

Music Licensing in the Age of TikTok

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Trends may come and go, but TikTok is likely here to stay. With many people stuck inside during the pandemic and needing inspiration for new hobbies, they turned to TikTok for recipes, books, dances, fashion, makeup and hair, sports, music and much more. Prior to the pandemic, TikTok had 381 million users. That number grew to over 1 billion in 2021, making it the most popular app in 2020 and 2021. For businesses, the app provides a new media for advertising, brand awareness and connecting with consumers, but those advantages do not come without concern, especially when it comes to music licensing.

The concept of TikTok is straightforward. Users upload videos and publish them on the app and consumers can view, comment and “heart” or save the video to their profiles. TikTok started as a music sharing application called Musical.ly before it was bought by media giant ByteDance and transformed into what it is today. Videos can range from 15 seconds to 10 minutes, depending on the length the user chooses. Users can choose to upload a video with the original sound or choose to mute the original sound and layer music over the video instead.

With the increase in popularity, TikTok experienced a substantial increase in problems with the music industry regarding the use of unlicensed music. The use of unlicensed music triggered an avalanche of the Digital Millennium Copyright Act (DMCA) takedown notices and copyright infringement claims. The DMCA is a mechanism used by copyright holders to enforce their rights. Under the DMCA, a copyright holder can send a takedown notice to TikTok when it discovers a video using its copyrighted music without a proper license. TikTok will remove the content immediately, and, unless the user claims they have the right to use the material, the content will be permanently removed. If the user does claim they have rights in the work, TikTok may repost the work, be absolved of any liability under the DMCA’s safe harbor, and it would then be up to the parties to then resolve their difference in court. In the first half of 2020, TikTok

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received 10,625 DMCA takedown notices with 86% of those leading to removal. TikTok's perceived indifference to the music licensing issues caused some rights holders to threaten litigation, including the music giant, National Music Publishers' Association.

In partial response to these problems, in mid-2020, TikTok began signing license agreements with major rights holders to provide a library of properly licensed music for use on the app. To date, TikTok has signed agreements with the National Music Publishers' Association, Sony Music Entertainment, Warner Music Group and Universal Music Group. While the details of the deals are undisclosed, these arrangements typically pay royalties to rights holders in return for providing licensed music options on TikTok. Following the signing of these deals, TikTok created a music library on the app where users can select licensed music to upload, presumably free from DMCA takedown threats or claims of copyright infringement.

The non-commercial TikTok music library, which supposedly contains only licensed music, is only available for "regular" (non-commercial) account users, not business accounts. "Verified businesses and brands" are designated by a blue checkmark, known as a "badge," beside their account name. These are meant to authenticate the content to consumers so they know it is coming from that notable person or business. TikTok created a separate music library for verified businesses, known as the Commercial Music Library (CML). Music in the CML is licensed specifically for commercial use.

For the most part, if a business uploads a video using a song or audio from the CML, it should not have to worry about DMCA takedown notices or copyright infringement claims; however, even this approach is not a total safe harbor for commercial accounts. Commercial users have recently reported using music from the CML only to nonetheless be hit with copyright infringement claims. It appears as though content creators on the platform have had the ability to designate the audio in their videos as approved for use in the CML, and that has been done without adequate due diligence on the part of TikTok to ensure such audio does not include unlicensed music. Accordingly, commercial users are advised to use an extra level of diligence when using audio from the CML. If that audio includes popular music, and is not clearly provided by or through a legitimate rights holder – for example, if that Beyoncé song was just recently uploaded by an account with the name of "glitterprincess" rather than Sony – proceed with extreme caution. Unlike non-commercial accounts, the consequences to a commercial user are more likely to include a claim for significant monetary damages in addition to the mere takedown of the subject post.

Many brands will find the CML to be less than satisfactory because the selection is more limited and generally does not include popular music or songs that are "going viral." Brands are not required to use music in the CML; they can upload a video using their own music. If a business chooses to use a song not in the CML, they are required to secure all copyright and licensing permissions. When a user uploads a video using a song that was not obtained in one of the TikTok libraries, it will be identified as an "original sound." But as noted above, the "original sound" designation does not guarantee that the audio has been cleared for use on the platform. If a brand publishes a video with a non-CML song without securing licenses, the

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business is at risk for receiving an infringement claim and DMCA takedown notice and having to remove the content, regardless of the sound description.

When publishing videos on TikTok, businesses need to be aware of three potential issues with music licensing:

- Conducting sufficient due diligence when using CML music
- Securing proper licensing rights when uploading non-CML music.
- Preparing responses to potential DMCA takedown notices.

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