

My Experiences with the DMCA on YouTube

Written by Patrick McKay

Wednesday, 07 October 2009 00:00 - Last Updated Friday, 16 July 2010 12:50

Originally published as "Square Enix Abuses the DMCA Takedown Process"

A few months ago I wrote a post on why [anime music videos \(AMVs\) would likely be considered fair use under US copyright law](#). Well it wasn't long before I was given the chance to test that theory.

This past Sunday I uploaded a new anime music video I made using footage from Final Fantasy VII: Advent Children Complete and Final Fantasy VII: Crisis Core, set to Breaking Benjamin's awesome new song "Anthem of the Angels." (You can currently see the video hosted on Facebook Video [here](#).) Because Advent Children Complete was released in glorious high definition, I uploaded the video in full HD to YouTube, which I think may have been the reason the video immediately triggered YouTube's copyright filters, which blocked it because of a copyright claim by Square Enix Co., Ltd., the Japanese video game company that makes the Final Fantasy series. Just as I have done each time one of my videos has been blocked by the YouTube Content ID system in the past because of the whole Warner Music debacle, I immediately disputed the copyright claim with the following statement:

The use of video footage in this video is fair use because it is (1) highly transformative, significantly altering both the content and message of the original; (2) noncommercial in nature; and (3) only uses a small fraction of the original.

I could also have added that the video could have no possible negative effect on the market for the original works, which is the fourth reason that the use of anime video content in AMVs is very likely fair use. Anyway, I thought that this would be the end of it. My video was restored and I verified that it was playable. However, *barely five minutes later* I got a notification from YouTube saying the video was blocked again, this time because of an actual DMCA takedown notice from Square Enix.

Because I am fairly confident my use of Final Fantasy footage in an AMV was fair use, I decided to go ahead and submit a formal DMCA counter-notification, which I generated with the handy [counter-notification generator at ChillingEffects.org](#). By law, DMCA counter-notifications must contain the following five elements, as nicely summarized by YouTube:

My Experiences with the DMCA on YouTube

Written by Patrick McKay

Wednesday, 07 October 2009 00:00 - Last Updated Friday, 16 July 2010 12:50

1. Identify the specific URLs of material that YouTube has removed or to which YouTube has disabled access.
2. Provide your full name, address, telephone number, and email address, and the username of your YouTube account.
3. Provide a statement that you consent to the jurisdiction of Federal District Court for the judicial district in which your address is located (or San Francisco County, California if your address is outside of the United States), and that you will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.
4. Include the following statement: "I swear, under penalty of perjury, that I have a good faith belief that the material was removed or disabled as a result of a mistake or misidentification of the material to be removed or disabled."
5. Sign the notice. If you are providing notice by e-mail, a scanned physical signature or a valid electronic signature will be accepted.

As you can tell from the wording above, this is pretty serious stuff, as it could potentially open me up to a lawsuit, though that is **incredibly unlikely**, given that, [according to the Electronic Frontier Foundation](#), no individual YouTube user has ever been sued over a remix video, and Square Enix would have to be incredibly stupid to bring the bad publicity on themselves of suing a fan for making a Final Fantasy tribute video on the eve of the release of Final Fantasy XIII in December. (Yes, that's Final Fantasy *thirteen* - you can see how popular this series is.)

So, I submitted a counter-notification to copyright@youtube.com around 11pm EDT Sunday, and almost exactly 48 hours later at 11pm on Tuesday, I received the following message from YouTube:

Dear Patrick,

Thank you for your counter-notification. It has been forwarded to the party that sent the takedown notification. If we receive no response, your material will be restored between 10 and 14 business days from today.

My Experiences with the DMCA on YouTube

Written by Patrick McKay

Wednesday, 07 October 2009 00:00 - Last Updated Friday, 16 July 2010 12:50

Sincerely,

The YouTube Team

What this means in short is that Square Enix has 14 days to file a lawsuit against me, and if they don't YouTube will restore my video. The ball is now in Square Enix's court, so we'll see what happens with that.

Analysis

1. Bad move for Square Enix

Now there are several things that are interesting about this situation. The first is that Square Enix would go after YouTube videos at all, which is an incredibly stupid business decision. The Final Fantasy series is not only the best selling anime video game franchise in history, but THE most popular source for AMVs, with a search for "["final fantasy' amv"](#)" resulting in 122,000 hits on YouTube. Over 8,000 Final Fantasy AMVs are hosted at animemusicvideos.org.

