

Illegal Internet Streaming of Copyrighted Content: Legislation in the 112th Congress

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Summary

Technological developments related to the Internet benefit consumers who want convenient ways to view and hear information and entertainment content on a variety of electronic devices (such as televisions, radios, computers, mobile phones, video game consoles, and portable media players). New technologies offer the potential to help copyright holders promote their creative works for artistic, educational, and commercial reasons. However, new technologies may increase the risk of infringement of the copyright holders' rights because they often provide faster, cheaper, and easier means of engaging in unauthorized reproduction, distribution, and public performance of copyrighted works than previous technologies. The widespread consumer use of high-speed Internet connections as well as increased reliance on data storage offered by "cloud computing" services may also contribute to infringement problems.

One of these new technologies enables the "streaming" of copyrighted content over the Internet from a website to an end user. There are many legitimate streaming websites such as Hulu, Netflix, YouTube, and HBO GO that offer on-demand streams of television programs, motion pictures, live sporting events, and sound recordings. However, streaming technology can also be misused for facilitating copyright infringement online. So-called "rogue" websites serve as an alternative to the authorized websites, willfully streaming unlawfully obtained copyrighted content to users and thereby infringing the copyright holder's exclusive right to control public performance of the work. By offering consumers an unlawful alternative for viewing streaming content, these rogue websites may reduce the number of people who would otherwise visit the legitimate providers of copyrighted material.

To enforce their intellectual property rights, copyright holders may file a lawsuit against the alleged infringer. In addition to these civil remedies, the U.S. Department of Justice has the power to criminally prosecute particularly egregious copyright infringers (repeat and large-scale offenders) in order to impose greater punishment and possibly deter other would-be infringers. Yet under the current law, many illegal streaming websites have evaded prosecution due largely to a disparity regarding the criminal penalties available for those who willfully infringe copyrights by means of reproduction and distribution (a felony offense in certain circumstances) and those who infringe copyrights by means of public performance (a misdemeanor).

In March 2011, the U.S. Intellectual Property Enforcement Coordinator recommended Congress amend the law to harmonize penalties for the act of illegally streaming copyrighted content with those applicable to downloading and peer-to-peer file sharing of such protected material: "To ensure that Federal copyright law keeps pace with infringers, and to ensure that DOJ and U.S. law enforcement agencies are able to effectively combat infringement involving new technology, the Administration recommends that Congress clarify that infringement by streaming, or by means of other similar new technology, is a felony in appropriate circumstances."

Following this recommendation, S. 978 was introduced in the 112th Congress. Commonly referred to as the Commercial Felony Streaming Act, S. 978 would authorize a maximum five-year prison sentence for those who, without authorization, willfully stream commercially valuable copyrighted material for purposes of commercial advantage or private financial gain. It also expands the current felony offense of unauthorized distribution of a pre-release commercial copyrighted work to include "public performance" of such work as an additional basis for prosecution. The Senate Judiciary Committee approved the bill on June 16, 2011, by voice vote, and Senator Leahy reported the bill on June 20 without amendment.

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Introduction

Streaming technology allows a person to view or listen to creative content without first needing to download a data file containing the content onto a hard drive or memory card, assuming the user's electronic device maintains an active connection to the Internet during the duration of the performance of the material. There are many legitimate streaming websites that offer on-demand streams of television programs, motion pictures, live sporting events, and sound recordings. However, so-called "rogue" websites willfully stream copyrighted content without the permission of the copyright holder, thus violating the copyright holder's exclusive right to control public performance of the work. By offering consumers an unauthorized alternative for obtaining streaming content, these rogue websites may reduce the number of people who would otherwise visit the legitimate providers of copyrighted material. Such harm to the legitimate market for streaming of copyrighted content may negatively impact the U.S. film and television industries as well as the U.S. economy as a whole.[1] In addition, some believe that rogue websites "expose consumers to criminals, who routinely collect personal and financial information from unsuspecting targets, subjecting those consumers not only to fraud and deceit, but also to identity theft and other harms."[2]

