM) from the College of Europe (Belgium). He has published two books in Spanish, one on the legal aspects of music in the internet, and a second one on music and the media.

Note from the author: Many thanks to Coco Carmona (ICMP), Yvan Boudillet (TheLynk), John Mottram (PRS for Music), Anja Braune (GEMA), Patrick Charnley (IFPI), Nicholas Solomon (CD Baby), Pablo Hernández (Lehmann & Cabaleiro), José Torrabadella and Emma Beldent (BMAT), Ruben Maximiano (OECD) and José María Blasco (La Cúpula Music) for feedback on some of the ideas herein. Google Spain was contacted but it seemed not possible to get their feedback. While I occasionally advise copyright holders and trade associations, this essay was not funded, modified, or requested by any organization.

The *Journal of the Music & Entertainment Industry Educators Association* (the *MEIEA Journal*) is published annually by MEIEA in order to increase public awareness of the music and entertainment industry and to foster music and entertainment business research and education.

The *MEIEA Journal* provides a scholarly analysis of technological, legal, historical, educational, and business trends within the music and entertainment industries and is designed as a resource for anyone currently involved or interested in these industries. Topics include issues that affect music and entertainment industry education and the music and entertainment industry such as curriculum design, pedagogy, technological innovation, intellectual property matters, industry-related legislation, arts administration, industry analysis, and historical perspectives.

Ideas and opinions expressed in the *Journal of the Music & Entertainment Industry Educators Association* do not necessarily reflect those of MEIEA. MEIEA disclaims responsibility for statements of fact or opinions expressed in individual contributions.

Permission for reprint or reproduction must be obtained in writing and the proper credit line given.

Music & Entertainment Industry Educators Association
1900 Belmont Boulevard
Nashville, TN 37212 U.S.A.
www.meiea.org

The *MEIEA Journal* (ISSN: 1559-7334)
© Copyright 2018
Music & Entertainment Industry Educators Association
All rights reserved