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Oliveras Legal LLC Presents:

DMCA

A Guide for the Sports & Entertainment Industry



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— L E G A L —

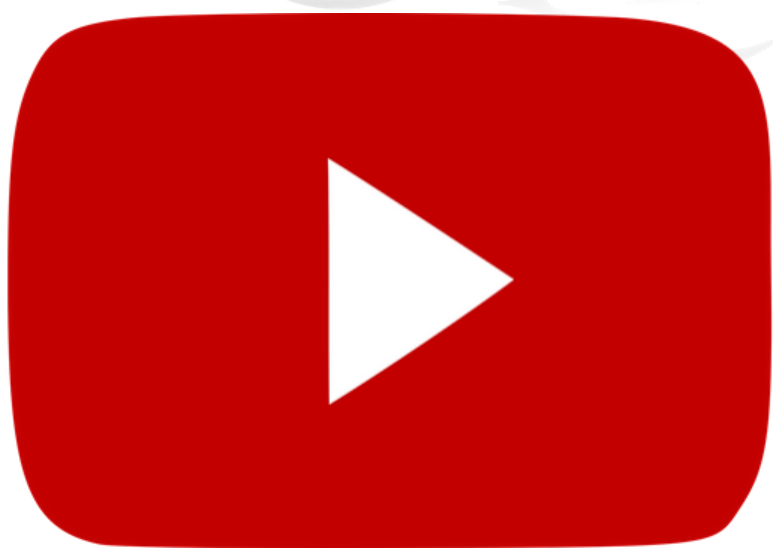
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DIGITAL MILLENNIUM COPYRIGHT ACT

As recent as June 2020, streaming platform Twitch began receiving mass DMCA take down requests from the Recording Industry Association of America (RIAA) for unlicensed use of music. In turn, and in compliance with federal law, Twitch reacted by removing the infringing content from its platform and notifying its users of the takedown notices.



WHAT IS THE DMCA?

DMCA stands for Digital Millennium Copyright Act and it is a 1998 United States Copyright law that implements two (2) 1996 World Intellectual Property Organization (WIPO) treaties; (i) the WIPO Copyright Treaty & (ii) the WIPO Performances and Phonograms Treaty. The DMCA basically protects sites that allow users to upload and share content with others (e.g. Twitch & YouTube) from liability for copyright infringement. Essentially, without the DMCA sites like Twitch could get sued directly for copyright infringement for content uploaded to their site.

The DMCA is divided in five (5) titles:

1. Title I is the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998.”
2. Title II, the “Online Copyright Infringement Liability Limitation Act,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities.
3. Title III, the “Computer Maintenance Competition Assurance Act,” creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair.
4. Title IV contains six (6) miscellaneous provisions, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in transfers of rights in motion pictures.
5. Title V creates a new form of protection for the design of vessel hulls.

The DMCA's principal innovation in the field of copyright, however, is the exemption from direct and indirect liability of Internet service providers and other intermediaries for copyright infringement by their users.

The DMCA addresses concerns arising from the rise of the digital age that the U.S. Copyright Act of 1976 could not have possibly foreseen. From the democratization of publishing, aided by the internet and other technologies such as mobile phones, required additional safeguards that do not necessarily apply in the more conventional types of publishing.

WHAT IS A COPYRIGHT?

Copyrights are the collection of rights that creators have over their literary and artistic works. Copyrights exist from the moment original works of authorship are fixed in a tangible medium of expression. Copyright protection applies only to the expressions, and not to the ideas, procedures, methods of operation or mathematical concepts as such. Therefore, copyrights exist to the expression of an idea and not the idea itself.

Registration of a copyright is not mandatory, since copyrights exist from the moment that an original work is fixed on a tangible medium of expression, but it is recommended for many reasons. Copyright registration provides the rights holder with a certification of registration and a public record of the work being registered. Furthermore, if a work is registered within five (5) years of publication, it is considered prima facie evidence in a court of law. Registered works may also be eligible for statutory damages and attorney's fees in litigation.

Statutory damages are usually between \$750 and \$30,000 per work, and can increase to \$150,000 per work if the infringement is found to be willful (intentional), or decrease to \$200 per work for "innocent" infringement if the work did not contain a proper copyright notice. Statutory damages are an important element of registration because the alternative type of damage award is "actual damages," which must be proven in court and can be difficult to determine. Actual damages can include profit that the copyright owner lost as a result of the infringement as well as any additional profits the infringer received from the infringement. These actual damages are often difficult to prove, therefore statutory damages are beneficial to copyright owners since they eliminate the element of proving actual damages. Copyright owners are eligible for statutory damages if they register their work with the U.S. Copyright Office within three (3) months of publication of the work or before the infringement starts.



PENALTIES UNDER THE DMCA

Violating the DMCA can mean both civil and criminal penalties. A civil penalty implies paying damages, while a criminal penalty can mean imprisonment, as well as fines. Criminal liability usually results from willful infringement, which means that the infringement was committed on purpose and with intent. In a criminal case, infringers can face up to five (5) years in prison and up to \$500,000 in fines.

The DMCA allows registered copyright owners to file infringement lawsuits in federal court. The copyright owner could then receive both actual and statutory damages, if successful at trial.

WHAT IS A DMCA TAKE DOWN NOTICE?

A DMCA takedown notice is a claim made by purported rights holder, where, by way of written communication, the rights holder notifies the service provider of a copyright infringement on its rights by a user of the site. In order to keep the protection granted by the DMCA, the service provider must comply with the DMCA's "notice & take down" system. This system essentially means responding to DMCA notices from right holders by removing infringing content & taking action against "repeat infringers." Service providers have no choice when they get a takedown notice, they have to enforce it. Furthermore, these service providers don't even have a role in reviewing the content.

