

**Bridging the Value Gap Between Content Creators and  
Digital Media Platforms:  
A Case Study of YouTube**

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## ACRONYMS AND ABBREVIATIONS

AFM: American Federation of Musicians

Art: Article

CD: Compact Disc

CEO: Chief Executive Officer

CTO: Chief Technology Officer

DSM: Digital Single Market

EU: European Union

GCA: German Copyright Act

GEMA: Gesellschaft für musikalische Aufführungs- und mechanische  
Vervielfältigungsrechte (Society for Musical Performing and  
Mechanical Reproduction Rights)

GVL: Gesellschaft zur Verwertung von Leistungsschutzrechten (Society for  
Performing Rights).

US: United States of America

YTU: YouTubers Union

## INTRODUCTION

Perhaps the biggest innovation riding on the wave of internet penetration is the rise of various digital platforms, digitizing almost all aspects of business and day to day activities. A category of such platforms are platforms like YouTube, Spotify etc, which have the commercialization of video and musical materials as the core of their business model. Like other platforms, these media platforms create economic value by lowering entry barriers to video and music publishing/distribution and generating revenue to content creators, amongst other values. However, as typical of platforms, media platforms create the ecosystem in which their business activities are run, and as the dominant player, impose the terms and conditions for participation by other actors. The exercise of such dominance greatly impacts the distribution of the value created in that ecosystem so much so that the ability of content creators/copyright owners to get value for their work is hugely dependent on the platforms. More so, the gross imbalance of contractual powers between individual content creators and the platforms (fuelled by the algorithmic control that the platform operators have over the functioning of the platforms) makes it impossible for content creators both to seek more favourable terms for the exploitation of their copyright and monitor compliance, as the law of contract would suggest. Using YouTube as a case study, this thesis analyses the relationship between media platforms and content creators, examines available legal solutions for rebalancing the contractual powers between them, and proposes a model within intellectual property management framework that ensures that content creators capture fairer economic value from media platforms.

This research is divided into three parts. Part 1 evaluates the functioning of YouTube vis-à-vis its relationship with its content creators and the legal incidents of that relationship. It investigates how YouTube makes money and how it distributes payments to content creators. Also, it looks into the power YouTube holds in the online video platform market. Part 2 draws references for this digitized relationship from the traditional, analog intermediaries and compares how fair value distribution is achieved within those relationships. This comparison is limited to assessing whether and/or how YouTube has disrupted the music/video publishing industry by examining the differences between both worlds. Part 3 analyzes strategic options for optimum redistribution of value between media platforms and their content creators. It examines the power management tools employed in offline relationships and investigates effective power management options for the online relationship.

## I. PART ONE

### YOUTUBE AS A BUSINESS

The U.S. based content sharing platform, YouTube, was founded in February 2005 by Chad Hurley, Steve Chen and Jawed Karim, three former employees of the internet company PayPal.<sup>1</sup> In November 2005, shortly after being founded, YouTube received 3.5 million dollars in financing from Sequoia Capital and was launched officially in December of that year, with Chad Hurley as CEO and Steve Chen as CTO. The investment by Sequoia was topped up in April 2006 by another eight million dollars.<sup>2</sup> In November 2006, internet giant, Google Inc. (now Alphabet Inc.)<sup>3</sup> acquired YouTube for \$1.65 billion in stock.<sup>4</sup> Since then, YouTube has become one of the internet's most used and observed media. In fact, it is currently the second most visited website in the world, surpassing Facebook and behind only Google.<sup>5</sup> YouTube's business strategy is based on a model that offers free videos on a global scale. It permits users to upload, view, rate, share, add to playlists, report, comment on videos and subscribe to other users via websites, mobile devices, blogs or e-mails. Anyone with Internet access can store and view videos on YouTube free of charge. Hence, it enjoys a wide variety of content uploaded by both individual users and corporate media.<sup>6</sup>

As is typical of similar online media sharing platforms, YouTube's revenue accrues from advertisements and subscription service fees. YouTube's advertisement is run through its opt-in ad program called TrueView, which provides for two types of ads, namely in-stream and video discovery.<sup>7</sup> In-stream ads are those which require the viewer to watch the first few seconds before having the option to skip the ad to start or continue watching the video they desire to watch. In this

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<sup>1</sup> Viacom Intl'l, Inc. v. YouTube, Inc. – 676 F.3d (2d Cir.2012), 2012 U.S. App. LEXIS 6909

<sup>2</sup> Artero J.P., Online Video Business Models: YouTube vs. Hulu, Palabra Clave vol.13 no.1 Chia Jan./June 2010. Available: [http://www.scielo.org.co/scielo.php?pid=S0122-82852010000100008&script=sci\\_arttext&tlng=pt](http://www.scielo.org.co/scielo.php?pid=S0122-82852010000100008&script=sci_arttext&tlng=pt)

<sup>3</sup> After its corporate restructuring in 2015

<sup>4</sup> The Age, 'Google Closes \$A2b YouTube Deal' (*The Age*, 16 November 2006), available: <https://www.theage.com.au/business/google-closes-a2b-youtube-deal-20061115-gdotv3.html>, accessed 1<sup>st</sup> June 2020

<sup>5</sup> Alexa, 'The Top 500 Sites on the Web' (*Alexa*, June 2020), available: <https://www.alexa.com/topsites>, accessed on 2 June 2020

<sup>6</sup> Only users who have first registered and created an account with the website are permitted to upload video clips, but this is not necessary for viewing.

