Content marketplaces as digital labour platforms: towards accountable algorithmic management and decent work for content creators

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Abstract

YouTube is probably the world's largest digital labour platform. YouTube creators report similar decent work deficits as other platform workers: economic and psychosocial impacts from opaque, error-prone algorithmic management; no collective bargaining; and possible employment misclassification. In December 2021, the European Commission announced a new proposal for a Directive 'on improving working conditions in platform work' (the 'Platform Work Directive'). However, the definition of 'platform work' in the proposed Directive may exclude YouTube.

Commercial laws, however, may apply. In the US state of California, for example, Civil Code §1749.7 (previously AB 1790 [2019]) governs the relationship between 'marketplaces' and 'marketplace sellers.' In the European Union, Regulation 2019/1150 (the 'Platform-to-Business Regulation') similarly provides protections to 'business users of online intermediation services.'

While the protections provided by these 'marketplace laws' are less comprehensive than those provided by the proposed Platform Work Directive, they might address some of the decent work deficits experienced by workers on content marketplaces, especially those arising from opaque and error-prone algorithmic management practices. Yet they have gone relatively underexamined in policy discussions on improving working conditions in platform work. Additionally, to our knowledge they have not been used or referred to in any legal action or public dispute against YouTube or any other digital labour platform.

This paper uses the case of YouTube to consider the regulatory situation of 'content marketplaces,' a category of labour platform defined in the literature on *working conditions* in platform work but underdiscussed in policy research and proposals on platform work *regulation*—at least compared to location-based, microtask, and freelance platforms. The paper makes four contributions. First, it summarizes the literature on YouTube creators' working conditions and collective action efforts, highlighting that creators on YouTube and other content marketplaces face similar challenges to other platform workers. Second, it considers the definition of 'digital labour platform' in the proposed EU Platform Work Directive and notes that YouTube and other content marketplaces may be excluded, despite their relevance. Third, it compares the California and EU 'marketplace laws' to the proposed Platform Work Directive, concluding that the marketplace laws, while valuable, do not fully address the decent work deficits experienced by content marketplace creators. Fourth, it presents policy options for addressing these deficits from the perspective of international labour standards.

Keywords: algorithmic management, content marketplaces, digital labour platforms, online intermediation services, YouTube

1 Introduction

On 9 December 2021, the European Commission announced a proposal for a Directive 'on improving working conditions in platform work'—the proposed 'Platform Work Directive' or 'PWD' (European Commission 2021a). The press release announced that the proposal aimed to 'ensure that people working through digital labour platforms can enjoy the labour rights and social benefits they are entitled to,' provide 'additional protection as regards the use of algorithmic management,' and 'provide increased legal certainty' for platforms (European Commission 2021b). That is, the PWD's two goals in terms of worker protection are to tackle false self-employment among persons performing platform work and to regulate algorithmic management on digital labour platforms (see e.g. European Commission 2021a, p. 3). Early legal research indicates that while the Directive is not 'perfect,' it appears likely to facilitate significant progress on achieving both of these goals if it is passed roughly as proposed and it is reasonably well-enforced (see e.g. Veale et al. 2023).

One question, however, has gone relatively underexamined in both the recent policy discussions around the drafting of the PWD and the early scholarly analysis of this new piece of legislation. This is the question of the PWD's *scope of application*: specifically, the question of *to what kinds of digital labour platform it will apply*. Research has identified at least five types of platform that have been described as 'digital labour platforms': platforms for location-based work (i.e., 'gig work platforms'), microtask or crowdwork platforms (e.g., Amazon Mechanical Turk, Clickworker), online freelance platforms (e.g., Upwork), contest-based platforms (e.g., 99designs), and content marketplaces (see e.g. Schmidt 2017; Berg et al. 2018; ILO 2021; Johnston et al. 2021).

While these platforms differ in ways that matter for policy—and some of the categories, especially 'gig' or location-based work platforms, can be divided further (e.g., according to sectors such as care work, domestic work, delivery, and personal transportation; see e.g. Schmidt 2017, pp. 6-7)—the research indicates that all of these types of platforms share some common features that pose challenges to decent work. In particular, they all typically make use of algorithmic systems to manage work activities, workers, and/or work outputs. Workers performing work through these platforms often grapple with the economic and psychosocial harms and risks that can arise when these algorithmic systems are opaque and/or error-prone, and when customers and/or platform operators do not respond to their inquiries and concerns about algorithmically taken or supported decisions. And workers on all five types of platforms have struggled to take effective collective action to motivate platform operators to make substantive changes to address these harms and risks and to engage in meaningful and ongoing dialogue with workers or their representatives. Put shortly, all five types of platform use algorithmic management systems; these systems are often error-prone and opaque and often cause decent work deficits; and progress addressing these issues through social dialogue has been scant.

