
The Lack of Value in the Value Gap

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論文

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Abstract

In the debates over the scope of copyright safe harbor regimes, music industry rights holders have argued that reforms are necessary to address what they describe as a value gap between payments made to performing artists from subscription streaming services(e.g., Spotify), against payments made to performing artists from advertising supported streaming services(e.g. YouTube). The premises of the value gap argument are that Youtube isn't paying enough and that somehow the existence of safe harbors is the reason for this underpayment. The premises are contradicted by the evidence, which shows that subscription services and advertising services respond to different types of listeners, listening to different types of music. YouTube complements subscription service, and pays out significant revenue to musicians. Debates on copyright reform are important -- and like all important issues they should be conducted based on empirical inquiries, and not on political slogans such as a "value gap" that doesn't exist.

Keywords

DSM, Value Gap, Digital Single Market, YouTube, ContentID

I. Introduction

The recent 10th Seoul Global Copyright Forum -- “Reviewing the Role and Responsibility of OSPs in the Era of Hyper-Connectivity” -- was a big success. The Forum covered both existing copyright laws governing Online Service Providers(OSPs), as well as possible future reforms. Given the Digital Single Market(DSM) initiative in the European Union, it is understandable that some speakers took up the proposed DSM reforms, including a provision on an alleged value gap. The value gap can be seen, it is claimed, by comparing payments made to performing artists from subscription streaming services(e.g., Spotify), against payments made to performing artists from advertising supported streaming services(e.g. YouTube). The false premises of the value gap argument are that Youtube isn’t paying enough and that somehow the existence of safe harbors is the reason for this underpayment. Therefore, the safe harbors need to be changed, the argument goes.

Unlocking the potential of the digital economy and eliminating barriers to trade were the original goals of the DSM, and they are positive, important goals. The European Commission’s website boldly states:

It’s time to make the EU’s single market fit for the digital age – tearing down regulatory walls ...¹⁾ The Digital Single Market strategy aims to open up digital opportunities for people and business and enhance Europe’s position as a world leader in the digital economy.²⁾

Korea and other technologically advanced Asian countries such as Singapore have been leading the way in utilizing digital creativity and innovation to build new economies. As a result, these countries will benefit the most as they continue

1) https://ec.europa.eu/commission/priorities/digital-single-market_en

2) <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>

to take the steps necessary to flourish in the Fourth Industrial Revolution. New regulatory walls, including the value gap proposals, are unfortunately not a step in this direction.

II. What is Value and How Can There be a Value Gap?

One cannot speak of a value gap unless we are clear about what “value” means and how it is determined. Once we have settled on a clear, shared meaning for “value,” we can conclude there is a value “gap” only if the alleged “gap” is between similar items. A “gap” between two dissimilar items is not a “value gap” since there are no shared values between the two items. As we shall see, the purpose of the term value gap in the DSM is not descriptive: it is not an effort to describe economic facts. Rather, it is a rhetorical, political device intended to invoke an emotional response that will trigger changes in safe harbor laws that the music industry seeks.

1. How Has the Value Gap Been Used in Economics?

How have economists used the value gap term? Despite the term sounding like it is derived from economics, economists have used it very rarely, and not consistently. Sometimes economists speak of businesses “closing their value gap,” by which they mean nothing more than increasing stock price.³⁾ Other times, the “value” in “value gap” refers to public policy principles, “values” the public believes businesses should hold, as seen in the title of the 2015 book “Bridging the Value Gap: How Authentic Organizations Bring Value to Life.”⁴⁾ This use does not refer

3) See e.g., Deloitte, “Closing the Value Gap: Synching market value and strategy”, available at: http://blog.deloitte.com/au/wp-content/uploads/sites/24/2015/08/51126_7_7_5_2015_Closing-the-value-gap.pdf

4) By Edward Freeman and Ellen Auster, published by Berrett-Koehler Publishers, available at Amazon.com

so much to economics as to the role of businesses in society.

The term value gap has been used to refer to opinions about measuring relevant macroeconomic activity. In his book "Economics and its Enemies: Two Centuries of Anti-Economics,"⁵⁾ William Oliver Coleman discusses what he calls a "value gap thesis." He states, "it must be allowed that as long as economics has values, it must be possible that a value gap exists. And obviously economics does have values."⁶⁾ The values he believes relevant are valuing reason, valuing a person's state of well-being, and valuing freedom. He candidly admits that other economists have different sets of values. The values he refers to are not mathematical amounts or gaps between them, but instead to how the selection of which values credit influences the calculation of macroeconomic activity, due to subjective opinions about what data to credit.⁷⁾

So much for economists' use of the term. What about colloquial uses of the term by non-economists? Historically, the term "value gap" has not been used to refer to objective, mathematically quantifiable and repeatable measurements between two equivalent valuations. Instead, the value gap concept has been used to describe subjective differences in perceived value, as when the owner of a house expects the house to sell at a certain amount, but the market value as measured by what buyers are offering is lower. In other words, the gap between the "bid" and the "ask." But this is not a gap between one comparable item and another; it is, instead, merely the difference between how people value the same item: a prospective house buyer ascribes one "value" to the house (X) while the prospective seller ascribes another "value" (X +).

here: https://www.amazon.com/dp/1609949560/ref=rdr_ext_tmb

5) (2002, Palgrave Macmillan).

6) Id. at page 133.

7) Other fields have their own values. On scientific values, see Richard Dawkins, "Science in the Soul," chapter 1 ("The values of science and the science of values") pages 21-66 (2017, Random House).

2. How is Value Determined?

(1) Intrinsic Value

How to determine “value” has, since the inception of economics, been fraught with disagreement.⁸⁾ Value in the economic sense means here price since a fundamental question in any theory of value is why goods and services are priced as they are, and why those purchasing those goods and services are willing to pay one but not another price.

One theory is that the value of an object can be found in the internal properties of the object. People will pay the price that reflects this internal value. This theory of an asserted intrinsic value has long been rejected by economists: gold and silver may, for example, have an historical market value -- what people in the past have paid -- but they have no intrinsic value, a value for their own sake. People have admired gold and silver for the brilliance of their colors and their perceived social prestige. Their economic value, if any, is attributed value, value due to other, external, ever changing factors.⁹⁾ Typically, those values are personal, subjective considerations.