<sup>7</sup> Andrew Beattie, 'How YouTube Makes Money Off Videos' (*Investopedia* 27 May 2020), available: <https://www.investopedia.com/articles/personal-finance/053015/how-youtube-makes-money-videos.asp#:~:text=YouTube%2C%20like%20most%20other%20Google,well%20as%20promoting%20featured%20content> accessed 8<sup>th</sup> June 2020.

case, the supplier pays only when the user watches over 30 seconds or clicked on the link put up in the ad. Video discovery ads are ads listed on the search result, along with other content and charged for only when the user clicks on them.<sup>8</sup> With about 5 billion videos watched daily by its over 30 million daily visitors<sup>9</sup>, YouTube is an increasingly attractive place for advertisers. In 2019, Alphabet reported a total revenue of over \$15 billion from advertisement on YouTube, comprising about 9% of Alphabet's overall revenue. This follows the trend of increase in revenue from over \$8 billion in 2017, to over \$11 billion in 2018, and 2019's over \$15 billion.<sup>10</sup>

YouTube offers two subscription services – YouTube Music Premium and YouTube Premium. For a monthly subscription fee of \$9.99, YouTube Music Premium gives advertisement-free access to Google's catalogue of music in audio form. Launched in 2018, YouTube premium is an all-encompassing subscription service.<sup>11</sup> Unlike revenue from advertisements, Alphabet Inc. has not separated revenue from YouTube subscription services in its accounts, and they are lost in the general Google Products overall revenue.<sup>12</sup> Hence it is impossible to state how much YouTube makes from this revenue source. Nevertheless, YouTube's revenue for its subscription services was estimated to be \$0.75 billion in, with the lion's share coming from North America, and predicted to more than double within 2018 and 2022 and be close to \$2 billion by that year.<sup>13</sup>

#### A. YouTube's Market Power

To determine whether a product/service has market power for competition law purposes, it is necessary to first determine the relevant product and geographical market. It has been argued that determining market power for digital platforms (like YouTube) will require the tweaking of traditional market definition tools.<sup>14</sup> This is partly attributable to the difficulty in assessing whether

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<sup>8</sup> *Ibid*

<sup>9</sup> Merchdope, '37 Mind Blowing YouTube Facts, Figures and Statistics – 2020', (*Merchdope* 26 February 2020), available: <https://merchdope.com/youtube-stats/> accessed on 5<sup>th</sup> August 2020

<sup>10</sup> Alphabet, 'Alphabet Announces Fourth Quarter and Fiscal Year 2019 Results' (*Alphabet* 2020) available: [https://abc.xyz/investor/static/pdf/2019Q4\\_alphabet\\_earnings\\_release.pdf](https://abc.xyz/investor/static/pdf/2019Q4_alphabet_earnings_release.pdf) accessed 8<sup>th</sup> June 2020

<sup>11</sup> YouTube Red is the predecessor of YouTube Premium. In 2015, YouTube launched its subscription service - YouTube Red. This service allowed subscribers to watch ad-free videos, make offline downloads, access YouTube Music features, background listening and a selection of original content from YouTube for \$9.99 a month.

<sup>12</sup> [https://abc.xyz/investor/static/pdf/2019Q4\\_alphabet\\_earnings\\_release.pdf](https://abc.xyz/investor/static/pdf/2019Q4_alphabet_earnings_release.pdf)

<sup>13</sup> See Mansor Iqbal, 'YouTube Revenue and Usage Statistics (2020)', available at <https://www.businessofapps.com/data/youtube-statistics/#6>, accessed on 12/08/2020

<sup>14</sup> Oxera, 'Market Power in Digital Platforms', paper contributed by Oxera to the European Commission's one-day conference entitled 'Shaping competition policy in the era of digitisation', January 2019, available: [https://ec.europa.eu/competition/information/digitisation\\_2018/contributions/oxera/oxera\\_market\\_power\\_in\\_digital\\_markets.pdf](https://ec.europa.eu/competition/information/digitisation_2018/contributions/oxera/oxera_market_power_in_digital_markets.pdf) accessed 5<sup>th</sup> August 2020

similar—and yet different—services (like YouTube, Soundcloud, Rumble, Facebook, Instagram) should be considered a part of the same market, or further narrowed by the specificity of their features.<sup>15</sup>