However, it is not clear if the proposed Platform Work Directive will apply to all five types of digital labour platform. Indeed in what in retrospect looks like a premonitory piece of visual communication, the single official 'related media' item accompanying the Commission press release announcing the PWD was a photograph of a postman wearing rainproof cycling gear, a bicycle helmet, and a backpack, holding a phone, standing in a office picking up an item for delivery (European Commission 2021a, 2021c); that is, it was an image of *location-based* work. Fittingly, most of the policy discourse around *regulating* platform work has focused on location-based platform work. And indeed the PWD's definition of 'digital labour platform' seems to *clearly include* location-based platform work; to *likely* include microtask, online freelance, and contest-based platform work; and possibly to *exclude* content marketplaces.

This situation may present a challenge for the policy objective of achieving decent work on 'digital labour platforms,' if one understands that term as it is typically meant in the broader body of relevant literature. Indeed the largest, most popular, and most culturally and economically significant digital labour platform in the world is likely YouTube—a content marketplace. Yet if the PWD's definition of 'digital labour platform' excludes content marketplaces, it will not apply to this influential digital labour platform, or to other similarly structured platforms.

This paper uses the case of YouTube to consider the regulatory situation of content marketplaces in the context of policy discussions on improving working conditions in platform work. The paper focuses on the mitigation of decent work deficits occasioned by algorithmic management. Three closely related issues—discrimination, collective bargaining, and employment classification—are also briefly considered. And indeed even if the PWD does not apply to content marketplaces, other laws *already in force*—specifically, 'marketplace laws' such as Regulation 2019/1150 in the European Union (the 'Platform-to-Business Regulation') and California Civil Code §1749.7 (previously AB 1790 [2019]), on 'marketplace sellers'—may apply and provide some protections against the risks and harms occasioned by opaque and error-prone algorithmic management.

When considering existing legislation, the paper focuses on two jurisdictions. The first is the European Union, which has developed the most extensive regulatory regime for platform work, including the General Data Protection Regulation and the proposed Platform Work Directive. The second is the US state of California, YouTube's 'home' jurisdiction and the location of several lawsuits brought against the platform by content creators. However, the paper's policy recommendations are oriented to the

'global level.' Foremost in consideration is the possibility of developing and ratifying relevant international labour standards through the ILO.

The remainder of the paper proceeds as follows. Part 2 summarizes the literature on YouTube creators' working experiences and collective action efforts. It concludes that creators on YouTube and other content marketplaces face similar challenges to other platform workers: decent work deficits occasioned by opaque and error-prone algorithmic management systems, relatively unresponsive platform operators, and a lack of social dialogue. As with other platform workers, these challenges arise in a legal context shaped by two features: first, a formal relation of self-employment between workers and platform, so workers have no access to the rights and mechanisms that would be afforded by employee or 'worker' status; and second, legal uncertainty around, and incomplete enforcement of, the potentially relevant data protection rights. Part 3 reviews the definition of 'digital labour platform' set out in the proposed Platform Work Directive and notes that it is not clear whether content marketplaces are included in this definition. Part 4 considers 'marketplace laws' already in force in the European Union and the US state of California that may apply. While these laws may be of some use to creators on content marketplaces, the protections they provide are weaker than those provided by the proposed Platform Work Directive, and they do not fully address the decent work deficits occasioned by algorithmic management. Part 5 considers policy options for addressing these deficits at the 'ILO level'; i.e., through international labour standards. Three main options are considered: a standard on platform work, which would clearly include content marketplaces in its scope of application; an update to Convention 181 (C181) on Private Employment Agencies, which would expand the scope of C181 to include digital labour platforms, including content marketplaces; and a hypothetical new standard on 'work-related data processing and algorithmic systems,' which could also serve as an update to the 1997 ILO Code of Practice on Protection of Workers' Personal Data. Part 6 concludes.

2 Content marketplaces as digital labour platforms: the case of YouTube

This part of the paper briefly reviews the main relevant developments regarding YouTube creators' working experiences and collective action efforts. Interested readers can find more information in the empirical literature, including scholarship by Wu et al. (2019); Kumar (2019); Bishop (2019); Niebler and Kern (2020); Niebler (2020); Glatt and Banet-Weiser (2021, esp. pp. 44-48); Miroshnichenko (2021); Cunningham and Craig (2021, esp. Ch. 14); Kingsley et al. (2022); and Glatt (2022a, 2022b); as well as in-depth research by journalists (e.g., Stokel-Walker 2019, Bergen 2022).

Although YouTube has used algorithmic systems to restrict the placement of ads on videos in line with its 'advertiser-friendly content guidelines' since 2012, in late 2016 YouTube began to communicate explicitly with creators about video 'demonetizations' (see e.g. Internet Creators Guild 2016; Kafka 2016)—i.e., videos that would receive no ads. A creator of a 'demonetized' video would receive no income from that video, even if they were generally eligible to receive income from ad placements. In the period between Fall 2016 and Spring 2017, the conversation around video 'demonetization' among YouTube creators, journalists, and outside observers such as media scholars effectively evolved into a discourse on decent work deficits arising from algorithmic management—and, specifically, from automated video demonetization decisions (see e.g. Alexander 2017).

