

# Full surrender: Fullscreen settles music lawsuit

## THE CASE:

*The National Music Publishers Association v Fullscreen, Inc*  
US District Court for the Southern District of New York  
8 January 2014

Seward & Kissel's **Jeffrey M Dine** questions how do you solve a problem like YouTube?

**On 8 January 2014, the National Music Publishers Association of America (the US trade association for music publishers ('NMPA')) and Fullscreen, announced that they had had settled a lawsuit brought by certain NMPA members against the online service and its principal, George Stropoulos.<sup>1</sup>**

Fullscreen is a 'multi-channel network' that provides a range of services for content creators on YouTube. NMPA's members brought suit in August 2013 in the US District Court for the Southern District of New York, alleging that Fullscreen had "engaged in widespread and wilful copyright infringement" in connection with videos using musical compositions owned by plaintiff music publishers.<sup>2</sup>

Fullscreen was formed in 2011, by Stropoulos, a former Google employee who co-founded YouTube's Partner Program, with the goal, he has said, of "build[ing] a global media company in partnership with thousands of creators around the world".<sup>3</sup> Fullscreen offers tools for content creators to analyse monetisation of their YouTube postings, seek sponsorship, develop audiences, and collaborate with other artists, and obtain support from Fullscreen itself.<sup>4</sup> Fullscreen claims 15,000 YouTube channels with 200m subscribers, and 3bn views per month.<sup>5</sup>

According to the parties' press release, NMPA members who opt in to the settlement agreement will be paid compensation for past use of their works. Going forward, Fullscreen 'affiliated' YouTube user channels<sup>6</sup> with music videos will be licensed under YouTube's existing licences with music publishers. Channels 'managed' by Fullscreen will have videos containing unlicensed music removed.

## Multi-channel networks and YouTube

YouTube, of course, is a behemoth video sharing network. It claims more than 1bn unique visitors monthly, and 6bn hours of video watched each month.<sup>7</sup> Users upload 100 hours of video to YouTube every minute. YouTube's Partner Program, started in 2007, enables content uploaders to receive payment from ads played before their videos.<sup>8</sup> But even highly successful providers (who can make over a \$100,000 dollars a year), have come under pressure from the increasing supply of content and decreasing advertising prices.<sup>9</sup>

To protect owners of content used in videos, YouTube's Content ID programme automatically compares uploaded videos against an extensive content database. When a video matches an item in the Content ID database,<sup>10</sup> YouTube automatically applies the copyright owner's country-specific direction (block or mute the content, monetise it or track it). Until very recently, however, Content ID applied only to amateur video, not YouTube partner videos.

## Multi-channel networks

Enter the multi-channel networks (MCNs), explained by YouTube as "entities that affiliate with multiple YouTube channels, to offer assistance in areas such as production, programming, funding, cross-promotion, partner management, digital rights management, monetisation/sales, and/or audience development."<sup>11</sup>

Key to the issues in the lawsuit is that, while amateur uploads to YouTube are automatically covered by YouTube's direct licensing agreements with music publishers, videos uploaded under the YouTube Partner

Program until recently, were not. Thus, MCNs had control over whether or not the music used in their member's channels was properly licensed, and although they represented to YouTube that it is, such may not actually have been the case.<sup>12</sup>

## NMPA member's complaint

According to the complaint, Fullscreen did not license music used by the creators with whom it worked. The complaint alleges that Fullscreen distributed, marketed and promoted infringing works of its network members.<sup>13</sup> It also alleges that Fullscreen was directly involved in producing many of these infringing works, and that some of these videos were sold through Apples iTunes and other distribution platforms.<sup>14</sup> Stropoulos allegedly controlled Fullscreen and its employees, was responsible for the infringing acts, and profited from them.<sup>15</sup> The complaint lists over 80 allegedly-infringed musical works, and identifies over 600 allegedly infringing videos by their URL.

The complaint claims that Fullscreen falsely represented to YouTube and others that it had licences to music in infringing videos, when in fact it did not and that Fullscreen claimed ownership of the entirety of the music videos on its network, when it does not actually own the musical works in them.<sup>16</sup>

NMPA's members claimed that Fullscreen's infringement was wilful, entitling them to statutory damages of up to \$150,000 for each infringed work registered with the US Copyright Office.<sup>17</sup> Plaintiffs sought, in the alternative, their actual damages and Fullscreen's profits from the claimed infringements. In addition, NMPA asked for attorneys' fees and expenses, which can be awarded for infringement of registered works.

Finally, plaintiffs sought an injunction against Fullscreen in the complaint, though they did not move for a preliminary injunction.<sup>18</sup>

Fullscreen and Strompolos never answered the complaint or filed a substantive pleading. Instead, five months after the lawsuit was filed, the parties filed their stipulation of dismissal with prejudice, ending all claims by the plaintiffs.

### How do you solve a problem like YouTube?

Content owners have engaged in a long-running struggle with YouTube, with mixed results. Most prominent is the lawsuit brought by Viacom International and other plaintiffs, including the NMPA and a number of music publishers, against YouTube in 2007. In that case, the federal district court judge found, and the appeals court affirmed in April 2012, that as a service provider, YouTube could only be outside the safe harbor provisions of the Digital Millennium Copyright Act.<sup>19</sup> Therefore, it was liable for infringement on the basis of videos posted by users, if it had 'actual knowledge or awareness of facts and circumstances that indicate specific and identifiable instances of infringement'.<sup>20</sup> The appeals court remanded for fact-finding on a number of particular issues.

