

Friend or Foe of the Music Industry?

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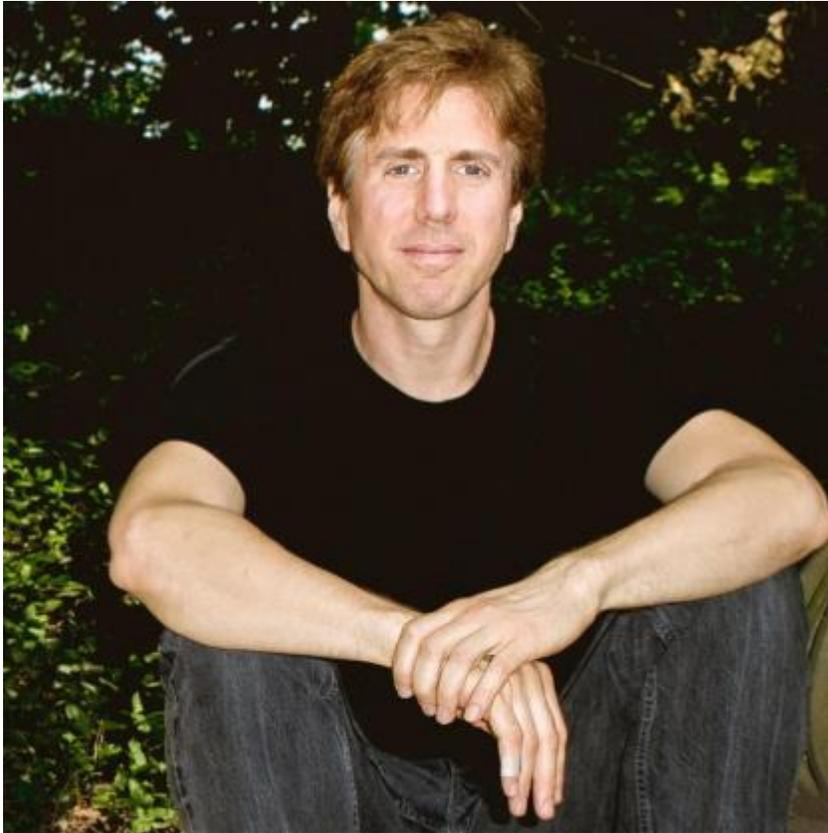
Two related themes have dominated music industry discussions and reporting over the last couple of years. From industry conferences at Canadian Music Week and South by Southwest to reports by the BBC and *New York Times*, there has been jubilation over revenue growth. Subscription streaming services like Spotify are credited with fueling a 5.9 per cent worldwide growth for the recorded music industry in 2016, which is the largest year-over-year increase since IFPI began tracking the market. In Canada, the growth was even more dramatic at 14.8 per cent thanks to streaming revenues more than doubling. On the flip side,

though, is fretting and even outright anger over the paltry royalties the largest online service, YouTube, pays music rights holders.

Many have not been shy about their feelings, with Metallica's manager, Peter Mensch, even saying in a BBC Radio 4 documentary last year that YouTube is "the devil" and, "If someone doesn't do something about YouTube, we're screwed. It's over. Turn off the lights." Maybe a bit melodramatic, but the point is clear and widely shared: YouTube's current business model is a problem for the music industry. But how is it a problem, and can it be fixed?

Sensing that the ire of musicians, labels executives, publishers, and even fans was shifting from music streaming services to YouTube, the Google-owned service's chief business officer, Robert Kyncl, went on the offensive. He revealed in a December 2016 blog post that "in the last 12 months, YouTube has paid out over \$1 billion to the music industry from advertising alone, demonstrating that multiple experiences and models are succeeding alongside each other."