If we look at the case of Twitch in 2020, RIAA claims to be the rights holder of many songs that appear in the backgrounds of videos uploaded to the platform, and thus filed mass takedown notices with Twitch. Twitch then had to take down the content and notify the users of the alleged copyright infringement.

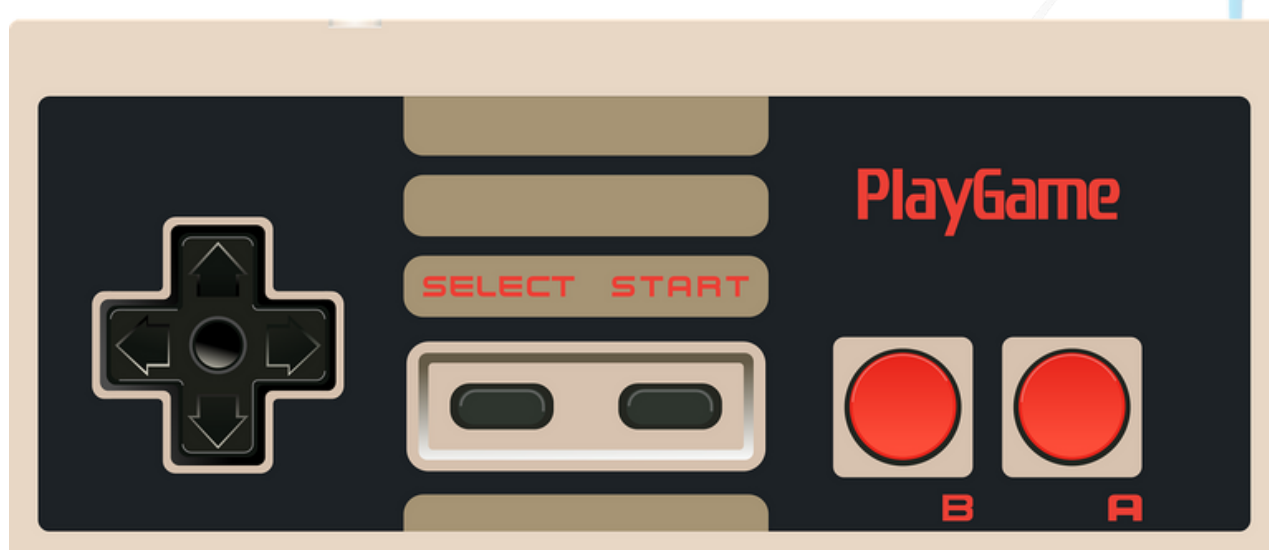


IS FAIR-USE A DEFENSE WITH THE DMCA?

With the DMCA, regarding streaming services, there is no fair-use defense to copyright infringement, especially if revenue is being made from the streams and/or videos. While there is plenty of case law on copyrights, and a fair share on DMCA, no case law unambiguously establishes the fair-use defense as a viable one in the case of copyrighted music on an online stream. Furthermore, if the user is making a profit off those streams, the fair-use argument would begin to look futile.

While it is arguable in a court of law, fair-use requires the copyright infringement to be established, meaning that it only comes into play during a lawsuit. As a matter of practice, it would be an uphill battle to make this argument, especially considering the resources that rights holders like RIAA have at their disposal. Proving fair-use would probably cost a significant amount of resources and time for the user, something that might make the argument even less appealing.

Interestingly enough licenses from music streaming services like Spotify or other streaming music providers are generally only for personal use. These licenses do not allow the song's use for a commercial purpose or for playing for the general public, which means that licensees can't use it on their streams or videos with just that license. As a matter of fact, users do not even have a license to use songs on a game's soundtrack for commercial or streaming purposes. This means that users could actually get DMCA takedown notices because the game's own soundtrack appears in the streams.



THE DMCA COUNTER-NOTICE

If a DMCA notice is issued regarding a user's content, the available recourse is to send a DMCA counter-notice to the alleged rights holder. In the counter-notice, the user declares under penalty of perjury, that they have a good faith belief that their content was wrongfully removed and that no copyright infringement occurred. If a user sends a counter-notice, the site has to reinstate the content, unless the rights holder files a lawsuit against the user.

Filing a counter-notice will get a user's content back on the site, but it also forces the rights holder to make a decision on either allowing the alleged copyright infringement to continue or pursuing a lawsuit against the user.

In the previous example, Twitch users could file counter-notices alleging that their content was wrongfully removed from the site. This would force RIAA, a multinational corporation, to decide whether to go down the 'slippery slope' of allowing the alleged infringement or filing a lawsuit against the users.

DOES DMCA APPLY WORLDWIDE?

While DMCA is a U.S. Federal Law, that only applies in U.S. territory, the DMCA affects the site's location, not the user's. This means that DMCA take down requests are sent to the service providers, not the users, and if the service provider is subject to US law, it applies to them. The service provider has to take down the allegedly infringing content regardless of where the owner of the account at issue lives.

TAKE AWAY

When streaming or making videos, be careful about the content being featured in your streams or videos. The use of copyrighted material can be a DMCA violation which can eventually lead to your content being taken down. It is essential to have valid licenses for all the content being used. On the flip side, if you feel your content is being infringed upon in videos or streams, there is a legal recourse available. DMCA take down notices and counter-notices are generally inexpensive, although they do contain formalities that need to be observed. And as always make sure you contact an intellectual property lawyer before taking any action, a good lawyer can save you a lot of time and money.

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