A 2017 market study by the Dutch Authority for Consumers and Markets (ACM) into the market for online video streaming platforms, showed that there was not, at the time of the report, any indications of anticompetitive conduct or dominant market power by any of the supposed top players, including YouTube.<sup>16</sup> This is however an old report, and a lot has changed in the digital content streaming landscape since then. As at June 2020, having analyzed millions of data points across the web to determine technology usage and other buying signals, Datanyze reports that YouTube holds 74.29% share of the online video market, with its closest competitor, Vimeo, holding only 18.4%.<sup>17</sup> Statista reports that 90% of respondents have accessed video on YouTube, by far the largest percentage of any video platform.<sup>18</sup>

The reason for such wide gap between YouTube and its competitors can be attributable to the tendency of network effects to create unstoppable monopolies for platforms that have crossed the mark.<sup>19</sup>

## B. The Relationship Between YouTube and Content Creators

A common feature of platform-based business models is their exploitation of direct or indirect network effects.<sup>20</sup> However, the level of sophistication of the interrelationship of users, control mechanisms within the ecosystem, method for value creation and pattern of value capture, all vary depending on the design of respective platform ecosystems. The case of YouTube provides an example of the uniqueness of platform design, especially in how network effects are created within its ecosystem. Here, the class of content viewers are attracted to the platform by the number of the

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<sup>15</sup> Ibid

<sup>16</sup> Authority for Consumers and Markets, Netherlands, ‘Report: Taking a Closer Look at Online Video Platforms’, available at <https://www.acm.nl/en/publications/publication/17575/Report-Taking-a-closer-look-at-online-video-platforms> accessed on 30 June 2020

<sup>17</sup> <https://www.datanyze.com/market-share/online-video--12/youtube-market-share> accessed on 30 June 2020

<sup>18</sup> <https://www.statista.com/topics/2019/youtube/>

<sup>19</sup> See <https://hackernoon.com/network-effects-and-the-unstoppable-unregulatable-monopolies-of-today-f5ab2ca5a5ad>

<sup>20</sup> David Evans, ‘Some Empirical Aspects of Multi-sided Platform Industries’, (2003) Review of Network Economics, 2(3), 2194- 5993 and David Evans, & Schmalensee, R. ‘The Industrial Organization of Markets with Two-Sided Platforms’ (2007) Competition Policy International, 3(1), 151-179 8 See: David Evans, ‘The Antitrust Economics of Multi-Sided Platform Markets’, (2003), Yale Journal, Vol. 20:325. Available at Regulation, <https://www.justice.gov/atr/single-firm-conduct-hearings-comment-david-evans-2>

class of content uploaders, the value of the platform increases for content uploaders as the class of content viewers and advertisers increase, and the class of advertisers obtains value from the ecosystem by the increase in the number of content viewers. However, unlike some platforms, it is easy to pinpoint the glue of this network – the class of content uploaders; for while they take value in the increase of other classes of users, this class is the first chain in this network. Being the value originators within the YouTube ecosystem, the relationship between YouTube and its content creators is key.

There are two levels of contracts between YouTube and content creators. First, there is the general user contract between YouTube and all users, including content creators, a section of which is exclusively for content creators. Second, there is the contract between YouTube and those content uploaders who meet its monetization threshold. Certain other rules come into play through the operation of law as a consequence of the legal classification of the relationship between YouTube and its content creators, which may not entirely be subject to contractual modification. Most of these rules are dependent on the classification of the relationship between the contracting parties. However, in the case of YouTube, as with various digital platforms, the elements of the relationship are so unique as not to fall squarely within the traditional classification of Record Label -Artiste or Employer- Employee relationship. The closest traditional classification that this relationship can assume is that between a licensor and licensee.<sup>21</sup>

C. Value Gap in YouTube-YouTubers relationship: The Problem of imbalance of contractual powers.

YouTube is the world’s biggest online video platform with more than 1.5 billion logged-in monthly users. The opportunities for artists to get a global audience have never been greater, and the choice for consumers accessing content online has never been wider. However, despite the attendant advantage that comes with size, many creators (including YouTubers) complain about not getting a fair amount as payment for their works.<sup>22</sup> Regardless of where the jury falls on whether or not YouTube has a dominant position in the market, while the occupation of a dominant market power position underlies various competition law concerns, the technical incidence of market power is not so much of a factor for determining the contractual power of a company in the platform

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<sup>21</sup> See YouTube, Terms of Service (updated version for UK users, effective from 32st March 2020), Available at <https://www.youtube.com/static?gl=GB&template=terms>, accessed on 29<sup>th</sup> June 2020

<sup>22</sup> Kaufman, L., Chasing Their Star, on YouTube, written 1<sup>st</sup> February 2014, available at <https://www.nytimes.com/2014/02/02/business/chasing-their-star-on-youtube.html>, accessed on 10<sup>th</sup> June 2020.