A billion dollars is an impressive figure, but it doesn't tell the whole story. The International Federation of the Phonographic Industry (IFPI), which represents the global recording industry, wasn't impressed. They initially accepted Kyncl's claim and said that when averaged out across its music-listening users, YouTube is paying the music industry \$1 per user, per year. They then noted Spotify's estimated \$18 per user, per year average. In its recently-released Global Music Report 2017, however, the IFPI says \$553 million was paid to rights holder in 2016, not \$1 billion, from all user-uploaded video streaming services combined, though it's fair to assume YouTube makes up the vast majority of that. That total is actually less than the music industry's revenue from vinyl sales in 2016 (\$563.6 million). They also revised their Spotify comparison to say that Spotify now pays \$20 per user, per year compared to YouTube's average of less than \$1.



Audiam Founder Jeff Price

“I hate it that when IFPI responded, and it’s an intelligent response, but it plays into the wrong paradigm,” states Jeff Price, founder of Audiam, the New York-based digital reproduction rights collection agency. (SOCAN purchased Audiam in July 2016, which seems to put it in competition with the CMRRA for collecting online reproduction royalties in Canada, but that’s for another story.) “How much you pay out isn’t an indicator of anything beyond how much money you paid out. It doesn’t mean you’re doing it right and it also doesn’t mean you’re doing it wrong. It’s just an abstract number and it has no relevance beyond the PR buzz,” continues Price. “The real question should be: Is YouTube paying out the appropriate amount of money based on the value it’s extracting from music? That’s the right question, and is a billion dollars the right number? Well, you’re dealing with a company that’s owned by Google, which has an over-half-trillion-dollar market cap and a sector of it going through explosive growth and adoption and music seems to be one of the reasons why this is happening. So a billion dollars, which is broken up between all the rights holders in all the different countries, is that the right amount?”

That's for you to decide.”

Evidently, the music industry has decided it's not. To understand why, you have to understand how YouTube calculates payments, who it's paying, and why - essentially, who is getting what slice of the pie?

Unfortunately, a lack of transparency due to non-disclosure agreements (NDAs) makes this nearly impossible. *Canadian Musician* reached out to Google Canada for this story and its press officer declined to arrange interviews. They originally agreed to provide background information on the topic but subsequent emails and phone calls went unanswered.

Canadian Musician also reached out directly to Andrew Lindsay, Google Canada's manager of music label partnerships for YouTube and Google Play Music, who also declined an interview.

In terms of who is getting what slice of the YouTube pie, a lot is unknown, even compared to Spotify, Apple Music, and other audio streaming services, which are notorious for their lack of transparency. With Spotify, for example, we know it operates according to the “big pool” model, where it pays rights holders a percentage of revenue. According to Billboard's sources, Spotify's new long-term deal with Universal Music Group, which will provide a framework for deals with other labels, sees the service pay about half of its revenue to labels. In Canada, on-demand audio streaming services also pay 12.78 per cent of revenue to publishers and songwriters via SOCAN and CSI (CMRRA-SODRAC). With YouTube, even these types of broad numbers are unknown.

“No one knows anything about [YouTube's deals with rights holders] and the people who do are usually under solicitor-client privilege, so they can't say anything anyway. So we don't know anything about them other than to say it seems like the major labels these days aren't happy with them, so there's something afoot,” says Safwan Javed, who wears many hats as an entertainment lawyer with Taylor Oballa Murray Leyland LLP, a songwriter and drummer for Wide Mouth Mason, VP of the Songwriters Association of Canada, and a SOCAN board member.

As Javed alludes to, the complete lack of transparency makes it hard to fairly judge YouTube. But who is insisting on such secrecy? It seems all sides are eager to lay blame on the other guy.

In Canada, SOCAN collects and distributes performing rights royalties from YouTube to its songwriter, composer, and publisher members. Previously, YouTube's payments to SOCAN were subject to Tariff 22.D.2, which applies to user-generated content services. It stipulated the

service pay SOCAN 1.7 per cent for the years 2007-2010, and 1.9 per cent for the years 2011-2013, of the service's relevant revenues. Since then, however, SOCAN and YouTube have reached a privately-negotiated agreement that also covers future YouTube Red subscription revenues, but that agreement is subject to an NDA.



SOCAN VP of Licensing Jennifer Brown

According to Jennifer Brown, SOCAN's VP of licensing, the performing rights organization would love to make public the details of its deal with YouTube. "We want to make sure that our members know the information and we can pass as much data on to them as possible," she says. "So that would also be in the interest of being able to put the information to our membership so that they can understand their royalties a bit better." Likewise, the Canadian Musical Reproduction Rights Agency (CMRRA) announced in August 2016 that it had completed a new licensing agreement with YouTube. For its publisher and songwriter clients, the CMRRA is now collecting royalties on YouTube advertising revenue for the existing free platform, and will do so when YouTube Red launches in Canada and through YouTube's Electronic Sell Through (EST) and Transactional Video-On-Demand (TVOD) services. Exactly what rates YouTube is paying the CMRRA is also subject to an NDA. CMRRA President Caroline Rioux told *Canadian Musician* they cannot reveal the duration of the agreement with YouTube, the formula(s) used for determining payment amounts, or any indication of how the

agreement compares to the CMRRA's licensing deals with audio streaming services. All Rioux could say in her written response to our questions is that, "generally speaking, our licensing agreements with online services include a percentage royalty rate on revenues as well as minimum royalty amounts on a per subscriber and/or per play basis."

"It's extremely frustrating to not be able to disclose information that I also agree should be disclosed, but there is an NDA in there," says Price at Audiam. "That being said, there are reference points that exist in the world that tend to show how these services operate. You know, advertising tends to be based on CPMs, so how much revenue is generated per thousand views. But there are multiple rights here being sliced in different ways and even if we disclose it, even then it's pretty opaque."

In a rare instance of addressing complaints about transparency, Kyncl appeared to lay the blame with the labels and publishers. In an interview with BBC Radio last year, the YouTube CBO said fully independent artists who control all their rights and upload their music to YouTube are being paid handsomely. He used the example of Lindsey Stirling, an American violinist, dancer, and performance artist who controls her business through her own label and promotes herself through a popular YouTube channel. Kyncl claimed YouTube paid Stirling \$6 million in 2015 alone. "It really depends how successful you are in driving your ship and ... the flow of the money from us to you. Lindsey [Stirling] is set up directly with YouTube and sees exactly all of her consumption on YouTube and how much money she's making. It's very clear, and in other cases, maybe less so," Kyncl told the BBC. "There are middlemen, whether it's collection societies, publishers, labels. But also, what they do is they fund content and then they give advances, and they want those recouped. It's just really hard when there is no transparency for the artist... I can say we'd be very happy to share that information if we could."

Many in the music industry had to stifle their indignation at Kyncl's assertion that YouTube would be happy to be more transparent if only the labels, publishers, and collection agencies would let them.

"Their claim is basically they've dumped all this money [into the music industry] and if it's not reaching the creator, then it is the labels' fault," says Graham Henderson, president of Music Canada, which represents the major music labels in Canada but is not privy to their contracts with YouTube or other services. "The answer is, first of all, 99.9 per cent of the artists we're talking about do not have record deals with major record companies. Those that do have deals that are negotiated,

transparent, and there are accounting statements. The suggestion is that somehow these evil record companies are hiding money somewhere on the ledger.”



Music Canada Pres. Graham Henderson [Photo by Darren Goldstein/DSG Photo]

Henderson says that as an entertainment lawyer in the 1980s and ‘90s, he regularly audited the labels to find unpaid money for his artist clients. He was also the subject of artists’ audits while working as senior VP of business affairs and e-commerce for Universal Music Canada in the ‘90s and early 2000s. He says that if a very success artist received a cheque for \$1 million from the label and then audited, it would usually turn up another \$100,000 or less. “Those [royalty] statements are becoming more and more transparent and more open,” he says, before calling Kyncl’s claim “hogwash.” “They want us to believe that it is our fault? It’s victim blaming, number one, and it’s ludicrous because if they were on the same footing [as other streaming services], it wouldn’t be \$2 billion, it would be \$20 billion or \$30 billion that they would be paying out and I can tell you we would live in a very, very different world. They would restore the old balance where there was enough money in the hands of independent and major labels so that they could actually invest in artists.”

It is widely believed that if YouTube was subject to the same laws and payment formulas as other streaming services - even other free services like Spotify's ad-based tier - it would solve a lot of financial problems for creators and rights holders. According to the IFPI, in Canada in 2016, ad-supported audio streaming generated \$15.72 million compared to video streaming's \$17.59 million, but with a fraction of the users.

There are two reasons YouTube is able to pay lower rates for music: 1) YouTube's ad action-based formula means the revenue generated from videos is unreasonably low, and; 2) the "safe harbour" provisions found in copyright legislation have created an uneven playing field that protects YouTube and puts it at an advantage over rights holders and competing streaming services.

Regarding its payment formula, unlike the on-demand streaming services (such as Spotify, Apple Music, and even Google Play Music), YouTube does not use a "big pool" model whereby it pays a negotiated percentage of total revenue to rights holders. It also does not pay a per-stream rate, even though per-stream averages are commonly referenced when discussing YouTube royalties. What it does is pay according to viewers' advertisement actions. So just because a YouTube video may be monetized and have an advertisement attached to it, it does not necessarily generate revenue on each view.

"It's a very interesting system based on time of year, advertising budgets, number of views, demographics watching the video, the duration of the video, etc.," says Price. "The person who watches the video actually has to perform a type of behaviour. That type of behaviour is they either need to click on the banner or text ad, or alternatively, they need to watch at least 30 seconds of the video commercial, or if the video commercial is less than 30 seconds, they need to watch the entire duration. If they do not do one of those two things, the video does not make any money." Additionally, not all ad views and clicks are created equal. For example, a video advertisement with a "skip ad" button is worth more if watched than a video ad with no skipping option.

So theoretically, a monetized video with 1,000 views could earn the same or more as a monetized video with a million views if the first did a better job of generating ad actions from viewers (i.e. more people clicked or viewed the ads).

In terms of the payment split, YouTube keeps 45 per cent of the ad revenue and the remaining 55 per cent gets split amongst rights holders. YouTube's percentage share is believed to be significantly greater than

the percentage of ad revenue Spotify keeps from its free tier, and that 55 per cent can be split a lot of ways.

The creator of the video gets a share for owning the video, the label gets a share for the rights to the recording, and the songwriter and publisher get a share for the rights to the composition. If that publisher and/or songwriter uses a digital collection agency (i.e. Audiam or the CMRRA) to identify uses of their composition and collect royalties, then that agency also gets a percentage of the royalties they collected for their client. So YouTube keeps 45 per cent and the various rights holders fight it out for what is left.



CIMA Pres. Stuart Johnson

“If YouTube were to pay rights holders even what Spotify pays for their free tier, it would be a significant and positive step forward for the independent community, but they don’t,” says Stuart Johnston, president of the Canadian Independent Music Association (CIMA), which represents indie labels, publishers, and other music businesses. “So that business model - and I am going to say it over and over again - it devalues music. It is an unfortunate situation.”

Trying to force YouTube to change that business model, however, appears to be a losing battle for the music industry. Unlike the audio streaming services, whose entire business is music distribution, YouTube is not wholly reliant on the labels’ and publishers’ product.

“Imagine the labels’ move with YouTube is to say, ‘We need to renegotiate our agreement,’ and YouTube says ‘no.’ So what’s the labels’ next move? If they want to go to a contentious and aggressive posture and say, ‘OK, we’re going to pull our catalog,’ well that’s all fine and the videos they’re making are not uploading, but other people are probably going to still be uploading stuff,” says Javed. “The general public will still be able to upload stuff, and sure you can try to police that, but policing that is exceedingly difficult and you’re spending a lot of resources on something that is essentially like a whack-a-mole that doesn’t stop.” And that brings up the second major point of contention: the safe harbour provisions.

The term “safe harbour” refers to copyright law provisions that protect user-generated content services from copyright infringement lawsuits. While it applies to other services beyond YouTube, the music industry’s lobbying efforts against safe harbours have almost exclusively focused on the world’s largest streaming service. In essence, what safe harbour means is that music rights holders cannot sue YouTube for copyright infringement when its users upload their music without permission. YouTube’s only responsibility is to operate some kind of notice-and-takedown system, which it does through its proprietary Content ID system. Safe harbour also puts the onus on the rights holder to identify infringement rather than the service. In that regard, YouTube is actually doing more than it’s required to because Content ID proactively informs rights holders of infringing uses of their product. If a video gets taken down or monetized via Content ID, however, YouTube is not liable if it gets re-uploaded and the notice-and-takedown cycle begins again. Most discussions and lobbying efforts to end safe harbours have focused on the U.S. Digital Millennium Copyright Act (DMCA), which created the precedent, and the e-commerce directive in the European Union. Canada, though, actually has an even more lenient safe harbour found in the Copyright Modernization Act of 2012. Here, instead of notice-and-takedown, Canada has a notice-and-notice regime. So when a rights holder sends a notice to a service provider identifying an instance of copyright infringement, the service is only required to forward that notice to the offending user. It does not need to take down the infringing content. That is about as lax as it gets.



CMRRA Pres. Caroline Rioux

Instead, what the music industry wants is a notice and stay down regime. Recently, artists have also become more public in their demands to end safe harbours. In the U.S., Katy Perry, Deadmau5, Christina Aguilera, Garth Brooks, Jon Bon Jovi, Lionel Richie, Steven Tyler, and more signed a letter to the Copyright Office last year calling for an end to the DMCA safe harbour. In Canada, the Focus on Creators coalition sent a letter to Minister of Canadian Heritage Mélanie Joly asking her to take a more creator-centric approach when conducting the Copyright Act review this year and on future legislation. That letter was signed by more than 2,550 Canadian creators, including Alanis Morissette, Brett Kissel, Blue Rodeo, Gord Downie, Gordon Lightfoot, Grimes, Metric, and The Sheepdogs. Henderson identifies safe harbour provisions as the number one reason labels and other rights holders cannot negotiate comparable deals with YouTube as they have with Spotify and other streaming services.

“We could get what we get from Spotify by using our exclusive rights to say, ‘Either we come up with a new agreement or you can’t use our music,’” says Henderson, imagining an environment with a notice and stay down regime. “Wouldn’t you expect, at the very least, that if Google was subject to the same rules of the free market, that we would get the same number? And if we got the same number, a lot of problems would go away overnight. The question would be: can they afford it? I laugh at that because of the valuation of YouTube.”

To be specific, Justin Post, a Merrill Lynch analyst that covers Alphabet

(Google's official corporate name that nobody uses), published a report in 2016 estimating YouTube's value to be \$90 billion.

The idea that safe harbours weaken rights holders' leverage in negotiations was made clear in a recent leaked memo from Warner Music CEO Stephen Cooper to his employees. Warner Music Group and its publishing division, Warner/Chappell Music, recently renewed a licensing deal with YouTube. Typically, when a new deal is signed, no matter how contentious the negotiations, both sides smile and say they are thrilled with whatever deal they got. Cooper, however, lamented the limited concessions Warner got from YouTube, saying, "We secured the best possible deals under very difficult circumstances."

"Our fight to further improve compensation and control for our songwriters and artists continues to be hindered by the leverage that 'safe harbor' laws provide YouTube and other user-uploaded services. There's no getting around the fact that, even if YouTube doesn't have licenses, our music will still be available but not monetized at all. Under those circumstances, there can be no free-market 'willing buyer, willing seller' negotiation," Cooper continued in the memo, which did not specify the terms of the licensing deal. "Our experiences during these negotiations were proof positive of the acute need to clarify 'safe harbor' provisions under US and EU copyright legislation. That's the only way to conclusively close the gap between the revenue YouTube generates and what songwriters, artists, publishers and labels make in return."