Final Fantasy fans love the series, and like true digital natives they like to express that love by making tribute videos—taking clips from the various Final Fantasy games and movies and setting them to their favorite songs. Many people then watch these videos and discover Final Fantasy for the first time, then go out and buy the games. Thus, AMVs serve as free advertising for the series, bringing in new fans and new sales for Square Enix.

While I don't necessarily think Square Enix intended to go after AMVs by opting into the YouTube filtering system (I think they're probably trying to catch people uploading FFXIII trailers or full scenes of Advent Children Complete), they must have known that YouTube's filter's would catch AMVs as well. A quick glance at AMV.org's forums revealed I am not the only person who has had FF AMVs blocked, and some people have had their accounts deleted because of it. Taking advantage of YouTube's filters therefore amounts to a declaration of war on Square Enix's most loyal fans—the ones who love Final Fantasy so much that they take the time to make music videos in honor of it. This is a new low for Square Enix, which is already notoriously overprotective of its intellectual property. What's more, it runs against the entire anime culture on which the FF series depends for its popularity in the first place. If they

My Experiences with the DMCA on YouTube

Written by Patrick McKay

Wednesday, 07 October 2009 00:00 - Last Updated Friday, 16 July 2010 12:50

continue to block AMVs in this manner, they risk alienating their fan base, and that is a stupid business decision no matter what way you look at it.

2. DMCA Abuse

The second interesting thing about this situation is the manner in which it occurred, leading me to think there is a strong legal argument that Square Enix is abusing the DMCA takedown process by making bad-faith copyright claims. Specifically the timing of the notices and the fact that the DMCA takedown notice came less than five minutes after I disputed the initial automated filter identification.

One of the things the DMCA requires copyright owners to include in a takedown notice is, **“A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”**

17 U.S.C. § 512(c)(3)(A)(v).

A federal district court in California recently held in [Lenz v. Universal](#) that this provision of the DMCA “*requires copyright owners to make an initial review of the potentially infringing material prior to sending a takedown notice*” and that this requires the copyright holder “*to form a subjective good faith belief that the particular use is not a fair use before sending the takedown notice.*”

Now, the timing in this situation is suspicious, because my video was re-blocked by a takedown notice only five minutes after it was unblocked when I disputed the automatic filter. This leads me to believe that the takedown notice was sent by some sort of automated system which automatically responded to my dispute of the filter by sending a formal takedown notice. That is unless Square Enix had lawyers working at their American headquarters in California at 6:20 pm PDT on a Sunday evening capable of firing off takedown notices less than five minutes after being notified of a dispute. (I’m assume the takedown notice did not come from their main headquarters in Japan). This means that the takedown notice was likely sent by a computer with no human intervention, and unless I’m seriously mistaken as to some legal precedent I haven’t heard of, a computer cannot formulate a good faith belief about anything, let alone

My Experiences with the DMCA on YouTube

Written by Patrick McKay

Wednesday, 07 October 2009 00:00 - Last Updated Friday, 16 July 2010 12:50

whether a use qualifies as fair use or not.

It would thus appear Square Enix did not fulfill their legal duties to make an initial review of potentially infringing material and to form a good faith belief that it was not fair use. So if this ever did come to a lawsuit, they would be wide open to a counterclaim of sending a false takedown notice in bad faith and abusing the DMCA takedown process. Like I said, interesting...

UPDATE 10/27/09: VICTORY!!!

Last Friday night, October 23, I received the following message from YouTube:

Hi there,

In accordance with the Digital Millennium Copyright Act, we've completed processing your counter-notification regarding your video:

<http://www.youtube.com/watch?v=u4Qs-YPVdRM>

This content has been restored and your account will not be penalized.

Sincerely,

The YouTube Team

My Experiences with the DMCA on YouTube

Written by Patrick McKay

Wednesday, 07 October 2009 00:00 - Last Updated Friday, 16 July 2010 12:50

My video is now back up and running. Now if only other AMV makers whose videos were falsely blocked by Square Enix would fight back as I did.