On remand, the district court in April 2013 resolved the factual issues in YouTube's favour and granted pre-trial summary judgment dismissing the case.<sup>21</sup> Plaintiffs had appealed, but at the time of writing, Viacom settled its suit against YouTube. The settlement details remain confidential, but it is reported that no payment is involved.

A related case was brought as a purported class action by plaintiffs, including the NMPA, on behalf of "every person and entity in the world who own infringed copyrighted works" that were the subject of repeat infringements on YouTube, or "are musical compositions which [YouTube] tracked, monetised or identified and allowed to be used without proper authorisation."<sup>22</sup> The judge (who also heard the *Viacom* case) begged off, saying that "[t]he suggestion that a class action of these dimensions can be managed with judicial resourcefulness is flattering, but unrealistic."<sup>23</sup> He denied class certification on the basis that individual factual and legal issues would predominate over class-wide issues for the 'extremely numerous' proposed class.<sup>24</sup> The parties stipulated to dismissal of the case with prejudice on 7 November 2013.

### A second front in the war on YouTube infringement

Litigation against YouTube has not brought the NMPA direct success. It did, however, play a role in YouTube's development and

continuing expansion of its content monitoring programme, now known as Content ID.<sup>25</sup> In 2012, the NMPA entered into an agreement with YouTube covering licensing of amateur content, not YouTube Partners. In his blog post on Billboard.com in March 2013, NMPA board member Matthew Pincus, made an express threat against Fullscreen and another prominent MCN, Maker Studios, saying, that "[b]oth companies should [enter into broad music licensing agreements] immediately and NMPA will be enforcing its rights to make sure that they do." In its August 2013 press release announcing the lawsuit against Fullscreen, NMPA also announced a settlement with Maker Studios.

One subtlety to the settlement is that Fullscreen will only be responsible for copyright compliance of its 'managed channels', while its 'affiliated channels' will be licensed under 'YouTube's direct licences with music publishers'. That provision is consistent with YouTube's licensing policy for MCNs, announced in October 2013. MCNs can now choose to work with creators as either 'managed partners' or 'affiliates'.<sup>26</sup> Videos uploaded by affiliates are to be subject to licensing reviews, which can delay them being monetised. Videos uploaded by managed partners, however, are not subject to delay. MCNs are incentivised to work with users as managed partners, because they get paid faster – but they must then take responsibility that the managed partner's videos are properly licensed. That policy was put into effect in December 2013.<sup>27</sup>

### Comment

The Fullscreen settlement is part of a successful, targeted effort by music publishers to enforce licensing requirements against commercial YouTube users and the MCNs that support and develop them. In conjunction with YouTube's licensing agreements with music publishers, MCNs are now under an imperative to take responsibility for the creators whom they manage, and their affiliate partners are also under significant pressure to monitor themselves.

### Footnotes

1. Press release, National Music Publishers Association, *NMPA and Fullscreen reach settlement agreement*, 8 January 2014. <http://www.nmpa.org/media/showwhatsnew.asp?id=96>.
2. Complaint, *Warner/Chappell Music, Inc et al v Fullscreen Inc*, No 13-civ-5472 at 2 (SDNY 6 Aug 2013).
3. Lori Kozlowski, 'A startup network, old Hollywood lot, and media shifting', *Forbes* (28 Aug 2013). [onforb.es/OduZH6](http://onforb.es/OduZH6).
4. <http://fullscreen.net/creators>.

5. <http://fullscreen.net>.
6. Any user with a YouTube account can create 'channels' to categorise and aggregate their uploaded content.
7. [www.youtube.com/yt/press/statistics.html](http://www.youtube.com/yt/press/statistics.html).
8. id.
9. Leslie Kaufman, 'Chasing their star, on YouTube.', *New York Times*, 2 Feb 2014, at BU1.
10. How Content ID works, <http://bit.ly/1fjv9aH>.
11. Multi-channel networks 101, <http://bit.ly/1irq7aD>.
12. Matthew Pincus, YouTube, partners need [sic] to work harder to pay songwriters, publishers fairly: guest post by Matt Pincus', *Billboard.com* (19 Mar 2013). <http://bit.ly/1kHuZgu>.
13. Compl. 39.
14. id 41.
15. id 42.
16. id 44.
17. 17 USC §§ 412 (registration requirement), 504(c) (statutory damages). Notably, works protected under the Berne Convention do not need to be registered as a prerequisite to suit (which is required of US authors) but the registration is required to claim statutory damages and attorneys' fees and expenses.
18. See 17 USC § 502.
19. 17 USC § 512.
20. *Viacom Int'l v YouTube, Inc*, 676 F.3d 19, 32 (2d Cir 2012).
21. *Viacom Int'l v YouTube, Inc*. 940 F. Supp 2d 10 (SDNY 2013).
22. *Football Ass'n Premier League Ltd v YouTube, Inc*, 2013 US Dist LEXIS 69401, at \*6 (SDNY 15 May 2013).
23. id at \*7-8.
24. id at \*11-12.
25. Kevin J Delaney, YouTube to Test Software To Ease Licensing Fights, *Wall Street Journal Online* (12 June 2007). <http://on.wsj.com/1gepHp8>.
26. Mike Shields, Videowatch: How YouTube's New Arrangements with MCNs Work, *Adweek.com* (30 Oct 2013 11:56 am) <http://bit.ly/1ncUJvg>.
27. Todd Spangler, YouTube Copyright Crackdown Hits Multichannel Network Affiliates, *Variety.com* (12 Dec 2013). <http://bit.ly/1j36kmc>.

### Author



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