ecosystem (as against its users), and even less so for consumer law concerns. Indeed, the Dutch ACM report noted that although there were no found competition risks from the online video streaming platforms, a preliminary investigation into the general terms and conditions of the platforms found that some conditions are unfair from a consumer law perspective.<sup>23</sup> Like most double or multi-sided digital platforms, YouTube is designed as a centralized ecosystem, with the platform operator playing a strong hierarchical role in the ecosystem in which it assumes the duo positions of gatekeeper, and economic actor. The role of YouTube as a gatekeeper for its ecosystem is limited to its relationship with content creators. As stated in the preceding section, although video viewing on the YouTube platform does not require account creation with YouTube, to upload a video, the content creator must register as a user with an account on YouTube. By setting platform membership rules and conditions that users must satisfy for initial registration and continuous participation on the platform, YouTube, as the gatekeeper, determines the pool of content creators within the ecosystem. In this power position, YouTube makes decisions on the organization of the platform, including those relating to membership, rules of operation, monitoring and sanctions.<sup>24</sup>

The second role of YouTube within its ecosystem is that of an economically benefiting actor. In the first instance, YouTube solely makes key financial decisions as between itself and content creators (like the threshold for content creator's monetization of account, the bar of which it continues to raise; and the percentage of advertising income accruing to content creators). Also, considering that remuneration to content creators is a factor of the cost of advertisement paid by advertisers, YouTube strengthens its contractual position against the content creators by creating information asymmetry in not letting content creators be privy to the breakdown of revenue from advertisements displayed on their videos. Indeed, since 2017, Alphabet Inc. has stopped separating the revenue from YouTube in its books of account, only making an isolated YouTube revenue announcement in 2019.<sup>25</sup> Coupled with the fact that YouTube has, by a wide margin, the highest traffic amongst its competitors,<sup>26</sup> the two levels of powers held by it in the ecosystem places it in

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<sup>23</sup> Ibid

<sup>24</sup> Kirchner S. & Schüßler E., *The Organization of Digital Marketplaces: Unmasking the Role of Internet Platforms in the Sharing Economy*. In Arne & Brunsson, *Organization Outside Organizations: The Abundance of Partial Organization in Social Life*, Cambridge University Press, 2019.

<sup>25</sup> See on page 11

<sup>26</sup> Statista reports that 90% of respondents to a survey have accessed video on YouTube, by far the largest percentage of any video platform. Available at <https://www.statista.com/statistics/266201/us-market-share-of-leading-internet-video-portals/> accessed on 8<sup>th</sup> June 2020.

a contractual relationship largely skewed in its favour against content creators; its market power regardless.

Generally, as between platform operators on one hand and the service providers and consumers on the other, it has been argued that the primary factors establishing bargaining power are the designation of providers' status (such as that of an employee or an independent third-party contractor), lack of informed consent by providers when agreeing to platform terms and conditions<sup>27</sup>, platforms' creation of new means of information asymmetry as well as leveraging on existing asymmetry in traditional value chain to its own benefit<sup>28</sup>, restrictive channels of communication<sup>29</sup>, restrained/controlled access to means of dispute resolution, and the possibility of collective actions. YouTube seems to check all of these boxes.

Unfortunately, as the relationship between YouTube and YouTubers is primarily regulated by contract, regulatory tools for balancing inequality of bargaining powers in recognized power asymmetry relationships do not apply to this. Also, copyright laws around the world are generally not concerned with balancing the bargaining power between the rightholders and whoever they enter into a contract with. The exception to the above is the German copyright contract law which provides authors with a right to "fair and equitable" compensation.<sup>30</sup>

## **II. PART TWO - DIGITAL PLATFORMS AS INTERMEDIARIES: HOW ARE THEY DIFFERENT?**

Traditionally, the role of intermediaries in the creative industry is taken up by record labels, book publishers, and artiste managers amongst others, under a variety of contract arrangements with the

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<sup>27</sup> Oren Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets – Introduction*, 2012, DOI: [10.1093/acprof:oso/9780199663361.001.0001](https://doi.org/10.1093/acprof:oso/9780199663361.001.0001). See also Guillermo Beltrà, *Ensuring Consumer Protection in The Platform Economy*, Position Paper, The European Consumer Organisation, 2018.

<sup>28</sup> Examples have been identified as practices of restricting access to information which would enable providers to assess the profitability of certain transactions, thus limiting their own ability to enact informed agency (Rosenblat, A., & Stark, L., *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, *International Journal of Communication*, 2016, 10, 3758-3784.).

<sup>29</sup> According to Irani & Silberman, such communication gap is attributable to the non-feasibility of engaging with individual provider in (for instance) the broader digital labour market. Irani, L. & Silberman, M., *Turkopticon: Interrupting worker invisibility in amazon mechanical turk*. In *CHI'13: Proceedings of the 31st Annual ACM Conference on Human Factors in Computing Systems*, 2013, (pp. 611-620). New York, NY: ACM.

<sup>30</sup> See the Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG), available at [https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html) accessed on 29<sup>th</sup> June 2020.

artiste. However, with the rise in online content sharing, the place of these traditional intermediaries appears threatened and their roles giving way to the use of online video and music streaming platforms. With this shift in the content distribution value chain, we are experiencing a transformation, not only of the means by which consumers have access to creative contents, but also of the dynamics of the relationship that content creators maintain with the intermediaries and the value flow to them. In essence, digital platforms like YouTube have not introduced direct relationships between the content creator and the audience. Rather, they themselves are intermediaries which are sometimes even more powerful ones than the traditional intermediaries.

