

Last October, YouTube announced some [much needed reforms](#) to its Content ID copyright dispute process. Bowing to growing public pressure, YouTube ended the practice of allowing copyright claimants to unilaterally deny disputes, leaving users with no further recourse to have non-infringing videos restored.

YouTube established a new “appeals” process, which once again gave users whose videos are blocked by Content ID recourse to the DMCA counter-notice process if the copyright owner insists on rejecting their dispute. At the end of the process, the user’s video would be restored unless the copyright claimant actually filed a lawsuit seeking an injunction to keep it offline. No longer.

YouTube refuses to honor counter-notices for “contractual reasons”

For months I have been trying to discover why many users have been receiving responses to DMCA counter-notices stating, “***It appears that you do not have the necessary rights to post the content on YouTube. Therefore, we regretfully cannot honor this counter-notification.***” I even got in touch with a YouTube product manager who promised to look into the situation for me, though he has not yet provided me with any answers. While I initially suspected some kind of technical glitch, it now appears that something far more nefarious is going on.

I have recently discovered evidence that YouTube has contracts with certain copyright holders (including Universal Music Group – UMG) to refuse to honor DMCA counter-notices sent in response to their copyright takedowns—essentially giving them the power to take down any video they wish, even if it does not infringe their copyright in any way.

It is interesting to note that a little over a year ago when UMG infamously took down the “Megaupload Song” video with a completely bogus copyright claim, UMG [claimed](#) it had unspecified “contractual rights” to do so even if it did not infringe its copyrights. At the time however, YouTube explicitly denied having a contract with UMG that gave them the right to take down videos on which they had no legitimate copyright claim, stating,

Our partners do not have the right to take down videos from YouTube unless they own

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Written by Patrick McKay
Thursday, 04 April 2013 13:24 -

the rights to them or they are live performances controlled through exclusive agreements with their artists...

”

It appears things have changed. Consider the following:

Last week I was contacted by a YouTube user named John (**YouTube username:** [WernerVo nWallenrod](#))

, who mainly posts reviews of old vinyl records. He uploaded a roughly [7 minute video](#) reviewing an old Eric B. & Rakim record from the 1980s, 90% of which consists of him standing in his kitchen talking about the record. The video includes a couple clips of him playing short (<1 minute) segments of the record while filming the record player.

Because the video uses only short, low-quality segments of a few songs on the record for purposes of critical commentary and review, the video almost certainly qualifies as a textbook example of fair use. Nevertheless, UMG had the video taken down with a DMCA notice. Believing his video to be fair use, John sent a properly filed DMCA counter-notice in response. A few days later, he received this email from YouTube (emphasis added):

Hi there,

Thank you for your counter-notification. The complainant has reaffirmed the information in its DMCA notification. **YouTube has a contractual obligation to this specific copyright owner that prevents us from reinstating videos in such circumstances. Therefore, we regretfully cannot honor this counter-notification.**

You may learn more about this here:

<http://support.google.com/youtube/bin/answer.py?hl=en&answer=3045545>

We unfortunately are unable to assist further in this matter. You may wish to contact the

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complainant directly at youtube@umusic.com .

Regards,

Linda

The YouTube Team

This message is extremely disturbing for multiple reasons. It appears that YouTube is saying it essentially has a contract with UMG to ignore DMCA counter-notices sent against its copyright claims, so that even if the copyright takedown has no legal basis, YouTube must nevertheless refuse to restore the video if UMG “reaffirms” the information in its DMCA notice. The [help page](#) referenced in the email provides further details (emphasis added):

Videos removed or blocked due to YouTube's contractual obligations

YouTube enters into agreements with certain music copyright owners to allow use of their sound recordings and musical compositions.

In exchange for this, some of these music copyright owners require us to handle videos containing their sound recordings and/or musical works in ways that differ from the usual processes on YouTube. **Under these contracts, we may be required to remove specific videos from the site, block specific videos in certain territories, or prevent specific videos from being reinstated after a counter notification**

• In some instances, this may mean the

[Content ID appeals](#)

and/or

[counter notification](#)

processes will not be available. Your account will not be penalized at this time.

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YouTube will inform you if this is the case for one of your videos, and will provide you with contact information for the complainant whenever possible so you can discuss the matter directly.

So the user is stuck. Their video could be fair use, in the public domain, or contain no UMG content whatsoever, but as long as UMG “reaffirms” their takedown notice (which based on previous experience I’m guessing they will *always* do), YouTube will refuse to restore the video. YouTube and UMG (and possibly other copyright holders) have made a contractual end-run around the DMCA notice and counter-notice process, giving certain preferred copyright holders a free pass to take down any video on YouTube they wish with impunity, having been guaranteed that their takedowns will be immune from counter-notices.

No recourse for user

In such cases about the only thing the user can do is attempt to contact the copyright claimant using the information provided by YouTube, and attempt to convince them to retract their copyright claim (probably a futile endeavor). In John’s case, he emailed the provided youtube@umusic.com address to inquire about this situation, and interestingly enough, even though the email is on a UMG-owned domain, he received a response not from UMG but from YouTube, stating:

For the reasons explained before, we regretfully cannot honor this counter-notification. However, your account will not be penalized and your strike has been resolved.

YouTube was kind enough to remove the copyright strike on his account, though only after he contacted them, not after they initially refused to restore his video.

YouTube’s liability limited

It should be noted that YouTube has no legal obligation under the DMCA to restore videos upon receiving a counter-notice. The DMCA is only a safe-harbor which sites *may* follow to be immune from liability, and is not in itself mandatory. In order to be immune from liability for users’ copyright infringement, YouTube must take down videos upon request. Likewise, in order to be immune from liability to the user for taking down the video, YouTube must restore the video within 14 business days of receiving a counter-notice, unless it first receives notice that the copyright holder, “has filed an action seeking a court order to restrain the subscriber from

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engaging in infringing activity relating to the material on the service provider's system or network."

Here, YouTube takes down videos upon receipt of a takedown notice, but it is refusing to restore them after receiving a counter-notice, even though no lawsuit has been filed seeking an injunction. This means in theory, YouTube is liable to the user for taking down the video. However, YouTube has been careful to immunize itself against liability for this through its [Terms of Service](#), which state:

If a counter-notice is received by the Copyright Agent, YouTube may send a copy of the counter-notice to the original complaining party informing that person that it may replace the removed Content or cease disabling it in 10 business days. Unless the copyright owner files an action seeking a court order against the Content provider, member or user, the removed Content **may be replaced**, or access to it restored, in 10 to 14 business days or more after receipt of the counter-notice, **at YouTube's sole discretion**.

So even though the law makes YouTube potentially liable for refusing to honor a counter-notice, YouTube's Terms of Service (which you have to agree to in order to use the site) override this, giving it the right to refuse to restore a video at its sole discretion.

About the only legal remedy the user could possibly pursue would be to sue Universal Music for misrepresentation under section 512(f) of the DMCA, along with seeking a declaratory judgment that the video is not infringing and an injunction against UMG continuing to assert a copyright claim over it. This, of course, is not feasible for the average YouTube user.

Conclusion

While YouTube has no actual legal obligation to restore videos after receiving DMCA counter-notices, YouTube is clearly violating the spirit of the DMCA. The DMCA is quite clear in its intent that the end result of the copyright dispute process on a user-generated content site should be that if the user insists their content is not infringing, it should be kept online unless the copyright holder sues for an injunction to have it taken down. This necessarily requires a court ruling that the material is infringing.

YouTube and UMG have taken the intent of the DMCA and turned it on its head. Now instead of the copyright holder having to sue to keep the material offline, the only way a user can have his video restored is to sue the copyright claimant for a declaration that the video is not infringing

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and to secure an injunction forcing the copyright claimant to withdraw its copyright claim.

Before posting this article, I sent emails to YouTube's press contact, Annie Baxter (whom I have corresponded with in the past), and to a YouTube product manager I met at a conference in February, seeking comment on this situation. Neither has sent me any response.

Plenty of questions remain. Is UMG the only entertainment company YouTube has this type of agreement with, or are there others? What are the conditions of these agreements? Does YouTube have any policies or procedures in place to protect users, or has it essentially given these companies a carte blanche to take down any video they wish with impunity?

For now, it is difficult to understate how badly YouTube has screwed over its users here. Instead of standing up for users' free speech rights, YouTube has sold them out to big entertainment companies, who now have the power to take down any video they wish by bogus assertions of copyright, with absolutely no accountability.

For all Google's "don't be evil" mantra, it appears that the depths to which Google is willing to sink to kowtow to the major record labels at the expense of its users' rights truly knows no bounds.