

August 2014

Streaming and Copyright Law: A Fast-Developing Area of the Law

League of Legends Article Series

Twitch.tv has grown in prominence as fast as eSports themselves, drawing hoards of dedicated users as well as the ire of copyright holders seeking to protect their intellectual property. How has Twitch responded to assertions of copyright infringement? Is that response legally mandated, or does Twitch have other options available? How can individual streamers protect themselves from claims of infringement? While the applicable statutes are not new, the precise legal questions fall into a fast developing area of the law; Twitch, streamers, and other service providers will need to stay on top of these issues to ensure they keep pace.

As detailed by the [first article](#) in this series, eSports have continued their meteoric rise as spectator activities. This growth has been coupled with the expansion of Twitch.tv, the world's premier streaming service provider and predominant broadcaster of eSports. Twitch is doing so well that it is reported to be the next item on Google's shopping list—at a \$1 billion price tag. Twitch has also drawn the attention of copyright holders, particularly in the music industry, and has been forced to alter its policies to avoid potential liability under US Copyright law. Twitch offers two types of content. The first and more popular aspect of Twitch's service is streaming, where broadcasters transmit live video over the Internet. The second type of content provided by Twitch is video on demand (VOD), which allows Twitch users to watch recordings of previous broadcasts and highlights.

This distinction has been highlighted by Twitch in its efforts to combat recent claims of copyright infringement. Twitch's General Counsel Elizabeth Baker [recently released a blog post](#) detailing plans to employ new copyright detection software called AudibleMagic, which mutes videos that may include potentially infringing audio. Most infringements in this context occur unintentionally, when there is copyrighted music playing in the background of a VOD or stream. The implementation of this system has therefore generated negative feedback for Twitch, as

many VODs have been muted in their entirety in order to remove infringing audio tracks.

[In a recent Reddit "Ask Me Anything,"](#) Twitch CEO Emmett Shear attempted to address the situation by explaining the necessity of reducing liability for copyright infringement. While recognizing the issues implicated by playing copyrighted music on streams (which, in turn, become VODs), Mr. Shear remained adamant that this policy will never affect Twitch's primary service: live streaming. "Even if we could run this on live this second, we absolutely would not," Shear told a skeptical Reddit audience. "We're not bringing audio-recognition to live streaming. I don't know how I can be more clear."

THE BASICS OF COPYRIGHT LAW

Before continuing with the analysis of the Twitch situation, it is important to understand the relevant copyright laws and their applicability to Twitch streams and VODs. The popular (and profitable) streams on Twitch include three main elements: the game, commentary, and background music. Streaming gameplay is typically expressly allowed by the game's terms of service, especially within the larger competitive games like [League of Legends](#), [DOTA 2](#) and [Hearthstone](#). A player's commentary similarly does not present copyright issues; after all, the

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commentary is provided by the player and may not be copyrighted material.¹ The background music, on the other hand, poses more significant issues.

Title 17 USC § 106 delineates the rights of a copyright holder. Under this section of the Copyright Act, copyright holders have the **exclusive** right to publicly perform the work and to reproduce copies of the work. Copyright holders can grant licenses to others to use the protected work at the discretion of the copyright holder, often in exchange for a fee. The absence of a copyright notice or wide-spread public use of a protected work does not mean that the work is public domain. Typically, the use of copyrighted music in a video, even in the background, infringes upon these rights. The copyright holder must explicitly authorize use of the work in order to avoid potential copyright infringement.

Unsurprisingly, most of the background music utilized by streamers is copyrighted by one or more parties. Even if the streamer obtained the music legally, that does not give them the right to use the music for a commercial purpose—purchasing a CD or subscribing to Pandora supplies the copyright for “personal use” only. With Twitch being the largest video game streaming website, boasting well over 2 billion minutes watched, 900,000 broadcasters, and 6 million total videos broadcast **each month**, the amount of Twitch content that likely violates US copyright law is staggering.

THE SAFE HARBOR PROVISION

In the beginning, Twitch enjoyed anonymity while it developed as a catalyst for user-generated content. While Twitch remained off the music industry’s radar, YouTube was on the hot seat for potential infringement—it faced legal challenges from major artists and publishers, including [billion-dollar litigation](#) brought about by mass-media company Viacom.

The *Viacom* case surrounded the then recently-enacted [safe harbor provision of the Digital Millennium Copyright Act](#) (DMCA), which was intended to shelter service providers from the infringing activities of their users. This provision states that a service provider (such as YouTube and Twitch) cannot be held liable for copyright infringement if it (1) does not have actual knowledge of the infringement, (2) is not aware of facts or circumstances from which infringing activity is apparent; **and** (3) upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the infringing material.

In a [2013 ruling](#) on the *Viacom* case, the Southern District Court of New York noted:

Title II of the DMCA was enacted because service providers perform a useful function, but the great volume of works placed by outsiders on their platforms, of whose contents the service providers were generally unaware, might well contain copyright-infringing material which the service provider would mechanically ‘publish,’ thus ignorantly incurring liability under the copyright law.

The court emphasized that the safe harbor provision was designed to resolve this issue, arguing that service providers are not obligated to scour their websites in order to identify potentially-infringing content; instead, the burden is on the copyright holder to identify infringing content so that the service provider may take steps to prevent infringement.

While this court’s reasoning was sound, its interpretation of the DMCA is not yet the law of the US (a court’s ruling is only binding in the jurisdiction in which it sits). Rather than relying solely on copyright holders to identify infringing material, YouTube implemented an internal policy to attempt to alleviate potential liability for user infringement.