2.1 Problems with the demonetization system

Creators reported multiple apparent deficiencies with the demonetization system that adversely impacted their working conditions—and, in particular, their ability to predict reliably whether a video would be demonetized or not, even when they had created it with the intention to comply with the advertiser-friendly content guidelines (for further details see e.g. Alexander 2018, 2019b; Kingsley et al. 2022). First, the system appeared prone to error, sometimes demonetizing videos that they believed complied with the guidelines. Second, when a video was demonetized by the system, creators were not told exactly which guideline(s) had been violated, or by which part(s) of the video. As a result, in many cases they did not know how to change the video in order to get it 'remonetized.' Additionally, there was no way for them to request such an explanation. Third, while the platform allowed creators to 'request manual review' of a demonetized video, this process had some shortcomings. The outcome was 'binary': either the video would be 'remonetized' or it would not be; it could take days or weeks, meaning that even if the video was 'remonetized' after manual review, the creator would not recover the ad revenue lost due to the algorithmic error; and if the manual review resulted in no change to the demonetization decision, there was no further appeal process. Fourth, there was no way for all but the most prominent creators to talk to a qualified, well-informed human decision maker at YouTube about the monetization status of their videos or the overall algorithmic decision-making process around monetization. Fifth and finally, the already dampened morale of 'independent' creators was further impacted by suspicions that YouTube channels operated by traditional media companies were being exempted from the new rules. Creators began calling the changes to the monetization system the 'adpocalypse.' YouTube scrambled to placate both advertisers and creators, and for a short time in Spring 2017 the situation seemed to have improved. But as creators' content production strategies evolved, the situation worsened again. By February 2019, journalists covering YouTube were writing of a 'fifth wave of the adpocalypse' (Alexander 2019a).

2.2 Impacts on creators

The ineffability and opacity of algorithmic decisions about monetization of individual videos—as well as YouTube's occasional tendency to make changes first and communicate them to creators later—caused significant economic uncertainty and stress for creators who had come to rely on their YouTube income as a significant or even primary livelihood. Some reported chronic stress, burnout, anxiety, depression, and other mental health issues—and some attributed these to the opacity of the platform's algorithmic decision-making systems (e.g. Stokel-Walker 2018; Parkin 2018). In one particularly tragic incident in 2018, a California-based creator who had posted content about veganism and fitness, alleging that the platform had 'filtered' and demonetized her videos, entered the YouTube headquarters building near San Francisco and opened fire, wounding three people before taking her own life (Baron 2018; Bergen 2022, Ch. 29).

2.3 Litigation

In some cases, evidence accumulated that led creators to believe that the system was biased. This accumulation led in 2019 and 2020 to two lawsuits in California, one brought by Black creators and one by LGBTQ creators. Both suits alleged that YouTube's algorithmic recommendation and monetization systems limited the reach (i.e., the number of viewers) of the creators' content as well as their ability to monetize that content, based specifically on the creators' identities and the nature

of the content itself. Both suits were dismissed (see e.g. Lang 2021; Allsup 2021). The suit brought by the Black creators was dismissed because the complaint failed to "allege facts that would support an inference that defendants *intentionally and purposefully* discriminated against them" (Koh 2021 [*Newman v. Google*], p. 10; emphasis added). The suit brought by the LGBTQ creators was also dismissed (Demarchi 2021 [*Divino v. Google*]). While independent data analysis by creators does suggest that the inclusion of some demographically specific terms in video titles—such as 'abortion,' 'gay,' 'LGBT,' and 'sexist'—did, at the time and in some cases, lead to 'automatic demonetization' regardless of video content (Beurling 2020; see further UK House of Lords 2020, pp. 65-69; Kingsley et al. 2022, pp. 11-12), the California plaintiffs failed to reach the legal standard required for courts to force YouTube to take prompt corrective action, or even to advance to discovery.

2.4 Collective action efforts

At least two institutionalized efforts for collective action among YouTubers were widely documented in the specialist media: the Internet Creators Guild and FairTube. The Internet Creators Guild was started in 2016—the year before the 'adpocalypse'—by the well-known YouTube creator Hank Green (Green 2016). It was founded with the intention to help educate journalists about online video; increase income transparency; and support advocacy (ibid.), and it organized some of the earliest investigation into demonetization (Green 2016b). However, it closed in 2019, citing a range of reasons including 'no path to financial sustainability' (Alexander 2019c; Dredge 2019).

Two weeks after the Internet Creators Guild announced it would close, the 'YouTubers Union'—a Facebook group started by Jörg Sprave, a German YouTube creator—announced a collaboration with IG Metall, the trade union in the German manufacturing sector. The collaboration was called 'FairTube' and called for 'more fairness and transparency' for YouTube creators (FairTube 2019a). FairTube called for YouTube to publish its decision criteria for video demonetization; give clear explanations for individual video demonetization decisions; give creators a human contact; allow creators to contest algorithmic decisions; create an independent dispute mediation body; and invite creators to participate formally in important decisions through an advisory board (ibid.). While the collaboration generated significant interest among creators, journalists, policymakers, and researchers (e.g. Niebler and Kern 2020; see further FairTube 2019b), the proposals were only partially implemented (see e.g. Miroshnichenko 2021, pp. 54-56).

