Creating a sustainable digital content market; why the Value Gap must be addressed

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論文

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Abstract

The music industry is a digital industry, with record companies having licensed some 40 million tracks to around 350 digital services globally and 18 services in South Korea alone. Recent growth in the recording industry is attributable in particular to the increased popularity of subscription streaming services, where users typically pay a monthly charge to enjoy on-demand access to vast catalogues of recorded music. However, a serious market distortion – the Value Gap - is holding back the industry, to the detriment of right holders, competing digital music services and, ultimately consumers.

The Value Gap refers to the substantial mismatch between the value that user-uploaded content (UUC) services, such as YouTube, extract from music and the payments they choose to make to the music community – those who create and invest in music. The Value Gap is caused by the lack of clarity surrounding the status of UUC services in relation to copyright, which has enabled these services to build large businesses based on the offering of music, attracting large numbers of users, while not remunerating right holders properly.

The evidence of the harm caused by the Value Gap is clear: UUC services are offering equivalent interactive music services to subscription services, while paying a fraction of the revenues paid by subscription services for the same music, and dissuading large numbers of users from using subscription services.

The entire music community is united in calling for a solution to the Value Gap, and legislators in Europe have already responded with draft legislation. But the Value Gap is a global problem, and for digital markets to thrive in the long term, including in Korea, there needs to be a level playing field in all countries.

Keywords

Value Gap, Safe Harbor, Streaming, UUC Service, Digital Single Market

1. Introduction

After almost two decades of decline, the recorded music industry saw growth in of 3.2% in 2015 and 5.9% in 2016. This growth follows the industry's double transition from a primarily physical market (mainly CDs) to a primarily digital market, and from ownership models (sale of CDs and downloads) to access models (streaming), with record companies having licensed some 40 million tracks to around 350 digital services globally and 18 services in South Korea alone. The recent growth is attributable in particular to the increased popularity of subscription streaming services where users typically pay a monthly charge to enjoy on-demand access to vast catalogues of recorded music.

The rate of growth in global industry revenues, while modest, was the fastest since IFPI began tracking industry revenues centrally in 1997. However, a simple look at a single headline figure disguises major transformations experienced and driven by the industry during that period: at the start of this century, for instance, recorded music industry revenues stood at US $23.3 billion in fixed currency terms, one hundred per cent from physical formats, and dominated by sales of CDs. By 2016, total revenues had fallen by around 45%, revenues from physical formats had fallen by more than three-quarters, digital formats provided half of all industry revenues with streaming more than half of all digital, and a considerable portion of total revenues was produced from diverse channels such as performance rights and synchronisation. A quick glance at rates of growth also hides the fact that some major sources of music consumption provided significantly less revenue than others in 2016.

Incomes from streaming services rose by 60.4% globally during 2016 to a total of US $4.56 billion, an increase of US $1.72 billion. The vast majority of streaming incomes – over US $4.00 billion dollars or 87.9% – came from users of subscription or ad supported audio services such as Spotify, Apple Music, Deezer, QQ Music,

Napster, and Melon. Only 12.1% of the streaming total (US$ 552.8 million) was contributed by video streaming services such as YouTube that are the main source of music consumption for many hundreds of millions of users.

Among all the changes in the industry one thing is unchanged; record companies remain the largest investors in artists and their careers. Further, record companies' investment remains risky; on average between 7 and 8 out of every 10 newly signed artists do not break even, meaning that the money invested in them is lost in whole or in part. To put that into context, a major international signing will cost between US$0.5 million and US$2 million to break in a major market[1].

Year on year, record companies invest 27% of revenues back into A&R and marketing – this is the work of discovering, marketing and promoting artists. In 2015 (the most recent year for which IFPI has investment data), investment in A&R and marketing totalled US$4.5 billion.

These substantial investments do not only benefit the music ecosystem, they have been an important factor behind the growth of the digital economy as a whole. The availability of professionally created copyrighted music content and engagement with it has been a key driver for the large scale take up of different digital platforms. For instance, out of the 10 most-followed Twitter accounts 6 belong to artists, 23 out of the 25 most popular YouTube videos are music videos, each having been viewed over a billion times.