In response to the Warner memo, Lyor Cohen gave an interview to tech industry website *Recode* in which he largely dodged any questions about safe harbours. Cohen used to be the head of Warner Music Group and is also the founder of pioneering hip-hop label Def Jam. YouTube hired him in September 2016 to be its "global head of music," which essentially means ambassador to the music industry. "We've talked over and over and over again how our business — I still feel part of this business — is going to return to growth by subscription and advertising, living side by side one another," Cohen told *Recode*. "I didn't hear anything about safe harbor, or any of that stuff ... I do know about the numerous conversations we had about them helping us, enabling us, to run this horse and to be successful. Because they would like a company the size of Google, [with] the international breadth of the company, to get into the subscription business. I don't think they want their revenues highly concentrated."



Entertainment lawyer, musician & songwriter Safwan Javed

When it does address the issue, YouTube's argument against ending safe harbours or enacting notice-and-stay-down legislation is that it simply isn't necessary. It says Content ID is doing an excellent job of identifying infringing content and is even creating a new revenue stream by allowing rights holders to monetize that content. Content ID allows labels, publishers, and independent artists to indicate a default setting for when their content is identified in third-party videos. Those rights holders have three options: do nothing, take down the video, or monetize the video by placing ads.

The labels, on the other hand, say Content ID is neither as effective as YouTube says nor is it truly giving them the takedown option. In its filing to the U.S. Copyright Office during a review of the DMCA in 2012, Universal Music Group claimed that Content ID doesn't identify more than 40 per cent of the labels' compositions on YouTube. Granted, that was five years ago; it's reasonable to expect the system has improved. Google Senior Policy Council, Katherine Oyama, claimed in a 2016 blog post (the company seems to prefer blog posts over interviews to defend itself) that since 2014, "over 98 per cent of copyright management on YouTube takes place through Content ID, with only two per cent being handled through copyright removal notices."

“I think both sides are right and both sides are wrong,” says Price. “There is a lot of music in the world and YouTube has business logic around its Content ID system. There are requirements around the amount of time a sound recording needs to play before it can even be fingerprinted, and then you move into mash-ups and remixes. So it’s safe to say that there is a large amount of music being used that is unidentified. At the same time, it’s safe to say that YouTube has created a system that has never existed on this planet before that does things that have never been done before and it, too, is going through growing pains, but it’s a pretty phenomenal system. But again, it has its problems and how could it not?” The larger concern for the labels, though, is that they don’t truly have the option to take their content off YouTube. In 2008, following unsuccessful contract negotiations, Warner Music Group (which was headed by Lyor Cohen at the time) attempted to take all its music off YouTube. The label later told the U.S. Copyright Office that it “views these efforts as having been largely unsuccessful” and estimated it spent nearly \$2 million trying to do so.

“So they tried to withdraw their recordings from the service through the Content ID program and it just didn’t work, so they end up having to accept it and click ‘monetize,’” says Henderson at Music Canada. “You’re put in an impossible position where you have no choice. And if Warner can’t get a proper deal, what the hell is some poor individual artist going to get out of this?”

Ultimately, the entire YouTube debate is about how the music industry can reintroduce value to music and how to close the “value gap” between music consumption and music revenue. It’s widely believed that more music is consumed now than at any point in human history, with YouTube alone accounting for around 40 per cent of it. Buzz Angle Music estimates that over 13 billion on-demand videos containing music were streamed in Canada last year. Clearly YouTube sees music as a cornerstone of its multi-billion-dollar streaming empire.

As Price says in conclusion, “No one forced YouTube to decide to have a model based on generating revenue off of music and videos any more than anyone put a gun to Daniel Ek’s head and forced him to make Spotify, so it drives me absolutely crazy when people push back and say that music doesn’t have value. Really, then why are you using it?”

END

Michael Raine is the Senior Editor of *Canadian Musician*.