2.5 Demonetization today

New changes to the demonetization rules continue to cause confusion and 'backlash' among creators: YouTube caused demonetization-related consternation among creators again in January 2023 when it announced new rules regarding profanity (e.g., Fairfax 2023; Clark and Weatherbed 2023)—then adjusted them again in March (e.g., Wilde 2023). The journalist Helen Lewis' portrayal of the situation in March 2023 seems to indicate that the main problems facing creators have remained largely unchanged: creators often struggle to understand why a particular video was demonetized; the platform admits that the algorithmic decision-making system is prone to error—but creators must shoulder the burden of 'appealing' erroneous decisions, and are typically unable to recover the revenue lost while a video is erroneously demonetized; and only creators with large followings have reliable access to human representatives of the platform (Lewis 2023). Further, rules changes with significant economic impacts are often promulgated without advance notice or consultation with

creators; and the impacts of these rules changes are often retroactive, impacting the earning potential of creators' 'back catalogs' (i.e., videos created before the rule changes) (see e.g. Clark 2023).

2.6 What rights?

This short history of YouTube creators' struggles with algorithmic demonetization, and their attempts to obtain more transparency over it, raises three questions. First, what rights *should* creators have with respect to algorithmic demonetization? Second, what rights *do* they have under existing laws? Third, if they should have rights that they do not have, what should policy makers do to close the gap?

The history of demonetization appears to indicate that YouTube creators have four main desires. First, they want to have access to an accurate and unambiguous articulation of the rules governing what content will, and will not, be demonetized. Second, they want to receive clear, unambiguous, and actionable explanations for individual demonetization decisions—so that they can alter demonetized videos to comply with the rules. Third, they want to be able to speak to a qualified human representative of the platform when they request further explanation of those decisions and seek to appeal them. Fourth, they wish to have advance notice of significant rule changes. Some policy analysts and institutional actors have called for two further rights: an independent mediation process for disputed decisions; and some form of information and consultation body.

While 'What rights do YouTube creators *want*?' is a different question to 'What rights *should* they have?', it does provide a starting point. And indeed the proposed Platform Work Directive would provide many of these rights to 'persons performing platform work.' This raises the question of whether YouTube is a 'digital labour platform' under the definition set out in that Directive.

3 The Platform Work Directive's definition of 'digital labour platform'

Article 2(1)(1) of the proposed Platform Work Directive sets out the following definition for 'digital labour platform':

> *'digital labour platform' means any natural or legal person providing a commercial service which meets all of the following requirements:*
>
> *(a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;*
>
> *(b) it is provided at the request of a recipient of the service;*
>
> *(c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location*

The criterion set out in Art. 2(1)(1)(a) is clearly satisfied. However, whether criteria (b) and (c) are satisfied is less clear.

3.1 'provided at the request of a recipient of the service'

Criterion (b) seems to imply the by-now 'classic' three-party platform work situation, in which a customer or 'requester' of work posts a 'request' for a particular piece of work to be fulfilled through

the platform. Either the platform then offers the work to one worker at a time (as for example in platforms for transportation work, in which the platform takes into account the location of the work and various possible workers who might perform it), or the work is added to a list which workers can browse and select from (as in platforms for online work such as Amazon Mechanical Turk and Upwork). And indeed Recital 5 of the proposal notes two major types of platform work—'online platform work' and 'on-location platform work'—and notes that at least in the latter case, the work 'activity' *follows* an 'online communication process':

> *Platform work can be performed exclusively online through electronic tools ('online platform work') or in a hybrid way combining an online communication process with a subsequent activity in the physical world ('on-location platform work').*

Content marketplaces such as YouTube use a different model: no explicit single request is needed to incentivize creators to produce and upload content, for at least two reasons. First, creators extrapolate from past viewership trends to assume that there will be an audience for their content. Second, online content is a work output that, unlike other kinds of work organized through digital labour platforms, is 'non-rival.' That is, its use by one viewer does not preclude or diminish its use by others; indeed it may *increase* its value. These differences from the 'triangular' model and the specific temporal sequence of work apparently assumed by Art. 2(1)(1)(b) PWD could be used to argue that content marketplaces such as YouTube do not facilitate work 'provided at the request of a recipient of the service,' and that such marketplaces therefore fall outside the PWD's scope.

This argument raises at least four questions. First, what about the advertisers? On YouTube, unlike microtask, freelance, or location-based platforms, there are not only three parties, but four: the creator, the viewer, the platform, and the advertiser. And in many cases, it is the advertiser that is the paying customer, not the viewer. This raises the question of *what 'service' is being provided by the platform, and to whom*: is the service provided 'video content', with the 'recipient' being the viewer? Or is the service 'the delivery of advertisements to an audience,' with the 'recipient of the service' being the advertiser? If the latter, it is certainly the case that the service is provided 'at the request of a recipient,' given that a prospective advertiser on YouTube must take steps similar to that of a customer on microtask, freelance, or location-based labour platforms.