The growth of the digital recorded music industry therefore benefits all those involved in creating and producing recorded music, from songwriters to performers to producers. It benefits consumers who enjoy more ways to access music than ever before, and it benefits the digital economy as a whole.

There is, however, a market distortion that is threatening the future sustainable development of the digital content market. This market distortion has resulted in what is colloquially known as the Value Gap.

1) http://investinginmusic.ifpi.org/

2. The Value Gap

What is it?

Different online services engage with music to drive traffic, achieve scale, and generate turnover. This would be positive but for the fact that some services – specifically those based on making available user-uploaded content (in the case of the music industry, copies of commercially released sound recordings) - do so, while claiming they are not liable for the music they make available on their platforms.

The Value Gap refers to the substantial mismatch between the value that user-uploaded content (UUC) services, such as YouTube, extract from music and the payments they choose to make to the music community – those who create and invest in music. The Value Gap is the greatest threat to the future economic sustainability of the digital content market and (as a digital industry) to the music industry. To be clear, the Value Gap is not about subjective valuations of music, as has sometimes been wrongly claimed, it is about the basic economic fundamentals of the digital content market.

What is causing the Value Gap

The main reason for the Value Gap is that the lack of clarity surrounding the status of UUC services in relation to copyright has enabled these services to build large businesses based on the offering of music, attracting large numbers of users, while not remunerating right holders properly. This has caused significant market distortion that is highly detrimental to right holders, competing digital music services and, ultimately consumers.

This lack of clarity is undermining free and fair licensing processes. When approached by right holders for licences, certain services take advantage of the legal uncertainty, arguing that their users are making available copyright content while they themselves are merely neutral hosting providers, whose activities are covered by the liability limitation privileges known as "safe harbours".

As a result, the negotiation process is fundamentally distorted and the market is rigged. The absence of a level playing field and fair negotiation process deprives right holders of revenues, depreciates the value of creative content, and ultimately undermines record companies' ability to maintain their level of investment in artists and to bring new music to consumers. In fact, everyone involved in making music is prejudiced; performers, record companies, authors and music publishers alike.

And the harm does not stop there. The ability of certain platforms to take advantage of legal uncertainty creates unfair market conditions for other digital music services, such as Spotify, Melon and Soribada, which negotiate licences with right holders on market terms prior to making music available, and also for any new innovative music services that seek to enter the markets having negotiated licences.

In addition, the uncertainty in the legal framework has had further unintended consequences. For instance, UUC services are the primary source of stream ripping, the widespread practice of making permanent copies of streamed content. Over 90% of stream ripping takes place on YouTube.

The Value Gap is one of a number of problems that have emerged as digital markets have developed, and which legislators are now tackling. After twenty years of policies focussed mainly on enabling the operations of online intermediaries and subsequently light touch regulation of online businesses, law makers are taking a closer look at some of the unintended, harmful effects of the rapid changes that have taken place in online markets. From anti-trust investigations[2], to questions over the collection and use of personal data[3], to concerns about hate speech and

2) https://www.bloomberg.com/news/articles/2017-12-18/google-s-record-fine-of-2-8-billion-was-a-deterrent-eu-says

other criminal activity on online platforms[4], there is a growing political and popular will to ensure a more balanced and a safer online environment, recognising that in addition to privileges, platforms should also have reasonable responsibilities.

The record industry as a digital content industry is heavily invested in the continued development of thriving digital markets. The industry's innovative approach to licensing new methods of music consumption has created a dynamic music market in which consumers have more choice than ever before. However, for the digital music market to continue to grow and to mature, it needs a level playing field to enable right holders to license their music in fair market conditions, and to ensure fair competition between market participants.