Using the music industry as an example, the traditional intermediaries as regards the exploitation of sound recordings are the music publishers (who act on behalf of authors) and the record labels or companies (who act on behalf of the artists). In the traditional market, it is usual for the creators to sign artist or publishing contracts assigning their copyright to record labels or publishing companies for the exploitation of their works. The industry thus revolves around the record label which opens the value chain by scouting for and signing a recording contract with artists (new or industry established). Following the signing of an artist, the record label then oversees the recording of songs by the artist, promotion of both the record and the artist as a brand, production of the song and, in some cases, the associated music video, and distribution of the physical bundle containing the audio or video recording of the song (i.e. a CD, tape, etc.)<sup>31</sup>. Embedded in these roles are a number of promotional/liaison duties, including licensing and negotiation of broadcasting deals with radio, tv and other broadcasting channels, as well as, depending on the terms of the contract, sponsorship deals. The traditional video distribution value chain is similarly designed.

The traditional creative content value chain is riddled with dissatisfaction about the value eroding effects of the activities of gross mismanagement, accounts padding, and the general accrual by record labels of gains highly disproportionate with the value added to the chain at the expense of the artists.<sup>32</sup> Other shortfalls creating value gaps in the traditional value chain have been associated with the exercise of the record label's power to decide how and when to release an artist's work

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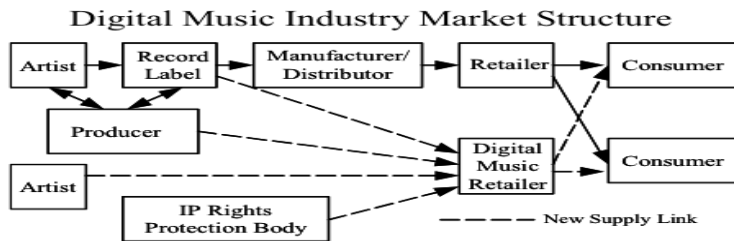
<sup>31</sup> Patrick Fogarty, 'Major Record Labels and the RIAA: Dinosaurs in a Digital Age' (2008) 9 Hous Bus & Tax LJ 140; Robert L. Frost, 'Rearchitecting the Music Business: Mitigating Music Piracy by Cutting Out the Record Companies', (2007), FIRST MONDAY, <http://www.firstmonday.org/issues/issue12.8/frost/index.html>.

<sup>32</sup> Robert L. Frost, *supra*.

(or whether to release it at all), the publicity channels, lack of continuity and consistency in the treatment of artists due to a change in management of the record label.<sup>33</sup> Such unsustainable flaws in the ecosystem have based the calls for and research into disintermediation of the creative content value chain, with digitalization being fronted as the long-awaited messiah.<sup>34</sup>

#### A. The Digital Content Streaming Value Chain

The digital content distribution market structure is fairly presented in the figure below<sup>35</sup>:



The changes brought by digitisation to the creative content ecosystem value distribution include the ease of entry into the market, the shortening of the value

chain (by the introduction of a new intermediary capable of replacing intermediaries in the traditional value chain), and the level of power/control wielded by the new intermediary.<sup>36</sup>

However, with regards to the tilt of power, nothing much has changed for artistes. Indeed, YouTube currently wields even more power than record labels wielded in the traditional value chain. Just as the record label can under-commercialise an artist, YouTube can decide to take down a content or deactivate an account; and the agitations against non-transparency in ad-earnings resonate the agitation against record labels' accounting practices. One difference is that a YouTube content creator can (generally) simultaneously distribute his work via other channels; even via competing streaming platforms.

<sup>33</sup> Helienne Lindvall, 'Behind the Music: When Artists are Held Hostage by Labels' (*The Guardian*, 15 April 2010), <https://www.theguardian.com/music/musicblog/2010/apr/15/artists-held-hostage-labels> accessed 27 July 2020; CBS News, 'Musicians Vs Record Labels: 14 Famous Feuds' (*CBSNews*) <https://www.cbsnews.com/pictures/musicians-v-record-labels-famous-feuds/7/>

<sup>34</sup> Ibid; Bernardo, Francisco, '5.2. Dodging the middleman: Insights on Disintermediation in the Independent Music Sector' (2013); Morten Hviid *et al*, *Digitalisation and Intermediaries in the Music Industry: The Rise of the Entrepreneur?* (2018), Scripted, Volume 15, Issue 2.