Second, and in the alternative, if viewers are 'the,' or at least 'a,' recipient of the 'service,' which is then understood to be the provision of video content, how are the various informal, but explicit, channels through which viewers make requests for specific kinds of content to be understood? Viewers request specific content by posting comments 'below' videos on the platform itself and by engaging with creators on other social media platforms such as Twitter. In some cases, these requests are prioritized or enabled by viewers' having provided payment. This can occur through the platform itself in the form of 'channel memberships,' or outside the platform, for example through crowdfunding membership sites such as Patreon.

Third, YouTube provides a diversity of quantitative data about viewers' viewing behaviour to creators, as well as guidance on how to interpret that data in order to guide content creation decisions (see e.g. YouTube n. d.). In the context of a blanket assumption that 'viewers will continue to want content' and that there is therefore no need for explicit requests for content *in general*, it could be cogently argued that these 'behavioural signals' constitute requests for more, or less, of different specific kinds of video content on the part of specific groups of viewers.

Fourth and finally, YouTube's advertiser-friendly content guidelines could similarly—again, in the context of a blanket assumption that viewers will continue to want content and therefore no need for

explicit requests for content in general—be interpreted as a request for specific kinds of content, made in practice by YouTube itself, but on behalf of advertisers.

3.2 'involves […] the organisation of work'

What about criterion (c), the requirement that a digital labour platform 'involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location' (Art. 2(1)(1)(c) PWD)?

Some pieces of this text may be worth considering in the case of YouTube and other content marketplaces. For example, 'by individuals'—in some cases, entities creating content will be groups or even small businesses. The clause 'as a necessary and essential component' also seems likely to raise questions in some cases. However the main question raised by the case of YouTube, and content marketplaces generally, in relation to this criterion is: what constitutes 'organisation of work'? While there are some quite significant exceptions (see e.g. Roth 2022), in most cases, content marketplaces do not directly 'organise' work in the colloquial sense of telling creators what kind of content to create, when, where, or with what tools or methods, and providing remuneration contingent on the fulfilment of those instructions. However, Recital 18 of the PWD proposal clarifies:

> *Organising work performed by individuals should imply at a minimum a significant role in matching the demand for the service with the supply of labour by an individual who has a contractual relationship with the digital labour platform and who is available to perform a specific task, and can include other activities such as processing payments. Online platforms which do not organise the work performed by individuals but merely provide the means by which service providers can reach the end-user, for instance by advertising offers or requests for services or aggregating and displaying available service providers in a specific area, without any further involvement, should not be considered a digital labour platform.*

With this clarification in view, the questions from Section 3.1 above—What 'service' is being provided by the platform, and who is the 'recipient'? And what relationship between the parties is assumed?—arise again. If the 'service' is the delivery of *advertisements*, and the 'recipient' is not the viewer but the *advertiser*, then, on one hand, YouTube in particular plays 'a significant role in matching the demand for the service with the supply' via the auctions that assign ads to videos (more specifically, to *instances of viewers watching videos*; see Google n. d.)—but, on the other hand, 'the supply' is not exactly a supply of *labour*, but a supply of *viewer time*. Viewer time, however, is contingent on both the number of viewers and the amount of *content*, which is in turn contingent on the supply of labour. Complicating the application to content marketplaces further, the recital text indicates that 'organising work' should involve matching demand for the service with the supply of labour by an individual 'who is available to perform a specific task'—implicitly assuming that labour must follow an explicit request and must be rival, rather than assuming demand and producing *work output* whose consumption is non-rival, as occurs on content marketplaces.

3.3 Summary

While a cogent argument could therefore be made that YouTube and other content marketplaces do in fact fall within the definition of 'digital labour platform' set out in the PWD, the definition does not provide the wished-for level of legal certainty with respect to these platforms.

4 'Marketplace laws': EU Regulation 2019/1150 and California Civil Code §1749.7

Even if the PWD does not apply to content marketplaces, however, existing regulations already in force in the European Union as well as in the US state of California may apply, and may offer content creators some remedy against error-prone and opaque algorithmic decision-making systems, especially in relation to demonetization. These are EU Regulation 2019/1150 'promoting fairness and transparency for business users of online intermediation services'—the so-called 'Platform-to-Business Regulation'—and California Civil Code §1749.7 on 'marketplace sellers.'