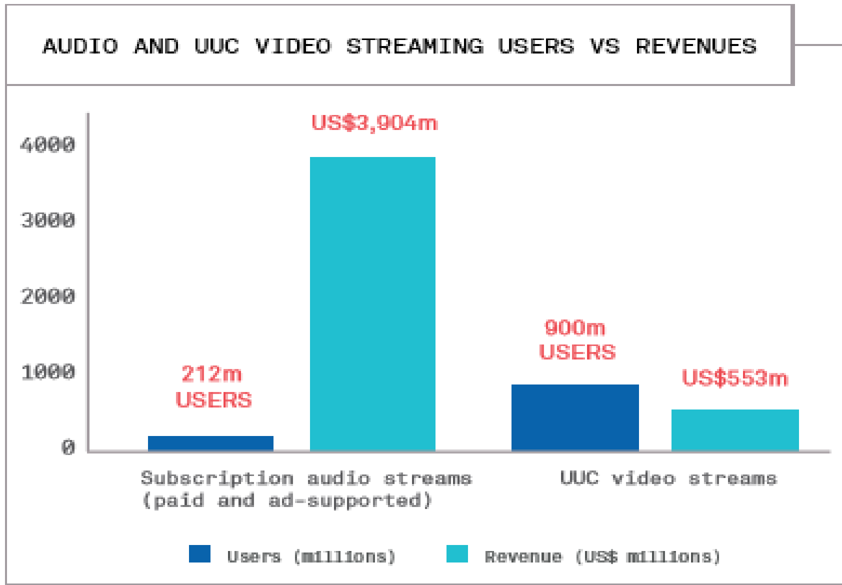
The Value Gap illustrated

One way to show the effects of the market distortion that has created the Value Gap, is to look at the difference in the amounts paid for recorded music by *subscription on-demand online music services, and user upload content on-demand music services.* The chart below represents the revenues paid in 2016 to the record industry by these two types of music service. On the left are subscription services, with some 212 million music users globally, and on the right are user uploaded video streaming services, like YouTube, with some 900 million music users[5].

3) https://www.wsj.com/articles/facebook-abuses-its-dominance-to-harvest-your-data-says-german-antitrust-enforcer-1513680355

4) https://www.bloomberg.com/news/articles/2017-12-19/u-k-lawmakers-slam-facebook-google-twitter-on-hate-speech

5) Data made available since IFPI compiled its 2016 Global Music Report indicates that the number of music users of UUC video services is substantially higher than 900 million. 2017 research by Ipsos found that 85% of YouTube users globally had used the site for music in the last month. Meanwhile, YouTube has stated that it has 1.5 billion users per month, meaning that YouTube, the largest music service in the world has 1.3 billion users using the site for music every month.



Recording industry revenue from YouTube is not available as a separate figure, but recording industry revenue in 2016 from all user-uploaded-content video streams including YouTube (and YouTube Red – the YouTube subscription service) was US$ 553 million. If all that revenue were attributed to YouTube alone, YouTube's payments to recorded music right holders in 2016 would amount to less than US$0.7 per user, compared to US$20 for Spotify.

This difference cannot be explained by normal commercial considerations – such as notable relevant differences between what the services offer to consumers.

3. Why the music industry has an issue with user upload content platforms - a case study: YouTube

YouTube launched in 2005 and has grown to be the world's most popular on-demand music service with an estimated 1.3 billion music users. Although currently licensed by a number of record companies, including IFPI's major record company members, YouTube has not always been licensed. Unlike the vast majority of music services, which entered into licensing agreements before launching their businesses, YouTube did not obtain licences from IFPI's members prior to launching. Rather, it quickly gained a worldwide audience driven by the availability of copyright content uploaded by users without the authorisation of the copyright owners. It was able to do this because of a lack of clarity about the application to UUC services of copyright and "safe harbours".

The effects of YouTube's position were seen in 2008/9 when negotiations between YouTube and Warner Music terminated without the parties reaching an agreement. Warner then sought to prevent its sound recordings from continuing to be made available on YouTube. Because YouTube claimed to be protected from liability by the "safe harbours" Warner had to monitor the YouTube service and send takedown notices to YouTube to request that it remove its recordings when they appeared (the "notice and takedown" procedure that typically forms part of "safe harbour" privileges). However, the reality of "notice and takedown" is that as soon as a link to or a copy of content is removed, it is uploaded again by the same or another user. After nine months of using "notice and takedown" to try to prevent its recordings from continuing to be made available, it was clear that the task was impossible to achieve. Warner entered into an agreement with YouTube in 2009.