<sup>35</sup> Jesse Bockstedt *et al*, *The Move to Artist-Led Online Music Distribution: Explaining Structural Changes In The Digital Music Market*, Proceedings of the 38th Hawaii International Conference on System Sciences (2005), available: <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=1385598>

<sup>36</sup> Sanjay Gosain and Zoonky Lee, 'The Internet and the Reshaping of the Music CD Market', *Journal of Electronic Markets*, Vol. 11 No 2, (2011), available: <https://www.semanticscholar.org/paper/The-Internet-and-the-Reshaping-of-the-Music-CD-Gosain-Lee/d1de70503494fcf767e2327bf398bc782ed08f28>

### III. PART THREE - BRIDGING THE GAP: STRATEGIC OPTIONS FOR OPTIMUM REDISTRIBUTION OF VALUE BETWEEN MEDIA PLATFORMS AND CONTENT CREATORS

Certain tools have been employed to shorten the value gap in the traditional creative content value chain and give artists better chances in negotiating deals. Such tools include procurement of professional representation in negotiating deals, legislative intervention, collective action, and a push to break up the monopolistic position of major players, from a competition law perspective.<sup>37</sup> However, legislative intervention and collective action have proven to be the most effective power-balancing tools in the creative industry; professional negotiation and demonopolising having been weakened by industry-wide contract standardization and financial/bureaucratic bottlenecks respectively.<sup>38</sup>

#### 1. Legislative intervention

One of the fundamental building blocks of the law of contract is the doctrine of freedom of contract, which preserves the liberty of persons of full contractual capacity to enter into any legal contract on such terms as they deem fit. Its bedfellow is the doctrine of sanctity of contract, which is to the effect that such contracts, freely entered into, are binding on the parties.<sup>39</sup> Hence, as with contracts in any other industry, the law presumes that contracts in the creative industry are entered into freely by the parties, therefore, the law ought not to intervene unless where necessary.<sup>40</sup> However, the general assumption that parties contract on equal bargaining strength has been severely flawed<sup>41</sup>, and the position of power occupied by intermediaries in the traditional value chain exemplifies this. In light of this, “a number of countries have copyright law provisions that seek to adjust the unequal bargaining power between authors and publishers, and in this way, reduce the likelihood of unfair contracts. They include rights reversion, bestseller clauses and other provisions that are meant to re-establish balance in the author publisher relationship”.<sup>42</sup>

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<sup>37</sup> See See Bret Swanson, ‘Lessons from the AT&T break-up, 30 years later’, Statement before the US House Committee on Agriculture (3 January 2014), <https://www.aei.org/technology-and-innovation/lessons-att-break-30-years-later/>; James Kanter, ‘E.U. Parliament Passes Measure to Break Up Google in Symbolic Vote’, Nov. 27, 2014, <https://www.nytimes.com/2014/11/28/business/international/google-european-union.html>; Margaret Harding McGill and Steven Overly, ‘Why breaking up Facebook won’t be easy’, Politico, 27 May, 2019, <https://www.politico.com/story/2019/05/27/breaking-up-facebook-antitrust-1446087>

<sup>38</sup> Supra.

<sup>39</sup> Jessel M.R. in *Printing and Numerical Registering Co. v. Sampson*, (1875) L.R. 19 Eq. 462, 465.

<sup>40</sup> Rita Matulionyte, ‘Empowering Authors via Fairer Copyright Contract Law’ (2019) 42 UNSWLJ 681, 689

<sup>41</sup> See generally Gertrude Block, Semantics and the Sanctity of Contracts, *ETC: A Review of General Semantics*, Vol. 38, No. 3 (Fall 1981), pp. 290-300

<sup>42</sup> Rita Matulionyte, ‘Empowering Authors via Fairer Copyright Contract Law’ (2019) 42 UNSWLJ 681, 682

In the context of the YouTube-YouTuber relationship, while legislative intervention as a tool will go a long way in balancing the contractual powers, such regulations must be tailor-made for the peculiar circumstances of the digital media value chain. In other words, applying extant regulations designed for the traditional value chain will be tantamount to attempting to fit a square peg in a round hole. For instance, the compulsory right of reversion of copyright to the author after a period of assignment is only protective in situations where the intermediary takes ownership of copyright in the works produced by the artist (as is the case with record labels). YouTube does not take ownership of the copyright in the contents created by its users; it only takes a non-exclusive license in the work. Hence, the gap is not created by copyright assignment and so cannot be bridged by a right of reversion. Also, Section 79(II)(2) of the German Information Society and Copyright Act<sup>43</sup> grants recording artists the right to terminate a deal after 5 years of its execution. This is to prevent the locking-in of an artist into a deal for an unconscionably extended period. Again, such a move will be ineffective to safeguard the interest of the content creator against YouTube. As analyzed in preceding sections, what locks a content creator in with YouTube is not the terms of his contract with YouTube. The reluctance to end relationship with YouTube is likely because YouTube has an overwhelming presence in the market and provides, in the aggregate, connection to the largest number of consumers and highest level of industry exposure.

In 2002, Germany took a major step in strengthening copyright owners in their contractual dealing by introducing Sections 32, 32a, 32b of the German Copyright Act<sup>44</sup>. The purpose of this reform was to place authors and performing artists in a better financial position by mandating equitable compensation<sup>45</sup>, continued profit participation<sup>46</sup>, as well as the non-circumvention of these objectives in the choice of law for international licences.<sup>47</sup> These provisions have been relied upon in a number of claims for more remuneration from the exploitation of a work. For instance, Elvis

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<sup>43</sup> Implementing the European Union Information Society Directive

<sup>44</sup> The French and Dutch Government have also made moves in this regard. In 2014, the French government introduced regulations for the appropriate remuneration of eBooks authors by means of Ordonnance n 2014-1348 du 12 November 2014 modifiant les dispositions du code de la propriété intellectuelle relative au contrat d'édition. Also, in the Netherlands, in 2015, a law to strengthen the contractual negotiating position of the Creatives and make them entitled to appropriate remuneration entered into force (Wet auteurscontractenrecht van 30 June 2015, Staatsblad 257).

<sup>45</sup> § 32

<sup>46</sup> § 32a

<sup>47</sup> § 32b

Presley Enterprises LLC, the holder of economic rights in Elvis' estate, sued Arista Music (Elvis Presley's German record company) claiming *inter alia* additional "fairness compensation", based on §§ 32a, 79 (2) of the German Copyright Act, and the claim that the consideration received is strikingly disproportionate to the profits made from exploiting Elvis' works. While the court did not agree that the consideration was disproportionate, there was no contention concerning the applicability of Section 32a.<sup>48</sup> Indeed, Section 32a(2) was successfully pleaded in a claim by the dubbing actor who lent his voice to Johnny Depp in the German language version of Pirates of the Caribbean I, II, and III, and he was awarded ten times the originally agreed upon consideration.<sup>49</sup>

Nevertheless, a YouTuber will have the burden of proving that the remuneration he is receiving is not only inequitable, but also conspicuously disproportionate.<sup>50</sup> The burden of proof, coupled with other factors such as the financial, time and technical demands of such suit impairs its practicality for any single YouTuber. Also, from the wordings of the provisions and the required burden of proof, while Section 32 may base a claim for collective action or collective bargaining, it will be very difficult, if not impossible, to bring a collective action for inequitable remuneration on the basis of Section 32a.

## 2. Collective Actions

The unionization of artists has a long history. In the US, one of the earliest artists' unions was the AFL-CIO-affiliated American Federation of Musicians (AFM). Founded in Indianapolis in 1892, the AFM is open to any remunerated musician, and was a force to reckon with in the development of US music industry.<sup>51</sup> In Germany, a number of collecting societies represent the interests of various artist groups. For music, there is the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte - GEMA (Society for Musical Performing and Mechanical Reproduction Rights); for literary works, there is the Verwertungsgesellschaft WORT (Society for

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<sup>48</sup> See, The 1907 Blog, 'Treat Me Nice: Fairness Compensation for Elvis Presley Enterprises?', 19 Sept. 2011, <http://the1709blog.blogspot.com/2011/09/treat-me-nice-fairness-compensation-for.html>, accessed on 12/08/2020; Annette Kur, 'Author-protecting rules in copyright and private international law - Remarks from a German perspective', Max Planck Institute for Innovation and Competition, 9 November 2017, [https://www.law.ox.ac.uk/sites/files/oxlaw/oxford\\_nov\\_2017\\_duran\\_duran\\_0.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_nov_2017_duran_duran_0.pdf), accessed on 12 August 2020.

<sup>49</sup> 24 U 2/10 of 29 June 2011, appeal to the German Bundesgerichtshof.

<sup>50</sup> Timm Neu, The Fair Pay Revolution - German Copyright Law's International Reach, (2018), Michigan State International Law Review, Vol. 26:3, 445-482, @p. 453-454; OLG Cologne, January 17, 2014 - I-6 U 86/13.

<sup>51</sup> See Joey La Neve Defrancesco, 'Musicians Can and Should Organize to Improve Their Pay and Working Conditions', Jacobin, 02/01/2020, <https://www.jacobinmag.com/2020/02/musicians-working-conditions-afm-amazon-sxsw-nomusicforce>, accessed on 12/08/2020; <https://www.afm.org/>

Literary Rights). There is also the Verwertungsgesellschaft BILD-KUNST (Society for Pictorial Art), as well as the Gesellschaft zur Verwertung von Leistungsschutzrechten - GVL (Society for Performing Rights). This tool has recorded enormous success in balancing powers in the traditional creative content value chain and shows promises for the online relationships as well. While YouTube is bigger than any single content creator and is thus not likely to bend to pressure from an individual creator, its ecosystem is bedrocked by the content generated by its users, and this makes it potentially vulnerable to collective efforts by its users.

The vehicle for such efforts can be a YouTube-specific collective action vehicle. In 2017, YouTube content creators and users formed a Union called the YTU for the purpose of collectively challenging the platform's governance decisions.<sup>52</sup> The union is formed as a Facebook group<sup>53</sup> with the aim of lobbying for improved working conditions on the platform. The union's flagship campaign is the FairTube campaign for fairer terms of engagement with YouTube. However, unlike similar platform unions like Uber and Upwork, YouTube falls in the remote, web-based activities category, thus posing obstacles for collective organizing. This is because its members are fragmented geographically.<sup>54</sup> Perhaps strengthened by these difficulties, sometime in 2019, YouTube through a representative, released a statement, saying it would not negotiate the demands of the union. But shortly after, the union joined forces with IG Metall, a German metalworkers union that is the largest industrial union in Europe, and YouTube was reported to have taken steps to appease the union; including inviting the union's representatives to the headquarters of its German subsidiary.<sup>55</sup>

An alternative to creating a platform-specific union is to use already established vehicles for collective actions and adapt it to the YouTube situation. Such vehicles will include collecting societies and various art guilds. An example of such is the GEMA.<sup>56</sup> Following a long-running dispute concerning compensation between YouTube and GEMA which resulted in the unavailability of content by GEMA's members on YouTube, both parties struck a deal in 2016

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<sup>52</sup> Valentin Niebler, "'YouTubers Unite': Collective Action by YouTube Content Creators", *Transfer* (2020), Vol. 26(2) 223 - 227

<sup>53</sup> <https://www.facebook.com/groups/youtuberunion/>

<sup>54</sup> *Ibid* 224

<sup>55</sup> Bijan Stephen, 'YouTube says it won't negotiate with the YouTubers Union' (*The Verge*, 26 August 2019), <https://www.theverge.com/2019/8/26/20833315/youtube-union-youtubers-negotiate-germany-meeting>

<sup>56</sup> See <https://www.gema.de/en/about-gema/organisation/>



agreeing on fairer compensation for the GEMA’s members for their works uploaded on YouTube.<sup>57</sup> This licensing deal covers the works of the 70,000 authors and publishers represented by GEMA. It was described by GEMA as the achievement of a “Milestone for a fair remuneration of music authors in the digital age”.<sup>58</sup>

Apart from the obvious difference in the periods of discord that YouTubers Union and GEMA have had with YouTube (YouTubers Union is barely two years old while GEMA fought their cause with YouTube for 6 years before reaching an agreement), the differences in structure of the vehicles might offer insights into the reasons for the success of one and the yet-to-be-recorded success of the other. Unlike the YouTuber Union, GEMA, established in 1933, has gathered 87 years of experience in the representation of its members, strengthening its bargaining position and synchronising the interests of its members. Also, unlike the YouTuber Union, the members of GEMA have more than their artistic interests in common – they are geographically bound and subject to similar laws and regulations. Perhaps what can be drawn from this is that the leverage on the strength of numbers should be paired with the commonality, not just of interest in YouTube (or any other platform), but of geography, and other favourable factors. In other words, leverage on already existing and strong collective vehicles shows more promises of success than the instrumentality of any new vehicles.

## CONCLUSION AND RECOMMENDATIONS

Two tools stand out as having been most effective in bridging the value gap in the traditional creative content value chain, albeit with room for improvement – collective actions and legislative intervention. It is submitted that the most effective power control mechanism for the YouTube-YouTuber relationship will be a combination of both.

The suggested focal points of regulation for the current purposes are accordingly categorised below in order of importance of purpose and level of intrusion (with rate setting being the most intrusive and the least likely to be implemented):

	<b>Least intrusive</b>	<b>Moderately intrusive</b>	<b>Most intrusive</b>
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<sup>57</sup> Melissa Eddy, ‘YouTube Agrees to Pay Royalties, Ending German Music Dispute’, (*The New York Times*, & 1 November 2016), <https://www.nytimes.com/2016/11/02/business/international/germany-music-royalties-youtube.html>

<sup>58</sup> <https://www.gema.de/en/news/press/gema-signs-agreement-with-youtube-milestone-for-a-fair-remuneration-of-music-authors-in-the-digital/>

<b>Dispute Resolution</b>	Invalidation of foreign jurisdiction forum clauses.		
<b>Transparency</b>	-Transparency in the terms and condition of usage -Prohibition of arbitrary adjustment of monetization thresholds.	Compulsory access by partners to relevant accounts and records consulted in calculating remuneration.	
<b>Regulatory</b>		Periodic investigation by regulator to ascertain conformity of payments with advertisement revenues.	
<b>Rate setting</b>			Setting of a platform-neutral/uniform rate for uploaded contents.

Implementing any of these legislative recommendations would be a factor of the interplay between the risk of YouTube’s blockage of users from that jurisdiction (in protest of the regulation) and the benefits accruing both to the jurisdiction as a whole (in terms of taxation and probably reduction of unemployment rate) and the YouTubers in that jurisdiction. On the other hand, the question of what YouTube’s reaction to such regulation would be – whether to lobby for milder terms before the legislation is passed, or to comply with it, or block users from that jurisdiction, will be answered by YouTube’s analysis of the benefits of the jurisdiction’s userbase to its ecosystem, vis-à-vis the cost of compliance. All the suggested points for regulation (except for regulatory oversight) can be enforced by individual artists or through collective actions, although the latter creates better leverage both for prosecution and enforcement.

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