4.1 EU Regulation 2019/1150: the 'Platform-to-Business Regulation'

EU Regulation 2019/1150 'promoting fairness and transparency for business users of online intermediation services' was adopted on 20 June 2019 and entered into force on 12 July 2020. Its main aim is to address anticompetitive or otherwise unfair business practices sometimes undertaken by providers of online intermediation services and search engines when these are used by consumers to search for goods and services. These categories capture a range of industries, including for example travel booking portals and 'app stores' (see e.g. Recital 11). More formally, 'online intermediation services' are defined to include any information society services that 'allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers' and are 'provided to business users on the basis of contractual relationships' (Art. 2(2)). A 'business user,' for the purpose of the Regulation, is defined as 'any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession' (Art. 2(1)). The Regulation provides a range of specific procedural rights to these 'business users' and imposes the concomitant obligations on the 'service providers' (i.e., platform operators) that may be relevant to creators on content marketpalces.

First, the Regulation requires that platforms set out in their terms and conditions 'the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users' (Art. 3(1)(c)). Demonetization and other related alleged practices, such as limiting the recommendation of videos, would seem to constitute a partial 'restriction,' and should therefore be captured by this requirement. That is, content marketplaces should set out in their terms and conditions the grounds for demonetization of restricted recommendation of content.

YouTube specifically does set out these grounds in the 'advertiser-friendly content guidelines' (YouTube 2022). Therefore the question may be whether they are 'drafted in [sufficiently] plain and intelligible language' (Art. 3(1)(a)), as while the guidelines are extensive, they are not unambiguous, with various exceptions and caveats that "context is very important" in demonetization decisions (YouTube 2022). This may to some extent be unavoidable in the review of such a large and diverse volume of content as appears on YouTube.

Second, the Regulation requires that platform provide advance notice of at least 15 days of 'any proposed changes of their terms and conditions' (Art. 3(2)). This should presumably include changes to additional terms, such as monetization guidelines. The Regulation further provides that platforms 'shall grant longer notice periods when this is necessary to allow business users to make technical or commercial adaptations to comply with the changes.'

Third, the Regulation requires platforms to provide business users whose access to the platform's services are suspended, terminated, or restricted with a statement of reasons for the decision (Art. 4). That is, the Regulation provides a 'right to an explanation' for these decisions—and the reason provided can only be one of the reasons set out in advance in the terms and conditions, as required by Art. 3 of the Regulation. Assuming that demonetization of a particular piece of content is a 'restriction' of services, the Regulation therefore provides a right to a written explanation for specific, individual demonetization decisions.

Fourth, the Regulation generally prohibits platforms from imposing retroactive changes to terms and conditions (Art. 8(a)).

Fifth, the Regulation provides that if a business user's access to the platform is suspended, terminated, or restricted, the platform shall 'give the business user the opportunity to clarify the facts and circumstances within the framework of [an] internal complaint-handling process' (Art. 3(3); see further Art. 11).

Sixth and finally, the Regulation requires platforms to name external mediators to which business users may have recourse, and with which the platforms agrees to submit to mediation, in the event that disputes cannot be settled through the internal complaint-handling system (Art. 12).

Assuming, therefore, that YouTube qualifies as a 'provider of online intermediation services,' that creators qualify as 'business users' of those services, and that demonetization qualifies as a 'restriction' of access to those services—plausible assumptions—then Regulation 2019/1150 appears to provide creators—at least those in the European Union—with almost all of the rights they have indicated they want. However, the Regulation has to our knowledge never been used in legal proceedings or even referred to in public discourse about YouTube creators' working conditions.

4.2 California Civil Code §1749.7: 'marketplace sellers'

California Civil Code §1749.7, originally AB 1790 in the 2019 California legislative session, was adopted in 2019 and came into force on 1 January 2020. It establishes rules governing the relationship between 'marketplaces' and 'marketplace sellers.' It defines a 'marketplace' as:

> *a physical or electronic place, including, but not limited to, a store, booth, internet website, catalog, television or radio broadcast, or a dedicated sales software application, that sells or offers for retail sale services or tangible personal property for delivery in this state and has an agreement with a marketplace seller to make retail sales of services or tangible personal property through that marketplace, regardless of whether the tangible personal property or the marketplace has a physical presence in the state.*

It defines a 'marketplace seller' as 'a person residing in the state who has an agreement with a marketplace and makes retail sales of services or tangible personal property through' that marketplace.

Notably, it would not appear at first that YouTube creators make 'retail sales of services or tangible personal property' through YouTube. However, the platform offers a range of monetization features beyond 'traditional' ads, including for example 'channel memberships'; 'Super Chat,' 'Super Stickers,' and 'Super Thanks,' various paid methods for promoting the visibility of viewers' messages; and 'shopping' (i.e., sales of physical merchandise through the YouTube platform) (YouTube Help n. d.). It

therefore clearly meets the definition of 'marketplace'—and creators, at least those who make use of these 'retail' monetization features, are 'marketplace sellers.'

§1749.7 imposes several obligations on 'marketplaces' with respect to 'marketplace sellers.' These are similar to, but less comprehensive than, those established by EU Regulation 2019/1150.

First, marketplaces must 'ensure that their terms and conditions regarding commercial relationships with marketplace sellers' '[s]et out the grounds for decisions to retain, or refuse to disburse, funds in its possession belonging to a marketplace seller pending investigation or resolution of a dispute between the marketplace and the marketplace seller and the grounds for suspending or terminating a marketplace seller from participating in the marketplace.'

Second, marketplaces must provide a 'written statement of reasons' for suspension or termination decisions. The written statement must include a description of 'the facts and circumstances that led to the decision'; '[i]dentify the term, condition, or policy that serves as the basis for the suspension or termination'; and '[e]xplain whether or not the decision may be appealed'—and, if so, how.

No requirements for specific complaint-handling or mediation procedures are established.

While useful in extreme cases such as the demonetization or closure of an entire channel—and perhaps useful for workers on other digital labour platforms—this provision seems unlikely to help YouTube creators who wish to understand or contest demonetization of individual videos. This is because it only requires marketplaces to set out in their terms and conditions grounds for three kinds of decisions: to retain funds; to suspend a seller; or to terminate a seller. Individual video demonetization is not such a decision.

Therefore, while this legislation is worth noting, especially given the size of the California market, it provides fewer relevant protections than EU Regulation 2019/1150, and, especially notably, seems unlikely to provide any protections to help creators contest or understand individual video demonetizations.

5 Policy options

What can be done at a regulatory and legislative level to improve working conditions on content marketplaces—and, more broadly, to mitigate the harms and risks arising from opaque and error-prone algorithmic management on digital labour platforms?

It makes sense to consider this question in specific jurisdictional contexts. In the EU, many of the harms and risks could be addressed by more stringent enforcement of GDPR in the context of content marketplaces. It appears quite clear that GDPR applies; the challenge is application and enforcement (see e.g. Johnston et al. 2021, pp. 10-11; Miroshnichenko 2021). Alternatively, creators could attempt to use the Platform-to-Business Regulation's provisions. At a legislative level, the definition of 'digital labour platform' in the proposed Platform Work Directive could be updated to ensure that it captures content marketplaces. If none of these options are practical, the Digital Services Act (DSA) will apply from 17 February 2024 and establishes that platforms must provide 'a clear and specific statement of reasons' for 'suspension, termination or other restriction of monetary payments' on the grounds that content is 'incompatible with their terms and conditions' (Art. 17(1)). This could provide creators in the European Union with a decisive legal argument for demanding clear explanations for individual video demonetizations. The European Commission could further establish specific rules for YouTube

under the DSA's Section 5 provisions (the 'very large online platforms and very large online search engines' provisions). Finally, the 'AI Act' will likely provide additional relevant protections.

Outside Europe, however, the prospects for improving the transparency and accountability of algorithmic decision-making on content marketplaces appear less promising. Even in California, the major jurisdiction with perhaps the most relevant legislation, the main protections are provided by §1749.7—the protections provided by which, as discussed above, may not apply to individual video demonetization—and data protection law.

With this gap between jurisdictions in view, this part of the paper considers what could be done to improve the transparency and accountability of algorithmic decision-making on content marketplaces at the 'ILO level'—i.e., through international labour standards. This discussion is undertaken in the context of awareness that discussions are underway at the ILO regarding possible standard setting on 'platform work' or 'digital labour platforms' (e.g. ILO 2022). Three possibilities are therefore noted. The first is a potential international labour standard on 'platform work.' The second is an update to Convention 181 on Private Employment Agencies, which could expand the scope of C181 to include digital labour platforms, including content marketplaces. The third and final option noted is a hypothetical new standard on 'work-related data processing and algorithmic systems,' which could also serve as an update to the 1997 ILO Code of Practice on Protection of Workers' Personal Data.

5.1 Considerations for an international labour standard on platform work

Given existing institutional momentum around a possible standard setting discussion in the next few years on the topic of 'platform work' (ILO 2022), this possibility seems the most salient.

It seems likely that the central 'object' of regulation for such a standard would be, as in the EU Platform Work Directive, the 'digital labour platform,' and that main goals of such a standard would be to ensure worker information and consultation in major decisions; establish transparency and accountability around algorithmic decision-making systems; and mitigate occupational health and safety risks.

This paper can offer two recommendations to the ongoing discussions regarding a possible international labour standard on 'platform work.'

First, the definition of 'digital labour platform' in such a standard should be constructed so as to include content marketplaces, without necessarily including other platforms through which working persons find income earning opportunities, such as social media platforms. Four distinctions between digital *labour* platforms, on one hand, and other digital platforms through which working persons find and realize income earning opportunities, on the other, can be noted as potentially helpful in establishing the scope of application of such a standard. At present, most, if not all, digital labour platforms, including content marketplaces, handle payment processing; set the level of remuneration for persons performing work (including content creators); manage relationships with paying customers (i.e., workers can earn income with no direct contact with paying customers); and require workers to sign a contract with the platform that establishes terms 'over and above' the general terms and conditions for all users of the platform. Arguably, a platform with *any one* of these characteristics could be considered a 'digital labour platform.' Notably (and beneficially), these criteria could capture particular 'products' or 'areas' within larger platforms, such as social media platforms, that are not generally considered digital labour platforms.

