



Regulatory Transparency Project

Unlocking Innovation & Opportunity

Closing the Streaming Loophole

Intellectual Property Working Group

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Executive Summary

Creativity and innovation are flourishing in the entertainment industries. But the growing threat of streaming piracy presents a major challenge to the continued vitality of legitimate online video services like Netflix, Disney+, Amazon Prime Video, Apple TV, and ESPN+. The problem is exacerbated by the lack of adequate enforcement remedies available to law enforcement, which – thanks to an artifact of copyright law – can only prosecute commercial streaming piracy as a misdemeanor. The time has come for Congress to close the “streaming loophole” by authorizing felony prosecutions for egregious violations of copyright law’s public performance (i.e., streaming) right. This paper will describe developments in the streaming marketplace for creative works and the piracy of these works, as well as the relevant legal provisions relating to criminal copyright infringement. Finally, the paper will recommend legislative change to close the streaming loophole and allay the concerns regarding such legislation.

A. The Good

Compelling new services offering high-quality original content powered by streaming technology are growing at a rapid pace, each year accounting for a greater percentage of the distribution market. For example, in the first quarter of 2020 Netflix announced it had added a record 15.7 million new subscribers, for a total of 182.8 million subscribers worldwide.¹ In the same period, The Walt Disney Company announced its Disney+ service’s total subscribers had soared to 50 million in just five months, putting it within striking distance of their 2024 goal of at least 60 million.²

It’s no secret why these services are flourishing. Streaming services are investing billions in exclusive content to differentiate themselves from the competition. Netflix series like “House of Cards” and “Stranger Things,” and big-budget movies like “The Irishman” join Disney+’s “The Mandalorian,” Amazon Prime’s “The Marvelous Mrs. Maisel,” Apple TV’s “The Morning Show,” CBS All Access’ “Star Trek: Picard,” and many other forthcoming original series and films in a time that has become known as “Peak TV.” Indeed, consumers have so many compelling viewing choices that film and TV critics complain they can’t keep up.³

Sports leagues and sports programming networks have also embraced streaming as the future of sports media distribution and consumption. Services like ESPN+, FuboTV, DAZN, and UFC Fight Pass now deliver both live and prerecorded sports content to fans all over the world, making it easier than ever before to follow your favorite team or watch the most anticipated fights at any time or place and on any device. A 2019 report on the future of streaming sports predicted sports media rights revenues will increase by 75% over the next few years, climbing from \$48.6 billion in 2018 to

¹ See Edmund Lee, *Everyone You Know Just Signed Up for Netflix*, New York Times (April 21, 2020), <https://www.nytimes.com/2020/04/21/business/media/netflix-q1-2020-earnings-nflx.html>.

² See Todd Spangler, *Disney Plus Hits 50 Million Subscribers*, Variety (April 8, 2020), <https://variety.com/2020/digital/news/disney-plus-hits-50-million-subscribers-disney-says-1234575130/>

³ See Nicole Sperling, *Is Peak TV Slowly Killing TV Critics?*, Vanity Fair (May 4, 2018), <https://www.vanityfair.com/hollywood/2018/05/is-peak-tv-slowly-killing-tv-critics>

\$85.1 billion by 2025.⁴ Of course, this research was conducted before the global coronavirus pandemic and could not have accounted for the current massive disruptions to sports and other live entertainment events. But as sports leagues plan for a post-pandemic world in which live audiences may be reduced or eliminated altogether, streaming sports media will play an even bigger role in connecting fans to events that they are either hesitant or no longer able to attend.

B. The Bad

Unfortunately, just as creators and innovators have embraced streaming technologies, so too have bad actors. Online analytics firm Sandvine found that in 2017 6.5% of North American households, equal to seven million homes, had a streaming device configured for piracy.⁵ The persistent growth of piracy, despite the widespread availability of legal content, prompted Netflix to call piracy's rise "sobering" in a 2015 letter to shareholders.⁶ Their concern is born out in the data, which reveal that streaming piracy incurs significant economic costs, endangers consumers through the spread of malware, and chills innovation by crowding out the use of legitimate streaming services.

The advent of the COVID-19 pandemic has only accelerated these trends. Together with increased adoption of legal services, film and television piracy has exploded as citizens around the world abide by stay-at-home guidelines. Describing the rise of piracy post-COVID-19 as "unprecedented," digital piracy research firm MUSO calculated that "film piracy increased by over 40% when lockdown measures were enforced."⁷

C. And the Ugly

The law has not kept pace with innovation or the piracy that accompanies it. A copyright grants to its owner the exclusive right to reproduce, distribute, display, and publicly perform creative works. When infringement of any of those rights occurs, the copyright owner can bring a civil lawsuit in federal court against the infringer for monetary damages and an injunction to stop the infringement. Most copyright enforcement is undertaken by private litigants. But in the most serious cases, federal law authorizes criminal prosecution of infringers. Because of the way criminal copyright law developed, some infringements can be prosecuted as felonies while others can only be prosecuted as misdemeanors. In particular, criminal infringement of reproduction or distribution rights is punishable by up to five years imprisonment for a first offense, and ten years and/or a fine of up to \$250,000 for a subsequent offense, but criminal infringement of the display and public performance rights, *no matter how egregious*, is punishable only by misdemeanor-level penalties of one-year

⁴ See Rethink Research, Rethink TV Archives, available at <https://rethinkresearch.biz/reports-category/rethink-tv/>.