It is common, regrettably, to confuse personal, subjective “value” with objective monetary “value.” This confusion is central to the OSP/DSM debates, as I discuss below in the section entitled “The Value Gap is a Campaign Slogan.” For now, allow me to illustrate the confusion with an example of the difference between the two types of value. I have been a musician for 61 years. My graduate and undergraduate university degrees are in music composition. One of my greatest joys in life is playing music with my 16 year old daughter, who is a better musician than I am. One of my most “valued” possessions is my bass clarinet:

8) See generally the discussion in David Throsby, *Economics and Culture*, chapter 2 (“Theories of Value”) pages 93-106 (2001, Cambridge University Press).

9) See Joseph Salerno, “The Myth of the Unchanging Value of Gold,” august 29, 2014, available at: <https://mises.org/library/myth-unchanging-value-gold-0>



I love that instrument. I have had it many years. Any performing musician will tell you that their instrument is an extension of themselves. Over the years, parts of your being become embodied in the instrument, especially for a wind instrument, where it is your very breath that makes the sound. When you hold your instrument, there is a psychological warmth, a feeling of being emotionally at peace. Your instrument contains memories of treasured events, and memories of sad events that music has seen you through. You remember every repair you have ever made to the instrument, every customization of it to better reflect you. The fit of the instrument works, you believe, only for you and that instrument is the only one that you can play on.

There have been musicians whose beloved instrument has been stolen, causing great emotional damage¹⁰. A friend of mine played bass clarinet in the Philadelphia Orchestra for decades alongside Nathan Brusilow. Brusilow played on a Selmer Centered Tone clarinet,¹¹ the same kind Benny Goodman played on(which made the Selmer an odd choice for an orchestral musician like Brusilow). The Selmer Centered Tone(made between 1952 and 1960)¹² was a good clarinet, but it was

10) See "Top Five Most Astounding Musical Thefts," at: <http://www.wqxr.org/story/217890-top-five-most-astounding-musical-instrument-thefts/>

11) See <https://clarinetcorner.wordpress.com/2013/07/25/4088/>

12) An earlier mode, called the Balance Tone, was made from 1946 to 1951. My bass clarinet friend

not handmade, it was not custom, and it was not wildly expensive, especially compared to other orchestral instruments. One day Brusilow's clarinet was stolen and probably sold on the black market. My friend told me Brusilow was never the same afterwards, either as a performer or as a person. The "value" of Brusilow's clarinet could never be calculated by money. Brusilow easily could have afforded to buy another clarinet and did, but the new one was never truly his.

If I wanted to sell my bass clarinet(which I never would), someone interested in buying it would not care about any of the things that make my bass clarinet my bass clarinet. To them, the instrument would be a Selmer Prestige Model 67 Low C bass clarinet, serial number 003214. They would discount its age, all the repairs I made, and offer me much less than a new bass clarinet. To them, if I took enough less money than a new bass clarinet costs, they would think about buying mine, but if I didn't take enough less they would buy a new one, which they would probably regard as being a better instrument. For me, there is no better instrument, and I would refuse offers for it well in excess of what I paid for it originally.

Our attachment to things that stir our emotions is strong, including our favorite music. I was a music composition major at university. I know what it means to create something out of a blank piece of paper. I appreciate the personal "value" that flows from having created a piece of music since I wrote musical compositions, struggled with them, and struggled to get my fellow students to perform them. But no one else can value your composition the way you do, for the simple reason that they are not you: the emotions and thoughts you put into your composition come from you alone. Since no one else can have your emotions or thoughts, and no one else labored at expressing them for you, they cannot possibly value the results of that process -- the finished work -- the way you do. To

from Philadelphia had a Balance Tone which he lovingly had customised over the years, and which, years after his retirement, he sold to me for my daughter this year. I paid a premium for it because it had personal meaning, "value" if you will, of having been my friend's instrument. And my owning it had "value" to him since he had held onto it for many years until he thought my daughter would appreciate it, as she does.

expect others to do so is unrealistic.

There are musical compositions and recorded performances that have a great deal of emotional value to me. If there were differential rates for downloads, I would translate this emotional value into monetary value by paying more for a download of a performance I loved than for one I didn't like as much, but such personal preferences can't be scaled: iTunes doesn't offer variable download pricing depending on how much you like this singer or that singer's version of a song.

That was also true in the days of CDs and vinyl records: there was one price for the same CD¹³⁾ for all people. Based on your personal preference, you either bought it or you didn't, just like for downloads today. Personal preferences are of no assistance either in figuring out what the revenues should be for a music subscription streaming service: if the service has enough of the type of music you like, you subscribe; if it doesn't, you don't. Yet, rightsholders have argued for a per stream rate, and moreover have argued that music services should pay at least X amount of money for a particular stream. That approach is not sustainable for any business. Record labels and music publishers, for example, don't pay composers or performers a royalty based on the perceived intrinsic value to the composer or performer. Record labels and music publishers have never paid composers or performers a royalty on that basis even in the days of selling albums on vinyl and Cds, nor do they do so for downloads. Such a business model would not be sustainable for them if they did and they know it, which is why they have never done so.

The same is true for music service platforms, and even within music platforms we have to differentiate between the ways that listeners use the service, including whether it is a subscription service or a free, advertising-supported service. Claiming that music is art and has X intrinsic value -- and therefore should have one set price no matter how the song is licensed or listened -- is empty political rhetoric. No one believes it because everyone knows the marketplace has never worked that

13) There were occasionally special or bonus versions of albums, but even these were the same price for everyone who bought them.

way and can't: there is no one true value that everyone shares, Nathan Brusilow could have testified to that.

(2) The Labor Theory of Value

Another theory looks at the labor that went into making the good or providing the service.¹⁴⁾ The more labor it takes, the greater the value of the good or service and therefore the greater the price(value). While Adam Smith may have believed some form of this, few people do today, and whatever appeal this theory may have had in general economic theory, it has no role in copyright law. Courts have long rejected the amount of labor as a basis for copyright protection. In a 1985 decision, the U.S. Court of Appeals for the Seventh Circuit rightly held:

The input of time is irrelevant. A photograph may be copyrighted, although it is the work of an instant and its significance may be accidental. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). In 14 hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week's installment of *Bleak House*. The Laffer Curve, an economic graph prominent in political debates, appeared on the back of a napkin after dinner, the work of a minute. All of these are copyrightable. Dickens did not need to complete *Bleak House* before receiving a copyright; every chapter-indeed every sentence-could be protected standing alone.¹⁵⁾

This is important for authors¹⁶⁾: authors secure copyright based on the content of their work, not how long it took to create it. A system based on the amount

14) One also sees this in other areas: some students, for example, think that their grade on an exam or paper should be determined by how much time they spent on it. Few teachers share this opinion.

15) *Rockford Map Publishers, Inc. v. Directory Service Co. of Colorado, Inc.*, 768 F.2d 145, 147-148 (7th Cir. 1985)(Easterbrook, Judge).

16) Protection for performers is based on their imparting creativity to another's work, the underlying musical composition. Nevertheless, performers have rarely had equality in treatment with authors in legal IP regimes.

of labor it took to create a copyrighted work -- with more protection going to those who labor the longest -- would lead to perverse incentives: the most inefficient, least creative works would get the most protection. Indeed, the U.S. Supreme Court rejected the mere exertion of labor (apart from creativity) as a basis for copyright, holding that doing so would "flout basic copyright principles."¹⁷⁾

(3) The Utility Theory of Value

Another classical economic view of value focuses on the utility of the good or service. Utility, however, varies from person to person, region to region, and time period to time period: people in Singapore have no use for snowplows, unlike people in Gangwon-do, and even in Gangwon-do, they have no use for snowplows in summer. Many goods or services have greater or lesser contextual utility: anyone who has tried to catch a taxicab in the rain knows this; such transient utility forms the basis for Uber's surge pricing. The utility theory of value can also suffer from subjectivity: the value of a very carefully prepared six course gourmet food to those who appreciate that food may be high -- and even higher depending on the subjective reputation of the chef -- but it has no value to people who like fast food. And in the case of cultural works such as music, their "utility" is wholly subjective, which is not to diminish the emotional value (as with my beloved bass clarinet) but obviously utility cannot form the basis for any monetary theory of value for cultural works.¹⁸⁾

17) *Feist Publications, Inc. v Rural Telephone Service Co.*, 499 U.S. 340, 354 (1991).

See *Chong Dae-yong v. State*, 94 To 2248, Taebopwon [Supreme Court] (Nov. 14, 1995), PANRAE KONGBO [OFFICIAL GAZETTE OF COURT DECISIONS] 117-19 (Jan. 1, 1996) ("originality" as the prerequisite for protection rather than "sweat of the brow").

18) This of course is not the same as whether cultural works contribute to the economy, e.g., through sale of copies of books, movies music, and the employment of the people who create them. Clearly there is real economic value for cultural works to economies. The point in the text is restricted to use of the utility theory of value for pricing such goods. Pricing of copies cultural works is a market issue: when I go to a symphony concert, the ticket price I pay will be the same whether the composition performed is in the public domain or under copyright. DVDs of movies are priced higher for new releases than for older catalogue, even though they all may be under copyright still.

(4) The Subjective Theory of Value

A straight-up subjective theory of value holds that the “value of a good is not determined by any inherent property of the good, nor by the amount of labor necessary to produce the good,” but instead by “the importance an individual places on a good for the achievement of his desired ends.”¹⁹⁾ Some people may enjoy Pansori music and others K-Pop, but it is unlikely the same person likes both types of music. Similarly, some people prefer a subscription service to access their music; others prefer digital downloads; others prefer streaming services that are free and supported by advertising because they don’t listen to a lot of music; yet others (like me) prefer CDs because we “value” the quality of the sound. To pretend all of these personal preferences are similar, and therefore represent a single monetary value in an alleged value gap comparison to a second, different preference, is to make a profound error:

Beyond such obvious dissimilarities, if you ask a pop music performer whether she values her work the same when it is streamed as part of a subscription service on Spotify as when it is streamed on YouTube as part of an advertising supported service, the answer will likely be yes. But this yes answer doesn’t mean that the answer of listeners is yes. A fan of K-Pop is unlikely to pay to go to a concert of Pansori. If you ask someone who doesn’t listen to a lot of music and just happens to come across a video of the performance of a song on YouTube to pay the same amount as a person who is an ardent follower of the performer and wants to download it, the answer will be no. The answer will also be no to getting a subscription to Spotify for casual listeners primarily interested in watching videos.

This is a central point lost in the value gap discussion: when we assert a value gap exists between dissimilar music services such as YouTube and Spotify, we are not talking about an objective, quantifiable, mathematical exercise in comparing two alike things, but rather are projecting subjective, personal preferences onto dis-

19) See https://en.wikipedia.org/wiki/Subjective_theory_of_value

similar things. There can be no value gap in such comparisons. YouTube's ad-supported service is not primarily a music platform, not even remotely. It is primarily a video platform and has been since its inception. YouTube offers a vast selection of video works, many amateur(YouTube's roots), some public domain, some under Creative Commons or other licenses. YouTube also hosts music videos, including many uploaded by the same rights holders that complain of a value gap. Ad-supported YouTube does not offer a "lean-back" experience where music can be played in the background while users engage in other activities on their mobile devices. A fraction of YouTube's revenues are from music. By contrast, Spotify is a music platforms, and has been since its inception.²⁰⁾ One cannot fairly compare a video platform to a music platform.

3. What the Data Show

It should also be emphasized that YouTube has a subscription service, available in Korea, YouTube Red. YouTube is committed to expanding that service. YouTube offers and believes in both types of services. Any fair comparison would therefore have to include the totality of revenues from YouTube, including YouTube Red, as well as the large amount of revenue monetised from Content ID.(This is discussed below in the section entitled "The Totality of Payments is What Matters")

But focusing for the sake of argument only on the music portion of YouTube and the advertising-supported part of that service, the facts about what actually happens on YouTube's advertising supported service versus what happens on subscription services such as Spotify brings home concretely that there is no value gap. A value gap only exists when there is an objective, accurate comparison of two sets of data from comparable, substitutional revenue sources; that is, where

20) Spotify recently launched an original video service, but few know about it. See here: <http://www.businessinsider.com/spotify-original-video-business-revamping-with-surgical-plans-2017-6>

monies derived from one revenue source are monies lost to another revenue. In short, a zero-sum equivalency: one service's gain is balanced by the losses of the other service. Or, to use the cake metaphor, if I take a piece of the cake there is one less piece for you. But if the cake is a chocolate cake and I don't like chocolate, when you take a piece of the chocolate there is no loss to me. And that's the way it works with music subscription services versus advertising supported services: they cater to people with different tastes.

It is not factually true that users come to YouTube en masse to find a particular song or artist in order to play and re-play that content. Instead, 80% of music views on YouTube are from algorithmically recommended content.²¹⁾(If you like this, you will like that). The principal reason people go to YouTube is to watch video. When they do encounter music, it is usually music they don't know, based on YouTube's algorithmic recommendations. While YouTube may, for some, be the first stop in the discovery journey, it is not the last for most people, many of whom go on to buy music from other services like iTunes. My kids will come across a music video on YouTube(via their mobile phone), and if they like the song, they will go to iTunes to download it. Far from being cannibalistic, YouTube serves as a way to other, paid consumption platforms.

The data supports this: In a study of four European countries, RBB Economics found that a higher number of YouTube views correlates to a higher number of streams on subscription services, indicating that YouTube is complementary to those services and not a substitute for them.²²⁾

Another factor to bear in mind is that those who do go to YouTube to listen to music, listen to different kinds of music than those who purchase subscription

21) See Interview with Lyor Cohen, May 8, 2017 ("Do you know that 80 percent of all of watch time is recommended by YouTube? That's one of the biggest misconceptions. Everybody thinks that all the music that's being listened to and watched is by search. That's something that I'm not sure why it got lost in the sauce, but that's a really important and powerful thing."), available at: <https://www.recode.net/2017/5/8/15575938/lyor-cohen-youtube-warner-music-interview>

22) "Value of YouTube to the music industry -- Paper 3: Promotion" RBB Economics (June 2017), available at: <http://www.rbbecon.com/downloads/2017/06/Value-of-YouTube-to-the-music-industry-Paper-III-Promotion1.pdf>

services: you can't make valid, substitutional comparisons where the kinds of music listened to are not substitutes for each other, as Pansori music is not a substitute for K-Pop. A June 2017 study by RBB Economics using data on listening habits in the United States, the UK, Italy, Germany, and France led them to this exact conclusion:

[U]sers tend to use audio streaming platforms and YouTube differently.

In summary:

- **YouTube users tend to listen to less popular tracks.** The top tracks on streaming platforms typically have more streams than YouTube views in the United Kingdom, France and Germany, whereas the less popular tracks on streaming platforms tend to generate more views than streams. This suggests that users are more likely to favour audio streaming services for the more popular tracks.
- **YouTube users tend to listen to slightly older tracks.** Breaking down songs by age shows that users' tendency to use YouTube to listen to less popular tracks is not driven by differences in the age of tracks; if anything YouTube users tend to listen to slightly older songs than the average on streaming platforms.
- **Official videos uploaded by the music industry directly (premium music videos) account for the largest share of YouTube views for the sample of tracks for which we received data,** and the shares of PMVs are even higher for newer and more popular tracks.²³⁾

23) "Value of YouTube to the music industry -- Paper 4: Value for Consumers," RBB Economics page 4 (June 2017), available at: <http://www.rbbecon.com/downloads/2017/06/Value-of-YouTube-to-the-music-industry-Paper-IV-Value-for-consumers.pdf>

On the final point in this quotation, the importance of official videos, see Value of YouTube to the music industry -- Paper 5: Direct Value to the industry" RBB Economics pages 12-15 (June 2017), available at: <http://www.rbbecon.com/downloads/2017/06/Value-of-YouTube-to-the-music-industry-Paper-V-Direct-value-to-the-industry.pdf>

Here is the data that led to RBB's conclusions:

The most popular songs represent a much larger share on streaming platforms than on YouTube. The top streaming tracks make up 32% to 46% of total streaming volumes, but only 7% to 25% of total YouTube views, varying by country. The less popular, non-picklist tracks make up only 54% to 68% of total streaming volumes, but as much as 75% to 93% of total YouTube views. **Users tend to use audio streaming platforms primarily for top songs, whereas YouTube is more likely chosen for less popular songs.** YouTube users listen to a much larger base of songs on YouTube, which are not as popular on streaming services.²⁴⁾

The music listened to on YouTube is not only less popular, it is also older, which has an effect on whether those songs are included in a subscription service since subscription services skew toward newer music:

Users tend to use YouTube to consume older music

Users' tendency to listen to more popular songs on streaming platforms, and less popular songs on YouTube does not seem to be driven by differences in the songs' ages. We compare the age of tracks between streaming platforms and YouTube. The age of a track was defined at the reference week, the week in which the top streaming tracks were chosen to construct the picklist of tracks. The tracks were then divided into different buckets based on their age, and for each bucket the share of total platform consumption was calculated.

The distribution of platform shares in the different buckets was then compared across YouTube and streaming platforms.

If anything YouTube users tend to listen to slightly older songs than the average on streaming platforms. A similar small difference is observed in the United Kingdom and France. Within our sample of tracks, in Italy, tracks

24) Id, at 4.

older than 6 months accounted for 66% of streams, but 72% of YouTube views; in Germany streams of tracks older than 6 months accounted for 70% of streams, but 92% of YouTube views.²⁵⁾

RBB's data demonstrate that comparisons between YouTube and subscription services are inapposite, apples and oranges. For there to be a value gap between YouTube and subscription services, YouTube would have to be substitutional, when in fact it either caters to a different audience or is complementary -- leading people to subscription services or to paid downloads like iTunes. This type of false comparison is a common, ancient logical fallacy, appropriately called "The Fallacious Comparison":

4. Fallacious Comparison

This is the familiar fallacy of comparing things which are not comparable — e.g., comparing apples with oranges — and then building an argument around the results of the comparison. Fallacious comparisons often result from asking questions which are either too vague or too broad. Thus, while it makes perfect sense to ask whether apples cost more or less per pound than oranges in a particular market on a particular day, it makes no sense at all to ask simply whether apples are more economical than oranges, a question which is too broad because it fails to specify not only date and market but also the intended use of the fruit. No matter how cheap apples become, they will never become an economical source of orange juice! Similarly, the question "are apples or oranges better" is too vague to yield a single, definite answer, as it appears to ask for a statement of personal opinion in response rather than a statement of fact.²⁶⁾

Given the different types of music listened to on YouTube versus subscription

25) Id, at 5-7.

26) See <http://www.angelfire.com/ks2/fallacies/fallcomp.htm>

services, it shouldn't be surprising that YouTube appeals to a different type of listener, people who listen to less music, less popular music, and older music than that listened to by people who listen to music on subscription services. And of course, revenue generated by paid subscriptions generates income differently than income generated by advertising supported services. The data refutes any value gap.

5. The Totality of Payments is What Matters

Comparisons between revenue sources can easily be manipulated by excluding some sources of income. The result and purpose of such manipulation is to make one party's contributions appear unfavorable. This has certainly happened with YouTube. The complaint that YouTube isn't paying its fair share (a wholly subjective judgment) is based on looking at a single source of revenue YouTube sends to artists, advertising revenue from its free service. YouTube also offers a subscription service in Korea, and the revenues from this service must also be counted toward YouTube's contributions to artists.

Content ID, which I spoke about at the Seoul Forum, is another revenue source and a very important one.²⁷⁾ Aside from the direct licensing deals, as of February 21, 2017, YouTube has paid out more than US \$2 billion from Content ID alone. In a blog post on August 17, 2017, Lyor Cohen, a long time music industry execu-

27) ContentID involves a copyright owner sending YouTube a digital reference file. When someone seeks to upload a video(including one containing music) to YouTube, YouTube runs a potential match between that video and the reference file previously provided by the rightsholder, according to match criteria set by the rightsholder. If there is a match, the rightsholder is put in the driver's seat: it can either block the video from being uploaded; it can allow the video to be streamed but receive revenues from advertising placed against the video, or it can allow the video to be streamed but not have advertising run against it. All of this takes place outside of the safe harbors: there is no need for a takedown if the the video is blocked or is allowed up with permission. Over 90% of music rightsholders opt to allow the video to stay up and receive advertising revenue. ContentID is a very important form of revenue for the music industry, and in the way it puts rightsholders in control, it is a form of licensing much like Spotify, rebutting the argument that safe harbors are a way to avoid payment.

tive and now an executive at YouTube, noted that in the previous 12 months, YouTube paid out to the music industry over \$1 billion US dollars. That is the same amount that ASCAP brought in as revenue for the same length of time for both domestic and foreign income.²⁸⁾ A billion dollars spends the same way whether it comes from YouTube's checking account or ASCAP's.

What one has to look at is not an apples and oranges comparison of how much money artists get from a subscription service versus an ad supported service, but rather at how much money YouTube actually pays artists from all sources, and that amount is quite impressive.

The advertising revenue source from YouTube can alone be very lucrative, though. There is a very famous example of this from South Korea. In two years alone, the Bloomberg News Service calculated that Psy of 강남스타일(Gangnam Style) fame²⁹⁾ made US\$2 million dollars from YouTube advertising dollars. But this is only part of the story:

It should be made clear that \$2 million figure mentioned above is from YouTube advertising alone. When all other revenue streams are taken into account—sales of the track on iTunes, live shows, endorsements, etc.—Psy's wealth swells to somewhere between \$8 million and \$10 million.³⁰⁾

That is from 2012-2014 alone. Psy's story makes clear a very important point: YouTube is not a streaming service, or a subscription service although it is both of those things. YouTube is primarily a way for South Korean artists to build a career. Psy was not the only Korean artist to do so in 2012: Bangtan Boys, the biggest current K Pop act from independent label Big Hit, got their start on YouTube and SoundCloud in 2012. They won top social artist award at Billboard

28) See <https://www.ascap.com/press/2016/0427-ascap-revenue-tops-one-billion-for-second-year>

29) Here is the link to his original post: <https://www.youtube.com/watch?v=9bZkp7q19f0>. As of November 2017, the post has almost 3 billion view.

30) <https://www.forbes.com/sites/hughmcintyre/2014/06/16/at-2-billion-views-gangnam-style-has-made-psy-a-very-rich-man/#4a50fbc73fdb>

Music Awards 2017. On YouTube, artists have multiple ways to express their creativity, and multiple ways to earn money.

YouTube has been of important benefit to South Korean artists, and not just to those like Psy. An August 2017 piece by Sohee Kim in Bloomberg Businessweek explains how “YouTube is turning South Korea into a pop culture juggernaut” :

On YouTube, views of videos by the top 200 K-pop artists have tripled since 2012. Last year they were watched about 24 billion times, with 80 percent of views coming from outside South Korea, YouTube says. Boy band BTS has more page-views than Lady Gaga, Selena Gomez, or Drake. “It might have been impossible for K-pop to have worldwide popularity without YouTube’s global platform,” says Sun Lee, head of music partnerships for Korea and Greater China at YouTube and Google Play. “K-pop is creating a great sensation in the U.S. I don’t think this is a temporary phenomenon.”

...

BOTTOM LINE - Global revenue from K-pop reached a record \$4.7 billion in 2016, buoyed by a YouTube audience that spans New York to Shanghai.³¹⁾

III. The Value Gap is a Campaign Slogan

The value gap theory in the OSP debates is not at heart bad economics(although it surely is that); rather, the value gap argument is, from its inception and in its purpose, the creature of a lobbying campaign by the music industry launched to influence the EU’s DSM copyright reform efforts.

Copyright legislative reform efforts are political campaigns, and catchy slogans are an essential part of political campaigns. Many such slogans are tested in focus groups put together by the public relations companies who coin the slogans. After

31) <https://www.bloomberg.com/news/articles/2017-08-22/the-4-7-billion-k-pop-industry-chases-its-michael-jackson-moment>

the slogan that meets with the best results from the focus group is picked, the slogan is marketed to the public as the long-held, deep, genuine beliefs of whichever politician decides to buy its use.³²⁾ The slogan becomes the centerpiece of the politician's call to action, and is marketed as somehow embodying concrete proposals for improving the lives of a country's citizens, when in truth it is a public relations ruse.

Ruses are not always evident at first; as a political tactic they may appear to be addressing actual problems. Indeed, that is precisely their power. Political ruses are built on fallacies and vague terms, as explained by American economist Thomas Sowell:

Fallacies are not simply crazy ideas. They are usually both plausible and logical - but with something missing. Their plausibility gains them political support. Only after political support is strong enough to cause fallacious ideas to become government policies and programs are the missing or ignored factors likely to lead to "unintended consequences," a phrase often heard in the wake of economic or social policy disasters. Another phrase often heard in the wake of these disasters is "It seemed like a good idea at the time." That is why it pays to look deeper into things that look good on the surface at the moment.

Sometimes what is missing in a fallacy is simply a definition. Undefined words have a special power in politics, particularly when they engage people's emotions. "Fair" is one of those words which have attracted political support for policies from Fair Trade Laws to the Fair Labor Standard Act. While the fact that the word is undefined is an intellectual handicap, it is a huge political advantage. People with very different views on substantive issues can be unified and mobilized behind a word that papers over their

32) See, e.g., Alex Wilson, "Alchemy of a Political Slogan," *New York Times* August 22, 2004, available at: <http://www.nytimes.com/2004/08/22/style/the-alchemy-of-a-political-slogan.html>

differing and sometimes even mutually contradictory, ideas. Who, after all is in favor of unfairness?³³⁾

This is exactly how the value gap campaign in the DSM reform effort arose. The campaign is based on the undefined and emotional words “fair” and “value.” We are told, variously, that authors and performers deserve “fair value” for use of their works; “fair remuneration;” that there needs to be a “fair balance” (balance is another undefined and emotional term); that there needs to be a “fair, level playing field” between music services; that there should be a “fair climate” for licensing. There is even an ad hoc group for the DSM project called the “Fair Internet for Performers.” The undefined, emotional words “fair” and “value” are then attached to a fallacious comparison -- comparing dissimilar music services -- and in the case of YouTube, by also excluding the vast majority of other revenue that YouTube pays out to authors and performers. The figures generated by this fallacious and incomplete comparison then forms the false basis for the alleged unfairness and alleged lack of value. The emotional purpose of conjuring up such moral judgment is to lead policy makers to reach a conclusion -- “something is wrong here” -- which will in turn lead to legislative proposals.

The use of “value” in “value gap” may seem like it is being used to refer to objective monetary amounts -- monetary values. This is why figures from dissimilar and incomplete revenue sources are used: those figures provide the patina of reality. But the thrust of the debate is emotional, an alleged lack of fairness. In his book “Rediscovering Emotion: Emotion and the Claims of Feelings,” British Philosopher David Pugmire cautions that “emotions are not just feelings, when they are feelings at all. They involve thoughts, and involve them essentially.”³⁴⁾ This is not new ground. Physicians Michael Lewis, Margaret Sullivan, and Linda Michalson have written that “emotion and cognition are neither separate nor independent processes. Rather, both are elements of a continuous, inseparable stream of

33) Thomas Sowell, *Economic Facts and Fallacies 1* (2d edition 2011, Basic Books).

34) Pugmire at 12 (Edinburgh University Press 1998).

behavior.”³⁵) Professors Fabrizio Macagno and Douglas Walton add that “judgments and emotions are strictly interwoven,”³⁶) Emotions, they state are also “motivations for action.”³⁷) The relationship between values and action is easy to see: our values form the basis for our emotions. Once our emotions are triggered, we believe we must act to protect our values.

How do emotions persuade? Professor Robin Nabi offers the following two relevant answers:

First, emotions serve as heuristics, or cognitive rules of thumb, guiding decisions with minimal information processing or thought.

...

[Second], emotions may promote selective information processing[:] emotions can be conceptualized as frames or perspectives infused into messages that promote the salience of selected pieces of information over other[[messages] and thus encourage different problem definitions, causal interpretations and/or treatment recommendations.³⁸)

In simpler terms, the use of emotive language like fairness leads to quick decision making with incomplete information under conditions where there is more than one possible outcome. This is the genius of the value gap rhetoric in the DSM debates: the deliberately ambiguous nature of the value gap term -- does it refer to monetary amounts(values) or to moral principles(values like fairness) -- allows it to function as a subconscious vehicle for the emotional rhetoric of fairness. We conclude the value gap is the result of unfairness, and we must then act to correct the unfairness. As Professors Macagno and Walton explain:

35) “The Cognitive-Emotional Fugue,” in *Emotions, Cognition & Behavior* 264 (Carroll Izard, Jerome Kagan & Robert Zajonc editors, Cambridge University Press 1984).

36) “Emotive Language in Argumentation” at page 62 (Cambridge University Press 2014).

37) *Id.*, at 64.

38) Robin Nabi, “Discrete Emotions and Persuasion” in *The Persuasion Handbook: Developments in Theory and Practice* 289, 299 (James Dillard & Michael Pfau editors, Sage Publishing 2002).

The use of emotive language covers up that an argument is being put forward in an argumentative way, [using] words that are likely to be vague and undefined and whose meaning is very much at issue. This way of proceeding is very hard to combat, for its proponent has seemed established that she is in the right in only a few words, while the respondent has to struggle to question or counteract the argument by getting into difficult territory. He has to start to talk about meaning of words and definitions and about emotive language, easily looking to be picky or incoherent.³⁹⁾

This of course describes the very burden this article has been forced to assume. Those who claim there is a value gap simply proclaim there is a gap, pointing to incomplete and dissimilar revenue sources and proclaiming them irrefutable proof of the gap. This gap then forms the basis for moral outrage and a call to action. The rest of us then have to do the hard work of showing that the term value gap has no shared meaning, and that whatever the meaning may be in economics, the data refute the claim.

I don't know whether "value gap" was focus-group tested, but we do know from the very public coordinated campaign that began in the music industry in 2015 that it was designed not descriptively of an actual economics state of affairs, but instead as the rallying political slogan for a larger attack on the existing EU OSP safe harbors. As Dr. Sowell warned, a fallacy that gains traction in a political context becomes a potent weapon in the intended attack on the perceived enemy, an enemy who is cast as being brazen and craven enough to oppose "fairness."

"Attack" is of course a metaphor, and a warlike one. Copyright political campaigns are staged like battles, complete with an enemy to be vanquished, in this case YouTube. YouTube is cast as The Other, as something different from ordinary businesses, and dangerously so, something that doesn't play by the rules and therefore must be punished in order for society to be safe again. The Other is the clas-

39) "Emotive Language in Argumentation" at pages at 2-3

sic false construct of Us and Them, Good and Evil. The Other is fabricated in order to simultaneously unite your side in a cause, and to paint the opposition to that cause as having a fundamentally evil nature, as possessing evil traits and malicious motives. The Other is classical identity politics.

In such an artificially created, polarized world, any meaningful communication is rendered all but impossible, as is the finding of a common ground. The Other must be brought to heel, involuntarily if it comes to that. Vanquishing The Other becomes an ideological litmus test against which all others are judged: you are either for us or against us, based on whether you agree with our framing of the world as revolving around a political campaign slogan masquerading as a single, simple purported ideology(e.g., “Make America Great Again”). Those who manufacture such a purported ideology “are less interested in the idea itself than in its use as the driver and justification of action.”⁴⁰⁾ Objections to politicians’ proposed actions is portrayed not as the normal operation of democratic expression of different views toward a common good, but instead is falsely painted as a betrayal, as supporting The Other, as being weak on crime, as being socially and morally corrupt.

This is the context in which the alleged copyright value gap must be understood: it is an ideological weapon deployed against the latest proposed enemy, YouTube.

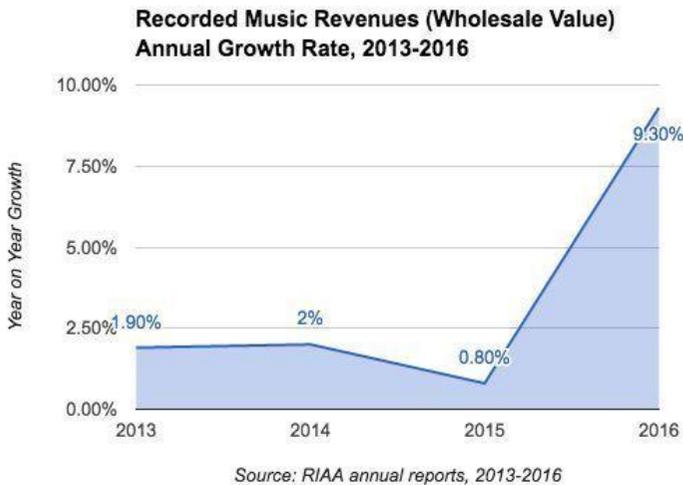
IV. A Short History of Copyright Owners’ Many Enemies

There have been many enemies in copyright law. In 1923, the music industry asked the U.S. federal government to deny radio broadcasters’ renewal applications, blaming radio stations for the decline in music sales. Ten years later the American Association of Composers, Authors and Publishers(ASCAP) put out a pamphlet decrying the phonograph as the “murderer of music.” Later, talking movies, jukeboxes, television, photocopying machines, cable television, videocassette

40) Masha Gessen, “The Future is History” page 434 (2017, Riverhead Books).

recorders, compact discs, digital audio tape, digital music storage lockers, the Internet, streaming services including Spotify were alleged to result in the end of copyrighted works. Spotify began as what was called a pirate service,⁴¹⁾ and has repeatedly been the subject of criticism by artists.⁴²⁾ The economic argument was the old favorite: Spotify was cannibalizing downloads, and paying artists less overall. Yet, as with past changes in technology, the artists and the industry adjust and do well.

The data support this conclusion: According to the music industry's own figures, revenues increased an impressive 9.3% in 2016 over 2015:



While these figures are for the United States, IFPI's most recent report⁴³⁾ noted:

The global recorded music market grew by 5.9% in 2016, the highest rate since IFPI began tracking the market in 1997, according to the IFPI

41) See <https://copyriot.se/2017/06/13/spotifyboken-skickad-till-forlaget/> and <https://gizmodo.com/early-spotify-was-built-on-pirated-mp3-files-new-book-1795109991>

42) See, e.g.: <https://www.theguardian.com/technology/2013/jul/29/spotify-vs-musicians-streaming-royalties>
<https://www.theguardian.com/technology/2013/oct/07/spotify-thom-yorke-dying-corpse>

43) <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2017>

Global Music Report 2017, released today. Total revenues for 2016 were US\$15.7 billion. At the end of 2016 there were 112 million users of paid music streaming subscriptions driving year-on-year streaming revenue growth of 60.4%. Digital income last year accounted for half the global recorded music industry's annual revenue for the first time. Growth in streaming more than offset a 20.5% decline in downloads and a 7.6% decline in physical revenue.

Streaming is helping drive growth in developing music markets, with China (+20.3%), India (+26.2%) and Mexico (+23.6%) seeing strong revenue growth.

Indeed, so well is the record industry adapting to the new environment of streaming that the report notes that the “[g]rowth in streaming more than offset a 20.5% decline in downloads and a 7.6% decline in physical revenue.” Yet, just a very few years ago, we were told that the value gap between downloads and streaming would be the end of the music industry.

1. Immanuel Kant and Musicians Making a Living

In 1781, German⁴⁴⁾ philosopher Immanuel Kant published "A Critique of Pure Reason."⁴⁵⁾ The work begins:

Human reason, in one sphere of its cognition, is called upon to consider questions, which it cannot decline, as they are presented by its own nature, but which it cannot answer, as they transcend every faculty of the mind. It falls into this difficulty without any fault of its own.

44) To be geopolitically correct, Germany did not become a nation state until 90 years later. Kant was born and lived in East Prussia, in the city of Königsberg. Königsberg is now called Kaliningrad and is a part of Russia.

45) Available here in an English translation: <https://www.gutenberg.org/files/4280/4280-h/4280-h.htm>

In simpler phrasing: to be human is to be haunted by questions we feel compelled to answer, but never can. Some of these questions are significant: "What is the purpose of life?", which my 16 year old son is struggling with mightily right now. Others are trivial: "Does my cat love me?" Some questions we can't find an answer to because we seek the one true path, the one true answer for all problems. The yearning for the one true answer takes place in a world that is always changing, yet we pretend the one true answer is static. The Sixth Century B.C.E, Greek philosopher Heraclitus noted this contradiction in his famous aphorism that "No one ever steps in the same river twice."⁴⁶⁾

The history of the creation and enjoyment of music is one of constant change as musical tastes change, and as consumer behavior and technology change. How could it be otherwise? Cultural works arise from culture. Cultures change in response to changing tastes and beliefs, as well as technological and other changes, and so too must cultural works, including music. There was a time when music was only made by amateurs, by people in their own homes. Music publishers arose to supply sheet music, and this was the dominant way music was enjoyed for a long time, until the phonograph record and player pianos at the end of the 19th century began to change habits. The market for player pianos soon died, like all technologies do. Very quickly, the spread of radio was added as a new existential threat to performing musicians and to culture: people would passively listen at home to whatever was being broadcast. And once radio stations broadcast recorded music, there was less need for radio orchestras playing live. Television was then deemed an existential threat to radio.

Composers are paid for such performances by radio and TV in the U.S., but not performers. Performers made their money by performing and by selling recorded performances, originally on vinyl records, and then on analog tape. Digital technology in the mid-1980s was said to be the sure end of the music industry, until the sale of compact discs became the largest source of income the music in-

46) See https://en.wikipedia.org/wiki/Heraclitus#Panta_rhei,2C_.22everything_flows,22

dustry had ever known.