To enforce their intellectual property rights, copyright holders may file a lawsuit against those who illegally stream their protected works.[3] They may also file a lawsuit against those who engage in the unauthorized reproduction and distribution of copyrighted works (whether using Internet technologies or traditional methods). In addition to these civil remedies, the U.S. Department of Justice (DOJ) has the power to criminally prosecute particularly egregious copyright infringers (repeat and large-scale offenders) in order to impose greater punishment and possibly deter other would-be infringers.[4]

However, a disparity exists regarding the criminal penalties available for those who willfully infringe copyrights by means of reproduction and distribution (a felony offense in certain circumstances) and those who infringe copyrights by means of public performance (a misdemeanor). In the digital context, this means that DOJ prosecutors could seek felony penalties for those who engage in willful, unauthorized copying and distributing of copyrighted material using Internet technologies, depending on the specific facts of the allegedly infringing activity; such penalties include imprisonment sentences of up to 10 years.[5] In comparison, prosecutors

[1] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Michael P. O'Leary, Executive Vice President, Motion Picture Association of America, Inc.).

[2] *Id.*

[3] 17 U.S.C. § 501.

[4] The 94 U.S. Attorneys' Offices located across the country have primary responsibility for prosecution of IP offenses. Every office has a Computer Hacking and Intellectual Property ("CHIP") Coordinator, who are Assistant U.S. Attorneys with expertise in prosecuting IP and computer crimes. U.S. DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, PROSECUTING INTELLECTUAL PROPERTY CRIMES (3rd ed., Sept. 2006), at 6, *available at* http://www.usdoj.gov/criminal/cybercrime/ipmanual/01ipma.html.

[5] 18 U.S.C. § 2319(b)(1), (2).

may only file misdemeanor charges that carry a maximum sentence of one year in prison against those who engage in willful, unauthorized online performance of copyrighted works.[6]

In March 2011, the U.S. Intellectual Property Enforcement Coordinator (IPEC) advised Congress to amend the law to authorize felony penalties for infringement of copyrights by streaming:

> *Ensure Felony Penalties for Infringement By Streaming and by Means of Other New Technology:* It is imperative that our laws account for changes in technology used by infringers. One recent technological change is the illegal streaming of content. Existing law provides felony penalties for willful copyright infringement, but felony penalties are predicated on the defendant either illegally reproducing or distributing the copyrighted work. Questions have arisen about whether streaming constitutes the distribution of copyrighted works (and thereby is a felony) and/or performance of those works (and thereby is a not a felony). These questions have impaired the criminal enforcement of copyright laws. To ensure that Federal copyright law keeps pace with infringers, and to ensure that DOJ and U.S. law enforcement agencies are able to effectively combat infringement involving new technology, the Administration recommends that Congress clarify that infringement by streaming, or by means of other similar new technology, is a felony in appropriate circumstances.[7]

This report describes streaming technology, explains the disparity in criminal penalties for different forms of infringement committed by electronic means, analyzes legislation in the 112th Congress that would harmonize penalties for illegal streaming with those available for other forms of online copyright infringement, and summarizes arguments for and against such a legislative change.

Background

Brief Overview of Copyright Law

Copyright is a federal grant of legal protection for certain works of creative expression, including books, motion pictures, television shows, photographs, artwork, and music.[8] A copyright holder possesses several exclusive legal entitlements under the Copyright Act, including the right to control reproduction, distribution, public performance, and public display of the protected material.[9] Unauthorized use of a copyrighted work by a third party in a manner that implicates one of the copyright holder's exclusive rights constitutes infringement.[10]

The Copyright Act has both criminal and civil provisions for infringement.[11] The copyright holder may file a lawsuit against an alleged infringer for a violation of any of the exclusive rights

[6] 18 U.S.C. § 2319(b)(3).

[7] U.S. Intellectual Property Enforcement Coordinator, *Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations,* March 2011, at 10, *available at* http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf.

[8] 17 U.S.C. § 102(a).

[9] 17 U.S.C. § 106. For a detailed description of the major provisions of the Copyright Act, *see* CRS Report RS22801, *General Overview of U.S. Copyright Law*, by Brian T. Yeh.

[10] 17 U.S.C. § 501.

[11] *See* 17 U.S.C. § 501 (civil) and § 506, 18 U.S.C. § 2319 (criminal).

conferred by copyright. The civil remedies available to the copyright holder that is harmed by infringement include the possibility of obtaining injunctive relief,[12] actual damages suffered by the copyright owner due to the infringement,[13] statutory damages,[14] and costs and attorney fees.[15] While "civil law protects all the copyright owner's exclusive rights, criminal law primarily focuses on the rights of distribution and reproduction."[16]

Criminal copyright infringement includes the following offenses:[17]

- copyright infringement for profit, 17 U.S.C. § 506(a)(1)(A), 18 U.S.C. § 2319(b);
- copyright infringement without a profit motive, 17 U.S.C. § 506(a)(1)(B), 18 U.S.C. § 2319(c);
- pre-release distribution of a copyrighted work over a publicly accessible computer network, 17 U.S.C. § 506(a)(1)(C), 18 U.S.C. § 2319(d);
- circumvention of copyright protection systems in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1204;
- trafficking in counterfeit or illicit labels and counterfeit documentation and packaging for copyrighted works, 18 U.S.C. § 2318;
- bootleg recordings of live musical performances, 18 U.S.C. § 2319A; and
- unauthorized recording of motion pictures in a movie theater (camcording), 18 U.S.C. § 2319B.

Streaming Technology

Internet technologies such as instant messaging, e-mail, peer-to-peer file sharing, electronic bulletin boards, cyber-lockers (a cloud computing service offering remote data storage), and streaming allow for electronic transmission of data files. Although such technologies have legitimate purposes, they may also be misused in ways that infringe copyrights. Until recently, most forms of online copyright infringement involved violations of the copyright holder's reproduction and distribution rights; for example, rogue websites that offer illegal downloads of copyrighted movies and software, or peer-to-peer file sharing of copyrighted sound recordings, infringe both the copyright holder's reproduction right (through the unauthorized copying of copyrighted content) and distribution right (through the unauthorized dissemination of these unlawfully made copies). [18]

[12] 17 U.S.C. § 502.

[13] 17 U.S.C. § 504(b).

[14] 17 U.S.C. § 504(c)(1).

[15] 17 U.S.C. § 505.

[16] U.S. Dep't of Justice, Computer Crime & Intellectual Property Section, Prosecuting Intellectual Property Crimes (3rd ed., Sept. 2006), at 3, *available at* http://www.usdoj.gov/criminal/cybercrime/ipmanual/01ipma.html.

[17] For a detailed explanation of these statutes and their corresponding remedies, *see* CRS Report RL34109, *Intellectual Property Rights Violations: Federal Civil Remedies and Criminal Penalties Related to Copyrights, Trademarks, and Patents*, by Brian T. Yeh.

[18] For more information on this topic, *see* CRS Report R41415, *Statutory Damage Awards in Peer-to-Peer File Sharing Cases Involving Copyrighted Sound Recordings: Recent Legal Developments*, by Brian T. Yeh.

However, technological advances in recent years—such as increased capacity in network bandwidth, faster broadband connections for consumers, more powerful computer processors, new transmission protocols, and more efficient data compression methods—have made possible the public performances of a wide range of copyrighted works over the Internet, including live content (such as sporting events) or pre-recorded performances (such as television programming and motion pictures). Streaming technology enables such public performance of copyrighted material from a particular source to a destination such as a personal computer, television, smartphone, or video game console. Consumers have many ways of receiving entertainment content and information through legitimate video streaming websites such as Hulu, Netflix, YouTube, HBO GO, MLB.com, and Crackle.[19] Video streaming now accounts for a significant portion of broadband Internet traffic, a percentage that is steadily growing as streaming websites increase in popularity.[20]

In addition to legitimate streaming websites, there are also "rogue" websites that use streaming technology to illegally distribute movies and television shows "because it is faster, cheaper, and more convenient" than providing often lengthy file downloads.[21] The availability of such illegal alternatives for online streaming of copyrighted works means that "at any given time, users are one or two clicks away from listening to or viewing any television program, movie, music video or song in the world—all with no return to the creator."[22] In addition to rogue streaming websites, there are also illegal "cyberlockers" that are file hosting services that encourage users to upload copyrighted content in order to store and "share" them (either through streaming or downloading) with other users.[23]

According to the Register of Copyrights, the unauthorized streaming of copyrighted material infringes the copyright holder's right of public performance, and possibly also the rights of reproduction and distribution.[24] As noted earlier, copyright holders may sue operators of illegal streaming websites to enforce their intellectual property rights. The federal government may also prosecute rogue streaming websites for criminal copyright infringement, although the remedies authorized by law appear to be limited to misdemeanor penalties.

The difficulty in criminally prosecuting those who illegally stream copyrighted works is that the law is unclear whether the act of streaming is considered a distribution of a copyrighted work or a public performance of the work. Some claim that this lack of clarity over the availability of felony penalties for unauthorized streaming of copyrighted content has made federal prosecutors

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[19] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Michael P. O'Leary, Executive Vice President, Motion Picture Association of America, Inc.).

[20] SANDVINE, GLOBAL INTERNET PHENOMENA REPORT: SPRING 2011, *available at* http://www.sandvine.com/downloads/documents/05-17-2011_phenomena/Sandvine%20Global%20Internet%20Phenomena%20Report.pdf (reporting that "Real-Time Entertainment traffic is continuing its journey to network dominance, particularly in North America, where it represents 49.2% of peak period fixed access traffic.").

[21] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Sandra Aistars, Executive Director, Copyright Alliance).

[22] *Id.*

[23] *Id.*

[24] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Maria A. Pallante, Register of Copyrights),

"reluctant to pursue cases against even the most egregious, illegal Internet streaming services" because they "tend to focus their limited resources and manpower on prosecuting felony offenses that might result in significant jail time."[25] The Register of Copyrights testified before Congress that streaming is "a lesser crime on the books" that "may never be punished at all" because "prosecutors have little incentive to file charges for a mere misdemeanor."[26]

Criminal Copyright Statutes Relating to the Internet

In 1997 and 2005, Congress passed laws providing criminal penalties for certain Internet activity that infringes copyrights. The No Electronic Theft Act (NET Act)[27] was enacted in 1997 as a response to a 1994 federal district court decision, *United States v. LaMacchia*.[28] The defendant in *LaMacchia,* an MIT graduate student, operated an electronic bulletin board system that allowed users to upload and download infringing software and videogames. The defendant established and operated this BBS for fun and did not seek any personal financial benefit from it. The DOJ could not prosecute him for criminal copyright infringement because, at the time of this case, the criminal copyright infringement statute required willful infringement committed for commercial advantage or private financial gain. Instead, the DOJ charged the defendant with conspiracy to commit wire fraud.[29] However, the federal judge dismissed the indictment against LaMacchia because of a 1985 Supreme Court decision, *Dowling v. United States*,[30] that ruled that the wire fraud statute could not be used as a copyright enforcement tool. In dismissing the indictment, the judge noted that Congress has the power to change the law:

> This is not, of course, to suggest that there is anything edifying about what LaMacchia is alleged to have done. If the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values. Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution. But, it is the legislature, not the Court which is to define a crime, and ordain its punishment.[31]

The NET Act was designed to close the *LaMacchia* loophole in criminal copyright law. It amended the Copyright Act and the criminal code several ways, including the following:

1. Expanded the scope of the term "financial gain" in the definitions section of the Copyright Act (17 U.S.C. § 101) to include the receipt (or expectation of receipt) of anything of value, including other copyrighted works. Thus, federal prosecutors need not prove that the defendant received cash as a result of a

[25] Motion Picture Association of America, Inc., Press Release: S. 978: The Commercial Felony Streaming Act, *available at* http://www.mpaa.org/Resources/2f0f3647-2403-40cd-9638-16ee42ec8373.pdf.

[26] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Maria A. Pallante, Register of Copyrights).

[27] P.L. 105-147, 111 Stat. 2678 (1997).

[28] 871 F. Supp. 535 (D. Mass. 1994).

[29] *Id.* at 541-42.

[30] 473 U.S. 207 (1985).

[31] *LaMacchia,* 871 F. Supp. at 545 (internal quotation marks and citations omitted).

criminal copyright infringement, but instead that he received (or expected to receive) something of value (for example, he provided infringing copies to others in exchange for other copyrighted works).

2. Created a new criminal copyright offense, 17 U.S.C. § 506(a)(1)(B), that does not require willful infringement for commercial advantage or private financial gain; instead, the reproduction or distribution, including by electronic means, during any 180 day period, of copyrighted works with a total retail value of more than $1,000, is itself an act that is eligible for criminal prosecution (regardless whether the defendant benefited or expected to benefit from the infringement).
3. Amended the criminal code provision (18 U.S.C. § 2319) that specifies punishments for the criminal offenses described in the Copyright Act (17 U.S.C. §506(a)) by adding the words "including by electronic means" after "reproduction or distribution," in referring to the felony offense that prohibits the unauthorized reproduction or distribution of 10 or more copies of copyrighted works with a total retail value of at least $2,500, for the purposes of commercial advantage or private financial gain.

Notably, the NET Act addressed the types of online infringing activity (unauthorized reproduction and distribution) that was most prevalent at that time; it does not apply to unauthorized public performances of copyrighted works over the Internet.

Congress enacted the Family Entertainment and Copyright Act of 2005[32] that included the Artists' Rights and Theft Prevention Act of 2005 (ART Act). The ART Act created a new statute, 18 U.S.C. § 2319B, that expressly prohibits the unauthorized recording of motion pictures in a movie theater. In addition, it established a new category of criminal infringement: unauthorized distribution of a pre-release commercial copyrighted work. This provision was intended to address the problem of people knowingly distributing via the Internet unlawfully acquired copies of motion pictures, musical works, software, and sound recordings, before the copyright holder has made them legally available to the public. The two provisions are complimentary in that people may use a camcorder to record a movie being performed in a movie theater and then distribute that recording over the Internet before the movie is distributed by the copyright holder in DVD or downloadable formats. However, like the NET Act, the ART Act did not expand the scope of criminal copyright law to include unauthorized public performances of copyrighted works over the Internet.

With the amendments made by the ART Act to the criminal copyright infringement statute, 17 U.S.C. § 506(a), there are currently three independent bases for criminal prosecution for copyright infringement:

1. Willful infringement for purposes of commercial advantage or private financial gain, 17 U.S.C. § 506(a)(1)(A).
2. Willful infringement by reproducing or distributing, including by electronic means, during any 180-day period one or more copyrighted works having a retail value of $1,000, 17 U.S.C. § 506(a)(1)(B).

[32] P.L. 109-9, 119 Stat. 218 (2005). For more information on this law, *see* CRS Report RS22042, *The Family Entertainment and Copyright Act of 2005*, by Robin Jeweler.

3. Knowingly making a work being prepared for commercial distribution available on a computer network accessible to the public, 17 U.S.C. § 506(a)(1)(C).

Legislation in the 112th Congress

On May 12, 2011, Senator Klobuchar introduced S. 978, "a bill to amend the criminal penalty provision for criminal infringement of a copyright, and for other purposes." This legislation is also commonly referred to as "the Commercial Felony Streaming Act" by its supporters and by the press, although the bill has no official title. The legislation would authorize felony penalties for willful, unauthorized streaming of commercially valuable copyrighted material (for purposes of commercial advantage or private financial gain) and also expand the current felony offense of unauthorized distribution of a pre-release commercial copyrighted work to include "public performance" of such work as an additional basis for prosecution. As indicated earlier in this report, the current law appears to authorize only misdemeanor penalties for unauthorized streaming of copyrighted content for purposes of commercial advantage or private financial gain and does not specifically prohibit pre-release public performance. The Senate Judiciary Committee approved the bill on June 16, 2011, by voice vote, and Senator Leahy reported the bill on June 20 without amendment.

Summary of S. 978, the Commercial Felony Streaming Act

Section 1(a) of S. 978 would amend the criminal code (18 U.S.C. § 2319(b)) provision that specifies the penalties for the offense of willfully infringing a copyright for purposes of commercial advantage or private financial gain. The bill would add to 18 U.S.C. § 2319(b) a new paragraph that authorizes a maximum of five years imprisonment and/or a criminal fine of up to $250,000 for an individual perpetrator (or $500,000 in the case of an organization that commits the offense), in the following scenario:

1. The offense consists of 10 or more public performances by electronic means, during any 180-day period, of 1 or more copyrighted works; and
2. The offense involves either of these financial thresholds:
    a. The total retail value of the performance, or the total economic value of such public performances to the infringer or to the copyright owner, would exceed $2,500; or
    b. The total fair market value of licenses to offer performances of those works would exceed $5,000.

Section 1(b) of S. 978 would amend the criminal offense provision of the Copyright Act (17 U.S.C. § 506(a)(1)(C)) to insert the language "or public performance" in the paragraph that describes the offense that the ART Act had established: willfully distributing a work "being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution." Thus, the bill would establish criminal liability for someone who willfully publicly performs a pre-release commercial copyrighted work (by making it available on a computer network), an expansion of the current law that allows felony prosecution for pre-release distribution of such work.

Analysis

The Copyright Act defines the term "to perform or display a work 'publicly'" to mean, among other things, "to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times."[33] The Register of Copyrights has determined that the act of streaming over the Internet, "which transmits a performance [of a copyrighted work] to members of the public, fits comfortably within" this statutory definition.[34] Federal courts have also found that streaming of a copyrighted work constitutes a public performance.[35]

Under the amendments proposed by S. 978 to the current criminal provisions of the Copyright Act and related provisions in the criminal code, federal prosecutors would need to prove several elements in order to obtain a conviction for unlawful streaming:

1. The existence of a valid copyright in the work in question.
2. The defendant infringed the copyright willfully.[36]
3. The defendant committed the infringement for purposes of commercial advantage or private financial gain.
4. The defendant infringed by publicly performing the work by electronic means, in excess of the following thresholds: 10 or more public performances by electronic means, during any 180-day period, of 1 or more copyrighted works.
5. The offense involved either of these financial thresholds: (a) the total retail value of the performance, or the total economic value of such public performances to the infringer or to the copyright owner, would exceed $2,500; or (b) the total fair market value of licenses to offer performances of those works would exceed $5,000.

The new offense of public performance of a pre-release commercial copyrighted work proposed by S. 978 involves the following elements:[37]

1. The existence of a valid copyright in the work in question.
2. The defendant infringed the copyright willfully.

[33] 17 U.S.C. § 101.

[34] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Maria A. Pallante, Register of Copyrights).

[35] *See, e.g.,* United States v. ASCAP, 485 F. Supp. 2d 438, 442 (S.D.N.Y. 2007) ("Although ... the streaming of a musical work does constitute a public performance, we conclude that the downloading of a digital music file, in and of itself, does not.").

[36] To establish criminal intent, the government must prove that the defendant infringed the copyright willfully. See 17 U.S.C. § 506(a) ("Any person who willfully infringes a copyright shall be punished ...."). The Copyright Act provides that "[e]vidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement." 17 U.S.C. § 506(a)(2).

[37] This listing is adapted from U.S. DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, PROSECUTING INTELLECTUAL PROPERTY CRIMES (3rd ed., Sept. 2006), at 18, *available at* http://www.usdoj.gov/criminal/cybercrime/ipmanual/01ipma.html.

3. The defendant committed the infringement by the public performance of the work (by making the work available on a computer network accessible to members of the public).
4. The work was being prepared for commercial distribution.
5. The defendant knew or should have known the work was being prepared for commercial distribution.

Arguments for the Legislation

Supporters of the legislation argue that S. 978 is necessary to adapt the law to technological changes that facilitate the illegal and unauthorized dissemination of copyrighted work. Although illegal downloading of copyrighted works remains a significant method of online copyright infringement, illegal Internet streaming of copyrighted content is gaining in popularity.[38] Yet the current criminal copyright infringement statute provides only misdemeanor penalties for violations of the public performance right (of which the act of streaming most strongly implicates), compared to the felony penalties that it authorizes for violations of the reproduction and distribution rights. This disparity creates an "impediment[] to effective prosecution" of willful unauthorized streaming websites.[39] The Register of Copyrights has endorsed the idea of creating felony penalties for unauthorized streaming activity, arguing that "[a]s a matter of policy, the public performance right should enjoy the same measure of protection from criminals as the reproduction and distribution rights; prosecutors should have the option of seeking felony penalties for such activity, when appropriate."[40] An organization representing copyright holders explained the need for such legislative changes as follows:

> At a narrow level, the issue of making illegal streaming a felony crime is simply a technical clarification. Illegally disseminating other people's works without their permission should be punished the same way under law regardless of the technology used to accomplish such dissemination.
>
> On a grander scale, this issue is another phase in the battle between creators and lawful distributors of copyrighted works on one hand, and on the other parasitic websites that expropriate their property, diminish the compensation and pension and health benefits of creators and workers, and harm communities across the United States by depriving them of jobs and diminishing their tax revenues.[41]

Supporters also point out that the legislation is narrowly tailored to target rogue streaming websites that intentionally profit from the illegal activity, and does not authorize prosecution of

[38] Joint Statement from AFTRA, DGA, IATSE and SAG Commending Legislation to Make Illegal Streaming a Felony, May 12, 2011, *available at* http://www.aftra.com/8574775862824FEAA64942552F510248.htm ("While illegal downloading of our members' creative works remains the best known method of Internet theft, illegal Internet streaming has actually become the preferred viewing and listening experience. Unfortunately, the law has not kept pace with these new consumer habits.").

[39] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Maria A. Pallante, Register of Copyrights).

[40] *Id.*

[41] *Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Sandra Aistars, Executive Director, Copyright Alliance).

those who stream copyrighted content without deliberately seeking commercial advantage or private financial gain or those who merely watch the content (as opposed to those who made the content available for such viewing).[42] The sponsor of S. 978 has asserted that the bill "gives police the tools to only go after [the] worst of the bad actors" who are infringing copyrights via unauthorized streaming, rather than minor or accidental infringers.[43] A cosponsor of the bill also has claimed that S. 978 "does not criminalize YouTube."[44]

Criticisms of the Legislation

Compared to supporters of the bill, some observers have worried about the "potential unintended consequences" of S. 978. For example, individuals who embed infringing YouTube videos on their blogs and other websites that may contain online advertising alongside the videos may be targeted by S. 978, as such use of advertising may be evidence of "private financial gain" from the infringement, thus supporting a criminal felony prosecution charge if the bill passes into law.[45] Another critic has asserted that "when law enforcement wants to charge someone with a felony where there's no obvious match, they'll often stretch laws like this to find something they can use. And this extension of criminal copyright law to include a 'public performance' seems ripe for misuse."[46]

Others question how the quantitative and monetary thresholds imposed by the bill might be interpreted by the courts:

> [T]here is no way of knowing how the dollar amounts in the bill will play out in the real world. It will be difficult for courts to determine how much each public performance would hypothetically be worth to a copyright holder, and even more difficult to determine the "the total fair market value of licenses to offer public performances"—especially when some copyright owners refuse to license their works for such uses.[47]

Some point out that for streaming activities, it is unclear who the "public performer" is and thus it is unclear who may be liable for felony prosecution under S. 978: the person who uploads the video and makes it available for public viewing, or the user who views the content by clicking on the "play" icon?[48] Even assuming that the public performer is the streamer (the person who

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[42] Joanna Anderson and Seth Stern, *Copyright Infringement Bill, Extension of FBI Director's Term Backed by Senate Panel,* Congressional Quarterly Markup & Vote Coverage, June 16, 2011.

[43] Nathan Pollard, *Senate Panel Mulls Online Streaming Bill, Takes No Vote Amid Lingering Concerns,* June 15, 2011, BNA'S ELECTRONIC COMMERCE & LAW REPORT (quoting Senator Klobuchar).

[44] Joanna Anderson and Seth Stern, *Copyright Infringement Bill, Extension of FBI Director's Term Backed by Senate Panel,* Congressional Quarterly Markup & Vote Coverage, June 16, 2011.

[45] Mike Masnick, *People Realizing New Anti-Streaming Criminal Copyright Bill Could Mean Jail Time For Lip Synchers, at* http://www.techdirt.com/articles/20110609/23171814649/people-realizing-new-anti-streaming-criminal-copyright-bill-could-mean-jail-time-lip-synchers.shtml#c871.

[46] *Id.*

[47] Liz Allen, Making Sense of the Streaming Felony Bill, July 18, 2011, *at* http://futureofmusic.org/article/article/making-sense-streaming-felony-bill; *see also Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of H. Comm. on the Judiciary,* 112th Cong., 1st Sess. (2011) (written statement of Maria A. Pallante, Register of Copyrights) ("It is not clear to us at this time how easy it would be to ascertain the total retail value of unauthorized streams, or how easy it would be to ascertain how many public performances were made by an unauthorized streamer.").

[48] Joe Newman, *The Many Murky Areas of Senator Klobuchar's "Anti-Streaming" Bill,* July 6, 2011, Public
(continued...)

uploaded the content), it is unclear, some critics contend, whether the bill's threshold of "10 or more public performances" refers to 10 unique views of the work by end users, or whether the streamer must post the content 10 separate times.[49]

In the cable and satellite television industry, a business dispute has arisen over whether existing retransmission agreements between cable and satellite companies and copyright holders allow the companies to stream copyrighted content to their subscribers. The cable television companies have raised concerns that S. 978 might expose themselves to felony penalties for such streaming.[50] However, the sponsor of S. 978 has stated that "[p]arties are entitled to have disagreements about the scope of their contracts, and they should not be criminally prosecuted for their legitimate disputes."[51] Nevertheless, it has been speculated that "copyright holders may use the threat of prosecution as leverage against broadcasters who transmit content pursuant to a license under dispute."[52]

Finally, some critics question believe limited government resources should not be used to prosecute operators of unauthorized streaming websites, arguing that "illegal public performance is the kind of economic concern that can be effectively managed through existing civil remedies."[53]

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Knowledge, *at* http://www.publicknowledge.org/blog/many-murky-areas-senator-klobuchar%E2%80%99s-anti-str.

[49] *Id.* (offering an analogy that "if you put on a juggling show in the middle of the street and 10 people see it, that doesn't mean that you did 10 shows").

[50] Nathan Pollard, *Witnesses Urge Congress to Update Law Penalizing Streaming of Copyrighted Content,* June 8, 2011, BNA'S ELECTRONIC COMMERCE & LAW REPORT.

[51] Joanna Anderson and Seth Stern, *Copyright Infringement Bill, Extension of FBI Director's Term Backed by Senate Panel,* Congressional Quarterly Markup & Vote Coverage, June 16, 2011.

[52] Abigail Phillips, *Felony Penalties Proposed for "Illegal Streaming": Senate Bill 978,* June 23, 2011, Electronic Frontier Foundation, *at* https://www.eff.org/deeplinks/2011/06/felony-penalties-proposed-illegal-streaming-senate.

[53] *Id.*