Warner's experience illustrates the problems faced by rightholders when their music is used by user upload content services – right holders have only bad options. They can:

1. Accept Terms on Offer: agree to the terms (if any) offered by those services and accept whatever revenue the services are prepared to share; or
2. Try to Keep their music off the service: this doesn't work in practice and the service is able to continue to benefit from making music available; or
3. Sue: commence costly and protracted legal proceedings. This option, when pursued, has resulted in legal and commercial uncertainty due to conflicting court decisions around the world. And, of course, where there is uncertainty, legal proceedings become increasingly complex and costly.

Therein lies the problem with the lack of clarity surrounding the application of copyright and safe harbours to certain digital services.

"Safe harbours" were designed almost twenty years ago as a legal safety mechanism to foster growth in digital online markets by protecting Internet infrastructure companies from copyright liability. They were designed to exempt technical, automatic and passive infrastructure intermediaries that enabled the Internet to function. They were not intended to give a free ride to companies that make available and monetise music, by exempting them from playing by the same rules as other music services, and distorting the market.

The lack of clarity around the application of copyright and safe harbours to services like YouTube has enabled (or emboldened) such services to exploit property rights in music on a vast scale, without rightholders being able to exercise control over how their property is used. YouTube merely offers rightholders the opportunity to share in any advertising revenues it may or may not receive, depending on whether YouTube chooses to monetise the music it makes available by serving its users advertisements along with the music. If rightholders do not accept these terms, their music will be available on YouTube anyway, because notice and takedown is not effective in preventing the availability of user-uploaded content. As a result, rightholders are deprived of their ability to choose how to exploit and generate revenue from their works - their property - and the purpose of copyright is undermined.

YouTube supports its position by suggesting that music rightsholders are requesting minimum payments per stream, which, YouTube says, would not be sustainable for any business to pay. Unlike the sale of CDs or downloads, where each sale is monetised, YouTube is suggesting that it should not always have to pay when it makes music available – according to YouTube it should be able to decide whether to monetise the use of music on its service at all. This is what marks YouTube out from the vast majority of music services, and it is a consequence of the lack of clarity surrounding the application of copyright and "safe harbours" to user uploaded content platforms.

But do user-upload content services really compete with subscription services – is the comparison fair?

Recent data from a consumer survey and a like-for-like comparison of the features offered by YouTube with audio subscription streaming services like Spotify, Melon and Soribada, illustrates the equivalence of the two types of on-demand services from a user perspective. Each provides access to catalogues of tens of millions of tracks, each enables users to search for particular tracks or artists, to pause, rewind or fast-forward tracks, and to listen to their services across different devices. Each also tailors its service to its users, using algorithms to suggest to users music they may like based on their previous listening habits (*"if you like this, you will like that"*, as YouTube puts it).

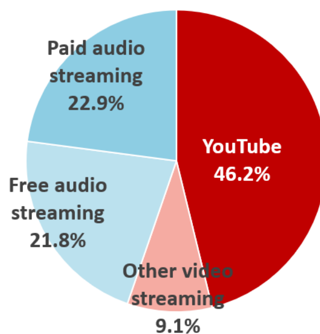
On the one hand, YouTube is a highly sophisticated music service that, for example, customises its service for users' individual tastes, while offering equivalent on-demand functionality to subscription services. On the other hand, YouTube claims that it is nothing more than a merely passive "hosting" service, and as such is eligible for the liability privilege known as "safe harbour", and it pays for music accordingly. The contradiction in its position is stark.

Evidence on YouTube users' music listening habits illustrates that YouTube, like

other music services, is an end destination for many users to listen to music. 2017 Ipsos research found that 76% of those who use YouTube for music listen to music they already know. That means that these users either first heard the music elsewhere and went to YouTube to listen to it again, or they first heard it on YouTube, and then returned to YouTube to listen to it again. 50% use the service to listen to some new music, and many of these people also use the platform to look for music they know as well.

That data illustrates that most YouTube music users are using YouTube for music they already know and not to discover music before paying for it elsewhere as YouTube claims. More importantly, whether or not users spend time on a service listening to music they already know or to new music is not relevant to whether a service should be licensed in the same way as the majority of other digital music services.

The scale of the problem for the music industry is further highlighted by UUC services' very substantial share of consumers' time spent listening to music streamed on-demand . Globally, YouTube accounts for almost half of all hours spent listening to on-demand music streaming.[6] In Korea, YouTube accounts for 34% of time spent listening, and YouTube and other video streaming services together account for 49% of time spent listening to music.



Global figures

6) IFPI Music Consumer Insight Report, September 2017, based on survey carried out by Ipsos for IFPI in 13 countries. Available at http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf

YouTube's dominance in the music streaming market is an obstacle to the launch and growth of new innovative services that do not seek to rely on legal uncertainty to avoid negotiating licenses for the content they distribute.

In 2017, Ipsos asked YouTube music users what they would do if YouTube started to charge for all the music available on the site. 27% of YouTube music users in South Korea said that they would instead turn to a paid audio subscription service while 17% said they would pay for downloads. Globally, 44% of YouTube music users – users who do not currently pay for music consumed through the site – would turn to methods that involved them paying for music instead. YouTube is clearly substitutional for services that offer better rewards to artists and record companies.

OK, but isn't YouTube just a music promotion platform?

YouTube claims that on the back of its vast user base the real value for music creators and producers in having their music on YouTube is promotion. This argument is flawed at many levels (and the data referred to above shows that the argument is simply wrong), but most importantly it misses the most fundamental point about intellectual property rights - they grant right holders the right to authorise the use of their works. So, even if YouTube would be good for promotion (and there is no reason why it would be any more promotional that other services), it is not for YouTube to determine how right holders should promote their works, and it is not for YouTube to decide that it doesn't need to pay fairly for the music is uses because of its own assessment that it provides value in a different way – through promotion. This assertion goes to the heart of the issue. The Value Gap concerns the monetary value of property rights and, therefore, the core economics of the digital economy.

Digital, and streaming in particular, is at the core of the music business. That a person may consume music in one way, and then consume it again in another,

does not mean that the first method of consumption is merely a promotion of the second, or the second method is merely a promotion of the third, and so on. Less still does it mean that if a person listens to music first on one service and then on another, the first distributor should be given special legal treatment that enables them to avoid licensing on fair market terms the music they distribute.

But YouTube says it has paid vast sums to the "music industry"

YouTube has made a number of claims about the total amount of money it has paid to the music industry, including a claim in 2015 that YouTube had paid US$ 3 billion in total to the industry (i.e. since 2007), or a more recent claim that in 2016 YouTube paid US$ 1 billion to the music industry.

Because YouTube has never explained these assertions, it is impossible to say what these number relate to. They would seem to make sense only if they included revenue not only from YouTube, but also from Google's music download store, and included payments to publishers and others.

More importantly, even if taken at face value, these are still unimpressive figures. YouTube is the world's largest music service, with some 1.3 billion music users. Assuming its US$ 3 billion payment claim represents the total sum of payments over ten years since 2007, this would account for only some 2 per cent of cumulative music industry revenues. By contrast, Spotify, with a small fraction of YouTube's user numbers, paid out US $1 billion in 2016 alone.

4. Addressing the Value Gap

Addressing the Value Gap requires legislative action to level the playing field and correct the market distortion caused by the legal uncertainty that enables certain services to avoid licensing the music they use on fair terms.

The entire music community is united in calling for a solution to the Value Gap.

In June 2016, some 1,300 recording artists wrote to the President of the European Commission to ask for urgent legislative action to address the Value Gap:

> *As recording artists and song writers from across Europe and artists who regularly perform in Europe we believe passionately in the value of music. Music is fundamental to Europe's culture. It enriches people's lives and contributes significantly to our economies.*
>
> *This is a pivotal moment for music. Consumption is exploding. Fans are listening to more music than ever before. Consumers have unprecedented opportunities to access the music they love, whenever and wherever they want to do so.*
>
> *But the future is jeopardised by a substantial "value gap" caused by user upload services such as Google's YouTube that are unfairly siphoning value away from the music community and its artists and songwriters.*
>
> *The situation is not just harming today's recording artists and songwriters. It threatens the survival of the next generation of creators too, and the viability and the diversity of their work.*
>
> *The value gap undermines the rights and revenues of those who create, invest in and own music, and distorts the market place. This is because, while music consumption is at record highs, user upload services are misusing "safe harbour" exemptions. These protections were put in place two decades ago to help develop nascent digital start-ups, but today are being misapplied to corporations that distribute and monetise our works.*
>
> *Right now there is a unique opportunity for Europe's leaders to address the value gap. The European Commission's forthcoming review of copyright legislation can fix this profound market distortion by clarifying the appropriate use of safe harbours.*

We urge you to take action now to create a fair playing field for artists and rights owners. In doing so, you will be securing the future of music for generations to come.

We hope we can work with you to create a sustainable and thriving music sector for Europe.

It is also important to note that the market distortion is not confined to the music industry. Many other industries within the creative sector are calling for action, including authors, book publishers, press publishers, broadcasters, film distributors, cinemas, football leagues and photo agencies.

In September 2016 the European Commission, the EU executive body, proposed a "Directive on Copyright in the Digital Single Market"[7] (the Directive), which includes measures to address the Value Gap. The draft Directive is currently going through the EU legislative process and is expected to be adopted in 2018.

In 2015, the European Commission acknowledged, in an official Communication to the European Parliament and Council, that

"[T]here is…growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users."[8]

The European Parliament subsequently called on the Commission to,

7) The Proposed Directive on Copyright in the Digital Single Market https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market. See Recitals 37-39 and Article 13.

8) Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions: "Towards a modern, more European copyright framework" 9 December 2015, p.9

> *"consider evidence-based options to address any transfer of value from content to services that will make it possible for authors, performers and right holders to be fairly remunerated for the use of their work on the internet without hampering innovation"*[9].

One of the three key objectives of the Directive, as stated in the accompanying "Impact Assessment on the modernisation of EU copyright rules"[10], is therefore to,

> *"ensure that the online copyright marketplace works efficiently for all players and gives the right incentives for investment in and dissemination of creative content."*[11]

The Explanatory Memorandum to the Directive proposal puts the issue succinctly:

> *"Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, right holders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and right holders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of right holders to negotiate and be remunerated for the exploitation of their content by online services*

9) Report from the European Parliament *"Towards a Digital Single Market Act" (2015/2147(INI))*, 21 December 2015

10) Available from https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules

11) Impact Assessment, p.2

giving access to user-uploaded content."[12]

Recital 37 to the proposed Directive explains how,

"[O]nline 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 right holders' 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."

The Impact Assessment regarding the proposed Directive notes:

"Some online service providers refuse to negotiate any agreement [with right holders with respect to their copyright-protected works], which means that despite the availability of copyright-protected content on these platforms no revenues are generated for right holders for the use of their content."[13]

The Directive sets out a three-pronged approach to address the situation:

- Recital 38 paragraph 1 confirms that UUC services are communicating to the public (an act restricted by copyright/related rights by virtue of Article 3(1) and (2) of the EU Copyright Directive 2001/29), and that they therefore need to take a licence from right holders, unless they qualify for any of the "safe harbours" under EU E-Commerce Directive 2000/31[14]; and,
- Recital 38 paragraph 2 clarifies that the limited liability (safe harbour) regime only applies to passive services, and not to any service that *"plays an active role"* (for instance by optimising the presentation of the content uploaded by

12) Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN, paragraph 1

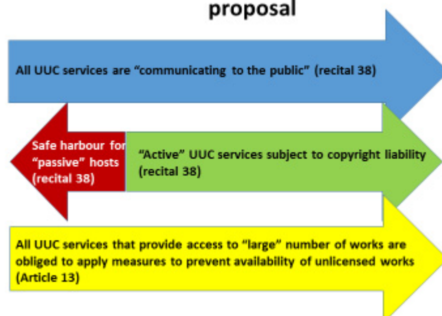
13) Impact Assessment, p. 139

14) Set out in Article 14 of the EU E-Commerce Directive 2001/31

their users or promoting it); and

- Article 13 introduces an obligation on UUC services that provide access to large amounts of content to take *"appropriate and proportionate"* measures to prevent the unauthorised availability of copyright content on their services, including by using effective content recognition technologies.

UUC services' liabilities, privileges and obligations, under the EU copyright proposal



The case law of the CJEU is converging with the Commission legislative proposals

The Court of Justice of the European Union ("CJEU") case law in relation to the "communication to the public" right (enshrined in Article 3 of the EU Copyright Directive 2001/29) provides the context to the Commission proposal.

Art 3 of the existing EU Copyright Directive 2001/29 does not define the scope of the "communication to the public" right in precise terms, although it is significant that the recitals stipulate that rights should be interpreted broadly:

> *"Any harmonisation of copyright and related rights [such as that effected by this Directive 2001/29] must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public*

at large. Intellectual property has therefore been recognised as an integral part of property."[15]

The CJEU has interpreted Art 3 of the EU Copyright Directive 2001/29 and clarified the scope of the communication to the public right done in series of decisions over a relatively short period.

- In *Svensson*[16], the CJEU gave a broad interpretation to the right, and held that the provision of hyperlinks may constitute an act of communication to the public. The Court subsequently however held that for a communication to be covered by the right in Article 3 of the Copyright Directive, it must be addressed to a "new" public, i.e. a public that the right holder had not contemplated when it authorised the primary act of "communication to the public".
- In *GS Media*[17] the CJEU considered that the provision of a hyperlink to a copyright-protected work (in this case a photograph) made available *without the authorisation of the right holder*, on a third-party website, constituted an act of communication to the public, unless the operator of the service providing the links did not know, and should not have known, that the copyright content was made available without authorisation. The Court further established that whenever the operator of the service providing the links has a profit motive, the operator is presumed to have knowledge that the content was made available without authorisation.
- The *Filmspeler*[18] decision concerned multimedia players with pre-installed hyperlinks to websites that (without the consent of the copyright owner) offered unrestricted access to copyright content, including films. The CJEU held that selling these media players constituted an act of communication to the public,

15) Recital 9, EU Copyright Directive 2001/29
16) *Nils Svensson and Others v Retriever Sverige AB*, C-466/12
17) *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15
18) *Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler*, C-527/15

notwithstanding that the websites linked to were (as in *GS Media*) freely accessible to the public even without using one of the players.

- The most recent CJEU decision on this subject was *The Pirate Bay*[19], a case regarding the liability of the operators of an unlicensed online file-sharing platform. The CJEU held that the management of an online file sharing platform constituted an act of communication to the public. Unauthorised copyright works were made available online by users of the platform, and the platform operators played (the Court found) an "essential role" in the communication of the works, intervening in the communication of works by indexing the torrent files which allowed users to locate and share copyright works (without right holder consent).

The European Commission's proposal in the Directive, clarifying the application of the communication to the public / making available right to UUC services is in line with the CJEU case law on the topic[20], reflecting a convergence in the solutions proposed by those two independent institutions.

The Commission's proposal has been welcomed by industries across the creative sector, from authors and performers to broadcasters to producers and publishers. The proposal is also supported by European digital music services, including Spotify and Deezer[21].

However, the Value Gap is not confined to Europe. It is a problem requiring solutions in all markets, including in Korea, and the European Union is not alone in looking at the problems caused by the Value Gap.

In the US, in recognition of the problems caused by the US DMCA section 512 safe harbour provisions, the US Copyright office is undertaking a study on the impact and effectiveness of the DMCA safe harbours. In December 2015: The US

19) *Stichting Brein v Ziggo BV and XS4All Internet BV,* C-610/15

20) E. Rosati, "The CJEU Pirate Bay judgment and its impact on the liability of online platforms", 21 July 2017 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591

21) http://www.musicweek.com/digital/read/streaming-is-driving-the-market-back-to-growth-digital-music-europe-unveils-its-policy-agenda/070549

Copyright Office issued a notice and request for public comment, stating[22]:

> *"In enacting section 512, Congress created a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet based services. The system reflected Congress' recognition that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement."*
>
> *"Recent research suggests that the volume of infringing material accessed via the internet more than doubled from 2010 to 2012, and that nearly one quarter of all internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material.* ***While Congress clearly understood that it would be essential to address online infringement as the internet continued to grow, it was likely difficult to anticipate the online world as we now know it****—where, each day, users post hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement.*
>
> ***As observed by the House Judiciary Committee's Ranking Member in the course of the Committee's ongoing multi-year review of the Copyright Act, and consistent with the testimony of the Register of Copyrights in that hearing, the operation of section 512 poses policy issues that warrant study and analysis.***"

As in Europe, the U.S. Copyright's Office's study has been met with call across the creative sectors for legislative action.

It is also worth noting that the U.S. Study highlights that the problems caused by the misapplication of "safe harbours" are not limited to the Value Gap.

22) http://copyright.gov/fedreg/2015/80fr81862.pdf, page 81862

Infringing sites also take advantage the “safe harbours” and the associated defective notice-and-takedown procedures to operate commercial-scale infringing music services.

Pirate services often claim the benefit of safe harbours, despite these laws never having been intended to apply to structurally or deliberately infringing services. Two examples of this show how notice-and-take down is viewed cynically, with some services deliberately structuring their businesses to benefit from the period in-between the posting of the infringing file, and the detection and notice to the service by right holders.

Grooveshark (an infringing streaming service)

When considering the effect of takedown notices on the service, the court cited EMI' s expert who described Grooveshark's system as acting as a “technological Pez dispenser: Each time a Primary File for a song is removed due to a DMCA takedown notice, a Non-Primary File is slotted in to take its place site”.

EMI and others v BSYB and others (a UK website blocking action)[23)]

Similarly to the Grooveshark case, when considering the notice and takedown programs purportedly operated by the three peer-2-peer sites that would be the subjects of the blocking order, the court found:

“the Websites' purported policies of removing infringing content only upon the provision of individual takedown notices would, even if rigorously implemented, be wholly inadequate to prevent the type of large scale, widespread copyright infringement which the Websites are engaged in.”

In addition to the legislative action in the EU and the U.S. Copyright Office Study, in Australia a Government proposal to extend the existing “safe harbour” regime to a broad range of services, including UUC services, was withdrawn in 2017 following widespread concerns that mimicking laws designed some twenty years ago for a very different internet would not serve Australia's digital markets.

The Value Gap is a global problem, and for digital markets to thrive in the long

23) EMI RECORDS LIMITED and others V. BRITISH SKY BROADCASTING LIMITED and others [2013] EWHC 379 (Ch) at para 68

term, including in Korea, there needs to be a level playing field. This requires legal clarity surrounding the application of copyright to digital content services, and ensuring that safe harbours are only available to the passive internet infrastructure services they were designed to protect, and not to highly active content platforms seeking to use the liability privileges to drive down the value of creative content.

Abstract

Creating a sustainable digital content market; why the Value Gap must be addressed

Patrick Charnley*

The music industry is a digital industry, with record companies having licensed some 40 million tracks to around 350 digital services globally and 18 services in South Korea alone. Recent growth in the recording industry is attributable in particular to the increased popularity of subscription streaming services, where users typically pay a monthly charge to enjoy on-demand access to vast catalogues of recorded music. However, a serious market distortion – the Value Gap - is holding back the industry, to the detriment of right holders, competing digital music services and, ultimately consumers.

The Value Gap refers to the substantial mismatch between the value that user-uploaded content (UUC) services, such as YouTube, extract from music and the payments they choose to make to the music community – those who create and invest in music. The Value Gap is caused by the lack of clarity surrounding the status of UUC services in relation to copyright, which has enabled these services to build large businesses based on the offering of music, attracting large numbers of users, while not remunerating right holders properly.

The evidence of the harm caused by the Value Gap is clear: UUC services are offering equivalent interactive music services to subscription services, while paying a fraction of the revenues paid by subscription services for the same music, and dissuading large numbers of users from using subscription services. The entire music community is united in calling for a solution to the Value Gap, and legislators in Europe have already responded with draft legislation. But the Value Gap is a global problem, and for digital markets to thrive in

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the long term, including in Korea, there needs to be a level playing field in all countries.

Keywords

Value Gap, Safe Harbor, Streaming, UUC Service, Digital Single Market

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