Second, the provisions of such a standard should be reviewed to ensure that they do not make it difficult to apply to the working arrangement found in content marketplaces. This arrangement differs from the 'three-party' platform work arrangement in which a customer posts a request to the platform, which is then filled by a worker. Content marketplaces may involve a fourth party, the advertiser, and workers (i.e., creators) may be incentivized to produce content not by a discrete request from a customer but by extrapolating past viewer and advertiser behaviour. The platform may not manage *work* or *workers* directly but rather indirectly, by selectively 'monetizing,' recommending, or otherwise prioritizing content with certain characteristics, or produced by creators with certain characteristics. Transparency and accountability provisions developed to govern 'algorithmic management' practices should also apply to systems that *indirectly* manage workers (creators) by 'curating' their work output (content).

5.2 Updating Convention 181

In the event that a 'free-standing' international labour standard on platform work is not ultimately developed, an alternative approach could be to update Convention 181 on Private Employment Agencies so that its provisions apply to digital labour platforms as well. Whether this would most sensibly be done by establishing that digital labour platforms 'are' private employment agencies, or by establishing 'digital labour platforms' as a separate category, is not obvious and would need to be considered. As with a 'free-standing' standard on platform work, the main recommendations of this paper for such an approach are to ensure that in either case, the standard applies to content marketplaces as well as the more commonly discussed types of digital labour platform, and to ensure that more complex working arrangements than the three-party 'request, then fulfilment' model can be sensibly regulated by the standard's provisions.

5.3 An international labour standard on work-related data processing: updating the Code of Practice on Protection of Workers' Personal Data

Finally, if a standard on 'platform work' is ultimately not developed, or does not include content marketplaces within its scope of application, an alternative approach for establishing transparency and accountability protections for content marketplace creators may be to further elaborate *general* work-related data protection rules. Indeed such an effort may in any case be increasingly called for given the growth in recent years in work-related data processing for management purposes (including but not limited to 'algorithmic management'), even in the context of 'traditional' employment (see further e.g. Adams-Prassl et al. 2023a, 2023b). Additional rules for work-related data processing may help protect not only working persons but also employers and other organizations in the context of the growing use of 'non-rule-based' data processing techniques such as machine learning. These techniques challenge managers' ability to direct and fully understand management decisions and in some cases put organizations at heightened risk of making erroneous decisions. As a result, more stringent rules, especially regarding technical and organizational validity, explainability, and accountability may be needed (see further Adams-Prassl et al. 2023b, esp. pp. 5-6, 8).

A comprehensive catalog of potential work-related data processing rules is beyond the scope of this paper. Such a catalog could however be developed by drawing on the growing literature on workplace data protection and algorithmic management (see e.g. Abraha 2022, 2023; Adams and Wenckebach 2023; Calacci and Stein 2023). Notably, work-related data processing increasingly affects the income earning opportunities, bargaining power, and working conditions of all working persons, regardless of

employment status: those in traditional employment relationships, those who may be falsely self-employed, genuine self-employed, and workers on digital labour platforms of all types and irrespective of employment status. The term 'work-related' is therefore used advisedly: this paper, as well as other literature on workplace data protection, offers evidence that such an instrument would ideally apply to all 'working persons' regardless of employment status, not only to 'workers' or 'employees,' and not only within the 'workplace.' The term 'related' is also used intentionally (see further e.g. Article 29 Working Party 2007; CJEU 2017). In the area of work-related data protection, as in the area of digital labour platforms, some jurisdictions have developed strong legislation while others have not—and even in jurisdictions with strong legislation nominally in force, enforcement remains a challenge in practice. Both of these 'gaps' could suggest an important role for ILO action.

6 Conclusion

Future empirical and policy research on decent work on content marketplaces can explore a range of topics, including:

- Mapping the size, location, livelihood importance, and economic importance of content marketplaces.

- Investigating the diversity of business models, workflow models, and algorithmic decision-making systems on content marketplaces, including different data processing techniques (e.g., rule-based vs. non-rule-based); different roles for human decision-makers; technical validity and error rates; and advtanges and disadvantages for platform operators, workers, customers, and other stakeholders (e.g., non-paying customers such as viewers).

- Investigating compliance of content marketplaces and other digital labour platforms with existing relevant regulation, including data protection law and international labour standards.

- Developing best design practices for safeguarding the interests of all stakeholders in digital labour platforms, including as inputs for technical standards and/or voluntary codes of conduct, potentially as anchored in legislation (i.e., 'regulated self-regulation,' e.g. with Art. 40 GDPR or Art. 42 GDPR as a basis; see further Silberman and Johnston 2020; Däubler-Gmelin et al. 2022, esp. p. 6).

- Investigating the possible role of international labour standards in establishing and promoting work-related data processing rules that advance decent work.

Disclosure

Co-author Silberman was an employee of IG Metall and involved in the 'FairTube' campaign in 2019-20, and remains formally a member of the FairTube organisation (FairTube e.V.). The authors declare no other potential conflicts of interest.

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