

## DMCA Takedown Notices: A New Opponent for Streamers

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For several months, live sporting events were halted because of the pandemic, yet during this period of uncertainty, the esports ecosystem has been active and thriving. The increased activity has meant substantial growth for streaming platforms including Twitch and YouTube Gaming. Live streams of video gamers garner countless views, and many of these streamers have made careers of distributing and monetizing content. This developing opportunity has come with new risks and hazards. Notably, streamers are increasingly having their content challenged for copyright infringement in the form of Digital Millennium Copyright Act (DMCA) claims made against their internet service provider (ISP) platforms (Twitch or YouTube).

Some background: In order to advertise their Twitch channels, streamers create “clips” made up of highlights of their live streams in order to attract viewers, which often, include background music. This was a somewhat common practice until June 2020, when streamers began receiving notices from Twitch that DMCA takedown requests were submitted for clips with copyrighted background music from 2017 to 2019. These infringement claims involving music that is “synchronized” to video content have accelerated significantly on all platforms during the pandemic. One reason for this is the pandemic-induced lack of public performances involving live and synchronized music. With the music licensing business having ground to a halt, the performing rights organizations responsible for licensing and enforcing rights in popular music have turned their resources instead toward pursuing infringements.

Given the huge volume of streaming content on Twitch, this meant some streamers have been hit with thousands of DMCA takedown notices. For some of those streamers, deleting thousands of videos would cost significant time and money, and threaten future viewership. Below, we briefly explore the issue and the law surrounding it.

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## DMCA and “Takedown Notices”

The DMCA, among other things, provides ISPs, such as Twitch, with immunity from liability for copyright infringement with respect to content posted by their users if the ISP follows the strict requirements of the DMCA. Among those requirements is promptly responding to “takedown notices” received from copyright holders. Specifically, the ISP is required to remove the subject content and notify the user of the DMCA takedown notice. The user has an opportunity to object and contest the notice, as detailed below.

Although the ISPs can avoid liability by following the requirements of the DMCA, the streamers who synchronized music to their videos remain at risk for copyright infringement even if the content has been removed. However, many copyright holders choose not to pursue infringement claims as long as the subject content is promptly removed, and the user is not a serial offender.

Generally, almost all popular music is subject to copyright registrations, and it’s possible that copyright infringers will be subjected to statutory damages and attorneys’ fees for violating copyright law. To avoid liability, it would be prudent for a streamer to self-audit their content, obtain licenses for music they would like to utilize, or use public domain music. However, some streamers may choose to refuse to remove their infringing material, and respond to a takedown notification.

## Responding to a Takedown Notification

If a streamer chooses to contest an alleged copyright holder’s claim, the DMCA permits a streamer to send a “counter notice” to the complaining party alleging the material at issue is not infringing. Counter notices are typically submitted when a party believes that their content has mistakenly (or maliciously) been removed by a DMCA takedown request. If a streamer files a counter notice arguing that there was no infringement, the copyright owner can file an action seeking a court order to resolve the dispute. If the copyright owner does not file an action after a counter notice is sent, the ISP must put the material in question back up within 10-14 business days after the counter notice was filed. Streamers should be sure they have a good-faith belief in the accuracy of their counter notification before sending it however, because filing without a good-faith basis may initiate a lawsuit.

Streamers should also consider possible defenses to the takedown notice. It is possible the material (e.g., music) at issue is not copyrighted at all or belongs to the public domain. Additionally, if the material is copyrighted, streamers may assert a defense including the fair-use defense. Each of these defenses requires specific conditions and elements to be met in order to be successful. Because of the prospect of litigation, streamers should thoroughly consider all defenses available and the merits of each before filing a counter notice.

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## Considerations for Copyright Owners

Under the DMCA, content owners have the option of filing a takedown notice but should consider several factors before doing so. If a takedown notice is filed without a sufficient basis, the complainant may be sued by the alleged infringer. Determination of whether a sufficient basis exists for filing a takedown notice requires many considerations, including the probability of successful defense by the infringer. As usage of takedown notices has increased, so has abuse of this tool to take down material that does not actually infringe on any copyright. Enforcement against inadequate takedown notices has increased in response. Content owners should be sure they have an adequate basis to issue the notice before doing so. Similarly, streamers and other content creators should consider the possibility that a received takedown notice may be defective.

## Conclusion

DMCA takedown notice proceedings can be simple if an accused infringer simply removes the materials, or complex if counter notices are filed and/or litigation is initiated. Depending on the facts of a specific takedown notice, either strategy may be appropriate, though streamers generally will bear a heavy burden in proving that their use of content did not infringe copyrights. But by carefully considering all options, streamers can identify the most effective path to respond to takedown notices that may affect their video content.

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