⁵ See Sandvine, Spotlight: Subscription Television Piracy, available at <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf>.

⁶ See Jacob Kastrenakes, *Netflix Says Piracy Service Popcorn Time is a Real Competitor*, The Verge (January 21, 2015), <https://www.theverge.com/2015/1/21/7868645/netflix-lists-popcorn-time-as-competitor>.

⁷ Tim Dams, *Digital Film Piracy Surges to 'Unprecedented Levels Amid Coronavirus Lockdown*, Variety (April 27, 2020), <https://variety.com/2020/film/news/digital-film-piracy-surges-unprecedented-levels-coronavirus-lockdown-muso-research-1234590451/>.

imprisonment and a lesser fine. So, if someone makes or sells large volumes of pirated DVDs of movies, he faces potential felony prosecution, but if the same criminal runs a web site streaming pirated versions of those same movies to millions of people, he faces misdemeanor charges at most. This discrepancy makes no sense – particularly as streaming becomes the dominant technology used for content distribution and consumption.

This “streaming loophole” discourages federal prosecutors from filing charges against operators, developers, and distributors of streaming-piracy devices, apps, and websites. These complex cases take considerable effort to mount, and prosecutors understandably consider them not worth the effort given the meagerness of the potential penalties.⁸ As a result, there is little to deter bad actors – who continue to undermine the creativity, innovation and investment of others, safe in the notion that they are extremely unlikely to face any criminal prosecution.

I. Streaming Media Marketplace and Piracy

In recent years, improvements in internet connection speeds have ushered in a new era of streaming. According to data from online analytics firm Sandvine, real-time audio and video entertainment accounted for only 29.5% of peak period internet traffic in 2009. Over the next decade, that number climbed significantly, accounting for 60.6% of such traffic in 2019.⁹ This phenomenon is mirrored in the proliferation of streaming services: there are now more than 480 legitimate video streaming services¹⁰ worldwide, and more than 250 for music.¹¹

This trend is only accelerating. The music industry is now predominantly a streaming industry. The Recording Industry Association of America recently reported that in 2018, “[s]treaming music accounted for 80% of industry revenues,” and that “[p]aid streaming services added more than 1 million new subscriptions a month, taking us past 60 million total paid subscriptions.”¹²

The film and television industry is also rapidly adopting streaming technology. Disney, NBCUniversal, Apple, and Warner Media have launched major streaming services – joining Netflix, Amazon, Hulu, CBS, and others in this increasingly competitive marketplace. Even AMC

⁸ The Department of Justice (“DOJ”) has limited resources, and it brings very few criminal copyright cases each year. The most recent data show that the DOJ brought only 46 cases against 70 defendants in 2011 and 40 cases against 59 defendants in 2012 for criminal copyright infringement. Misdemeanor streaming cases represent an even less attractive target for the government than a potential felony case. See DOJ, Office of the Attorney General, FY 2011 Performance and Accountability Report, D-3 (Nov. 2011), <http://www.justice.gov/sites/default/files/ag/legacy/2011/11/15/par2011.pdf>; DOJ, Office of the Attorney General, FY 2012 Performance and Accountability Report, D-3 (Nov. 2012), <http://www.justice.gov/sites/default/files/ag/legacy/2012/11/26/par2012.pdf>.

⁹ See Sandvine, 2019 Global Internet Phenomena Report, available at https://www.sandvine.com/hubfs/Sandvine_Redesign_2019/Downloads/Internet%20Phenomena/Internet%20Phenomena%20Report%20Q32019%2020190910.pdf.

¹⁰ See Alliance for Creativity and Entertainment, Our Mission, available at <https://www.alliance4creativity.com/mission/the-thriving-digital-content-marketplace/>.

¹¹ See Pro Music, Find Music Services, available at <https://pro-music.org/legal-music-services.php>.

¹² Recording Industry Association of America, Mid-Year 2019 RIAA Music Revenues Report, available at <http://www.riaa.com/wp-content/uploads/2019/09/Mid-Year-2019-RIAA-Music-Revenues-Report.pdf>.

Entertainment – the largest theater chain in the world – recently announced it will soon be launching a digital on-demand service for films.¹³

Moreover, there is more great music, film, and television for audiences to enjoy than ever before. FX Research found that in 2019 there were a record breaking 532 scripted shows across basic and premium cable, streaming, and broadcast services.¹⁴ Not only are more high-quality films and shows being produced, the proportion appearing online before being made available in more traditional formats continues to grow. In 2018, 160 streaming series aired online, compared to 117 in 2017. