



**LEGISLATIVE  
APPROACHES  
TO ONLINE PIRACY  
AND COPYRIGHT  
INFRINGEMENT**

**Donnell A. Russell  
Trent E. Griffin**  
Editors

**INTERNET POLICIES  
AND ISSUES**

**NOVA**

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TO ONLINE PIRACY AND  
COPYRIGHT INFRINGEMENT**

DONNELLA A. RUSSELL



TRENT E. GREEN

**EDITORS**

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## PREFACE

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. The global nature of the Internet offers expanded commercial opportunities for intellectual property (IP) rights holders but also increases the potential for copyright and trademark infringement. Piracy of the content created by movie, music, and software companies and sales of counterfeit pharmaceutical drugs and consumer products negatively impact the American economy and can pose risks to the health and safety of U.S. citizens. This book discusses legislative approaches to online piracy and copyright infringement.

Chapter 1 - 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. 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.

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.

Chapter 2 - The global nature of the Internet offers expanded commercial opportunities for intellectual property (IP) rights holders but also increases the potential for copyright and trademark infringement. Piracy of the content created by movie, music, and software companies and sales of counterfeit pharmaceutical drugs and consumer products negatively impact the American economy and can pose risks to the health and safety of U.S. citizens. Although rights holders and law enforcement agencies currently have some legal tools to pursue domestic infringers, they face difficult challenges in enforcing IP laws against actors located abroad. Many websites trafficking in pirated copyrighted content or counterfeit goods are registered and operate in foreign countries. These foreign "rogue sites" sell or distribute subject matter protected by federal IP laws to people located within the United States—without the authorization of the IP rights holders—yet the website operators remain beyond the reach of U.S. courts and authorities.

Chapter 3 - The Copyright Act allows statutory damages of between \$750 and \$30,000 for each act of infringement, and up to \$150,000 in cases where the infringement is committed willfully. Congress granted the copyright owner the power to choose to recover either statutory damages or the owner's actual damages plus additional profits of the infringer at any time before final judgment is rendered. Statutory damages serve both compensatory and deterrent purposes: they provide the copyright owner with restitution of profit and reparation for the harm suffered by the owner in situations where it may be difficult or impossible to submit evidence of actual damages (such as lost profits), and they also punish the infringer and discourage that individual, and others, from further infringement.

Chapter 4 - New technologies have always presented opportunities as well as challenges for copyright owners. The evolving technologies that gave us piano rolls, silent movies, television, photocopiers, satellite transmissions and countless other ways of reproducing and distributing works of authorship have been nothing short of revolutionary in the creation of new commercial opportunities for authors and their licensees as well as global markets for the United States. At the same time, these technologies have provided opportunities for nefarious actors to undertake ever more pervasive forms of infringement. Such actors usurp the economic value that the author depends

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upon as an incentive for and means to create original works of authorship, thereby destroying the bargain envisioned in the Constitution's Copyright Clause. And to make things more complicated, not all of them act for purposes of financial gain. Some have no profit motive at all, yet cause great damage all the same by infringing purposely and irresponsibly.

Chapter 5 - The Copyright Alliance is a public interest and educational organization supported by more than 40 entities comprised of individual artists and creators, as well as the associations, guilds and corporations that support and invest in them. Besides these institutional members, there are more than 7,000 individual "One Voice Artist Advocates" who give their personal time and creativity to support our work.

Chapter 6 - As the primary voice and advocate for the American motion picture, home video and television industries in the U.S. and around the world, we have witnessed the world-wide proliferation and increased sophistication of web-based enterprises dedicated to stealing the product of our workforce. We are gravely concerned about the detrimental impact that digital theft has on the millions of American men and women who work in our industry.

Chapter 7 - Kent Walker, Google's Senior Vice President and General Counsel and a former federal prosecutor, is well aware of the need to enforce laws against the infringement of intellectual property rights, the complexities of such cases, and the fact that the Internet can be used for unlawful purposes, often by sophisticated criminals. As an assistant U.S. Attorney in San Francisco, he specialized in cybercrime and brought one of the first criminal copyright infringement cases in the country. He was also involved in the successful prosecution of a prominent computer hacker.

Google supports developing effective policy and technology tools to combat large-scale commercial infringement. As the author will describe below, Google has dedicated tens of millions of dollars in engineering and other resources to help weed out notorious bad actors. But such activity accounts for only a very small percentage overall of the creative, political, social, and commercial opportunities created and empowered by the web. As this Subcommittee considers new enforcement tools against rogue foreign websites, it should not jeopardize the legitimate Internet services and technologies that underlie the United States' lead in the global information economy.

Chapter 8 - The Go Daddy Group devotes considerable time and resources to working with law enforcement to preserve the integrity and safety of the Internet by quickly closing down websites and domain names engaged in illegal activities. A vast number of our customers earn their livelihood from

the successful businesses they have been able to establish and grow online, and their ability to continue to do so is of paramount importance to us. Go Daddy is committed to doing everything it can to ensure that the Internet is a safe and trustworthy way to communicate and conduct business. The author challenges their counterparts on the Internet to make the same commitment.

Chapter 9 - CDT is a non-profit, public interest organization dedicated to preserving and promoting openness, innovation, and freedom on the decentralized Internet.

CDT supports the goal of reducing online infringement. Large-scale copyright infringement undermines First Amendment values in promoting expression and threatens the growth of new media and e-commerce. With respect to the particular focus of this hearing, CDT recognizes that there are websites whose main purpose and activity is to enable and promote infringement. These sites are true “bad actors” and they deserve to be the target of law enforcement.

CDT believes, however, that the specific *means* chosen to address infringement matter a great deal. Some tactics may be attractive from a copyright protection perspective, but would carry significant costs to important values such as innovation and free speech. CDT urges members of this Subcommittee to be aware of this risk and to carefully avoid tactics that would impair lawful Internet-based media and communications tools that are of growing value to consumers, the economy, and society in general.

Chapter 10 - Daniel Castro is the senior analyst at the Information Technology and Innovation Foundation (ITIF). ITIF is a nonpartisan research and educational institute whose mission is to formulate and promote public policies to advance technological innovation and productivity.

The Internet is a tremendous enterprise of user empowerment, free speech, and innovation, but it facilitates unlawful acts just as much as lawful ones. The proliferation of parasitic or rogue sites—websites enabling online piracy and the trade of counterfeit goods at the expense of legitimate businesses—is a pervasive problem that hurts American consumers and costs Americans jobs. Unchecked these rogue sites are a threat to the economic welfare of the United States.

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*Chapter 1*

**ILLEGAL INTERNET STREAMING  
OF COPYRIGHTED CONTENT:  
LEGISLATION IN THE 112<sup>TH</sup> CONGRESS\***

*Brian T. Yeh*

**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. 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.

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

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\* This is an edited, reformatted and augmented version of the Congressional Research Service Publication, R41975, dated December 1, 2011.

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. Following this recommendation, S. 978 was introduced in the 112<sup>th</sup> Congress. Commonly referred to as the Commercial Felony Streaming Act, S. 978 would allow 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.

Section 201 of H.R. 3261, the Stop Online Piracy Act, would make similar changes to criminal copyright law as S. 978 and also a few more. The notable new addition is that H.R. 3261 would authorize misdemeanor and felony penalties for *non-commercial* willful public performance by means of digital transmission, during any 180-day period, of one or more copyrighted works, where the total retail value of the public performance exceeds \$1,000. That is, H.R. 3261 would allow criminal penalties for such streaming activity without proof that the willful infringement was committed for purposes of commercial advantage or private financial gain. Such a provision is not included in S. 978.

## INTRODUCTION

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 relatively recent technological development is Internet streaming. Streaming 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.<sup>1</sup> 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."<sup>2</sup>

To enforce their intellectual property rights, copyright holders may file a lawsuit against those who illegally stream their protected works.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> In comparison, prosecutors 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.<sup>6</sup>

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 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.<sup>7</sup>

This report describes streaming technology, explains the disparity in criminal penalties for different forms of infringement committed by electronic means, analyzes legislation in the 112<sup>th</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

The Copyright Act has both criminal and civil provisions for infringement.<sup>11</sup> The copyright holder may file a lawsuit against an alleged infringer for a violation of any of the exclusive rights conferred by copyright. The civil remedies available to the copyright holder that is harmed by infringement include the possibility of obtaining injunctive relief,<sup>12</sup> actual damages suffered by the copyright owner due to the infringement,<sup>13</sup> statutory damages,<sup>14</sup> and costs and attorney fees.<sup>15</sup> While "civil law protects all the copyright owner's exclusive rights, criminal law primarily focuses on the rights of distribution and reproduction."<sup>16</sup>

Criminal copyright infringement includes the following offenses:<sup>17</sup>

- 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).<sup>18</sup>

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.<sup>19</sup> Video streaming now accounts for a significant portion of broadband Internet traffic, a percentage that is steadily growing as streaming websites increase in popularity.<sup>20</sup>

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.<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> As noted earlier, copyright holders may sue operators of illegal streaming web sites 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 “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.”<sup>25</sup> 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.”<sup>26</sup>

## **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)<sup>27</sup> was enacted in 1997 as a response to a 1994 federal district court decision, *United States v. LaMacchia*.<sup>28</sup> 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.<sup>29</sup> However, the federal judge dismissed the indictment against *LaMacchia* because of a 1985 Supreme Court decision, *Dowling v. United States*,<sup>30</sup> 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.<sup>31</sup>

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 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. Section 506(a)(1)(B), that does not require willful infringement for