Next was mp3 technology, which focused on the sale of individual songs, rather than the sale of entire albums. The music industry protested loud and wide that this technology had resulted in a loss of income, and there was some truth to this. But the real truth was that the sale of compact discs was already on the decline, and the loss of revenue came not from piracy but from consumers finally being able to buy the one or two songs they wanted, rather being forced to also buy 10 or 11 other songs they didn't want: forcing consumers to buy 12 songs in an album when they only wanted one or two certainly resulted in larger profits for the record labels, but this was not a benefit to the public, which was forced to spend money on unwanted goods. It would be like going to a clothing store to buy socks and being told they were only sold as a part of set of pants, a shirt, and a jacket. Once things changed and you could only buy socks the stores may well have less income, but to me this would be a cause to celebrate.

From society's standpoint, the unbundling of recorded songs from albums was not a loss of consumer spending, since consumers were then free to spend money on other things, things they needed or wanted. Nor did this mean consumers were purchasing less music, only that they were purchasing it in the way they had always wanted to but had been prevented from doing. Today, we cannot imagine having to buy music only in albums, rather than by individual song, even though the album format was the dominant way recorded music was sold for many decades. What once seemed the only natural way to purchase copyrighted works has always been replaced by new ways: few people today, for example, buy musical sheet music, although that was the dominant form of access to music in Sousa's day.

In Sousa's day, the enjoyment of music took place in the house or in the concert hall. With radios in cars, music became more portable, although not completely portable since your car was allowed only in certain places. The Sony Walkman cassette player, introduced in the late 1970s, made the idea of a truly portable home music system a reality, leading to a revolution in consumer habits. The Walkman had another revolutionary impact: Portable radios had been around for

decades, but you were limited to listening to what the radio station had selected for you to hear. With the Walkman, you could listen to the music you wanted to hear, and in private: while running, walking to work, or even at work if your boss let you. The Walkman changed as technology changed: there was a Walkman for CDs(I owned one), and later for mp3s.

The iPod, introduced on October 23, 2001, almost 9 months after the iTunes store came to Macintosh computers, was the great portable device for digital downloads. There was one drawback, though: storage space. Portable devices, which are forms of external data storage devices, inherently have limitations on storage space: mp3 technology, by compressing the size of the file, allowed for more music to be stored, but there were limits, and those limits acted as an obstacle to purchases. Another problem was when the portable device malfunctioned or was lost or replaced: with a download, you lost access to the download when the device on which it was stored no longer functioned. This inconvenience led to the innovation of cloud services where storage took place on remote computer servers.

Another, related innovation has led to another fundamental change in consumer habits: if something could be stored in the cloud, why download it at all? Why not have the copy reside from its inception in a cloud service? Why not just access it when you want from the cloud? This way you don't need to worry about storage limits or malfunctioning devices. Purchase a new phone? No problem, your music is in the cloud not on your phone. Ownership of physical copies of copyrighted works became much less necessary or attractive. This had nothing to do with copyright law or an alleged value gap, but rather with technology providing a more convenient way to live. But even here, some rightsholders fought the technology, claiming that you should have to buy a new copy for every device you listened to a copyrighted work from. Fortunately, this argument met with such resistance that it was dropped.

The introduction of streaming services has had a similar appeal to cloud storage: with streaming you don't even need your copy being stored in the cloud. You access a copy previously purchased by the streaming platform. If one million people

want to listen to a particular song or watch a particular video, why should there be a million separate copies? Rather than having to store one million copies, one will do just fine. Note that this has nothing to do with value: it is a technological issue. With a download, the copy is stored on the consumer's device and can only be accessed from that device. There is a discrete sale that can easily be monetized and calculated. There can be similar behavior with streaming and is: if you want to watch a movie, the movie copyright owner can charge you a one-time fee to watch the movie, or to watch it over a set period of time. Some services do work this way, so it is important not to confuse monetisation with different types of technology.

When there are a large number of copyrighted works that consumers want to access, subscription services can provide a good way to monetise: people pay a set fee and can then access as many works as they want. Cable television worked that way and still does, although even cable services also offer video on demand: you have a basic cable channel that works by subscription, supplemented by on demand services that resemble retail sales. There are also over-the-air broadcast channels that are advertising supported. Some people choose not to have cable but only these free, advertising supported channels. To suggest that platforms must only offer one type of service is to deny consumer choice.

Importantly, different types of works are enjoyed in different ways by people. Many people will listen to the same song over and over again. Few people watch the same movie over and over again. Most people read a book once, but may wish to have a copy of it around to refer to now and then. Some works, especially short ones, are the equivalent of fast food: you “digest” them quickly, often, and without much thought. Magazine articles may be read at leisure, but only once. Newspapers may be scanned for headlines with the occasional reading of an article of interest. And people in different countries have different consumption patterns for the same types of works, as well as having very different levels of economic and technological development.

There is no one business model for all copyrighted works, or one business mod-

el for just music. Why not? Because human preferences vary and change, and because countries are different too. We like the freedom to find new things, and to find new ways of enjoying old things. Yet, when it comes to drafting laws, there is a strong compulsion to find the one magic solution, a solution that will solve all of our problems. YouTube provides new ways for musicians to reach new and old audiences, both through its free advertising supported service and through its YouTube Red subscription service. Other services provide other types of services, including downloads. People like me still buy CDs and go to lots of live concerts, and buy sheet music.(Sousa would approve) Musicians have always relied on a variety of ways to create music, reach audiences, and make money. YouTube is an important partner in those efforts, but it is not the only one: the making of false comparisons between different paths ignores that there is not one true but many paths. And that's a good thing.

Abstract

The Lack of Value in the Value Gap

William Patry
Chung, Jae-Hoon

In the debates over the scope of copyright safe harbor regimes, music industry rights holders have argued that reforms are necessary to address what they describe as a value gap between payments made to performing artists from subscription streaming services(e.g., Spotify), against payments made to performing artists from advertising supported streaming services(e.g. YouTube). The premises of the value gap argument are that Youtube isn't paying enough and that somehow the existence of safe harbors is the reason for this underpayment. The premises are contradicted by the evidence, which shows that subscription services and advertising services respond to different types of listeners, listening to different types of music. YouTube complements subscription service, and pays out significant revenue to musicians. Debates on copyright reform are important -- and like all important issues they should be conducted based on empirical inquiries, and not on political slogans such as a "value gap" that doesn't exist.

Keywords

DSM, Value Gap, Digital Single Market, YouTube, ContentID

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