[YouTube’s Content ID program](#) allows for copyright holders to pursue the most effective protection for their individual needs. This system “[scans] YouTube videos against a database of files that have been submitted...by content owners.” When infringing material is identified, it gives the copyright holder four options: (1) monetize the video by adding advertisements and receiving a share of the revenue;

¹ *And, to the extent it is copyrighted, that copyright belongs to the player.*

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(2) track the viewership statistics to make a decision at a later date; (3) mute the infringing audio; or (4) block the video outright.

Now that Twitch has started to draw the attention of music copyright holders, litigation appears inevitable. It therefore decided to act proactively, [implementing the AudibleMagic system](#) in an apparent attempt to establish a defense under the safe harbor provision of the DMCA. The AudibleMagic program searches a database of registered, copyrighted content and attempts to match them to VODs. Upon a match, the selected audio is muted in 30-minute sections.

FIRST COME THE VODs, THEN THE STREAMS THEMSELVES

Despite the strength of Shear's public rhetoric ("We're not bringing audio-recognition to live streaming. I don't know how I can be more clear"), it's not clear that live streaming is legally distinguishable from VODs in the eyes of current copyright law. Like VODs, a live stream arguably infringes on the music copyright holders' exclusive right to publicly perform the work and to reproduce copies of the work.² Moreover, one could simply record the live broadcast, providing the same access as a VOD.

That being said, Twitch's stance does find some legal support. VODs allow for users to download copyrighted content (the background music). Though the *Viacom* court disagreed, facilitating such downloads could remove Twitch from the protections of the DMCA safe harbor provision. Streams, on the other hand, cannot be downloaded in the same manner. Attempting to track live streams would also impose a much more significant burden on a service provider—whether that burden is imposed by the safe harbor provision of the DMCA depends on how a court interprets the requirement that a service provider "is not aware of facts or circumstances from which infringing activity is apparent." Since this issue has not been addressed by the US Supreme Court, the viability of Twitch's current position remains an open question.

POSSIBLE SOLUTIONS

I. The Boycott—An Ineffective Option

Some of Twitch's competitors have attempted to capitalize on the uproar over AudibleMagic. Azubu.tv, another well-known eSports streaming website, broadened its exclusive broadcasting program from invite-only to open-application. Its ultimate impact on Twitch market stranglehold appears marginal. Moreover, copyright laws do not change from one streaming site to the next. If a new streaming service provider rises in prominence, it will have to tackle the same legal issues Twitch now faces.

II. Revise the AudioMagic System

Twitch's method of handling copyright violations seems unnecessarily restrictive. YouTube offers far more options for copyright holders, and does not rush to eliminate potentially infringing content. Rather, the YouTube policy appears to offer a win-win for copyright holders and content providers by creating a [revenue-sharing system](#) for advertising revenue on videos containing tracks claimed through the Content ID system. Twitch could model its own policy after YouTube's, striking a better balance between the interests of users, viewers, and copyright holders.

² *An entire article could be written to address this single issue. Unfortunately, this analysis is outside the scope of the current white paper. Stay tuned for later installments, which may address this point in further detail.*

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It is also worth noting that if the safe harbor provision is interpreted consistently with the 2013 ruling in the *Viacom* case, Twitch does not have to assume the burden of identifying and removing infringing content. Instead, this responsibility would be placed on copyright holders.³ Once again, YouTube can serve as a model—its Content ID system requires users to submit copyrighted material. If such material is not provided, YouTube arguably cannot be held responsible if the applicable copyright is infringed by a user.

III. Commercial Licenses

Streamers could consider acquiring commercial music licenses, through services such as [DMX for Pandora](#) or [CloudCover](#). These companies pay copyright holders for the licensing of particular tracks and for the ability to sublicense the tracks to others who require their usage for an audience that might be large enough to constitute public performance. Although this type of service is more expensive than a premium audio subscription for an individual, it *potentially* protects the individual against legal action because a license is granted.⁴ It is also worth noting that even if individual streamers obtain proper licensing to air copyrighted music on their streams, Twitch has not established protocols for users to prove their right to play copyrighted music and avoid automated muting by AudibleMagic.

IV. Use Music That Is Not Copyrighted

Sure, streamers won't be able to play Beyoncé or Macklemore, but there is still non-copyrighted music available. Take, for example, the [Creative Commons \(CC\)](#)—a repository of music available on the Internet that merely requires the user to credit the artist for the work. There are also a wide array of artists who offer their creations to the world free of charge and, of course, can be used per the creator's direction and discretion. Riot even went so far as to solicit such music through [Twitter](#). Repositories of non-copyrighted music include: [Jamendo](#), [SongFreedom](#), [Archive Org](#), [Freesound](#), [Soundcloud](#), [Longzijun](#) and [CMixer](#).

CONCLUSION

The copyright issues facing Twitch and individual streamers are not new, but the application of copyright law to streaming is a fast-developing area of the law. Given Twitch's enormous success, it is hard to believe they will not be able to work with key players in the music industry to try to resolve the disputes and enable streamers to use music in the background of their streams. In the meantime, the blanket muting policy seems to be the wrong way to go. And while streamers can explore some of the solutions proposed in this article to address their infringement on an individual basis, the ultimate solution is going to come from Twitch itself.

³ Twitch implicitly recognized this possibility in its official blog post announcing the implementation of the AudibleMagic system, stating: "Twitch is not obligated to filter content stored on the Twitch platform by its users and assumes no liability for the actions of its users notwithstanding the implementation of the Audible Magic technology. Twitch reserves the right to stop filtering audio content in VODs in its sole discretion at any time and without liability to any third party, subject only to any contractual obligations."

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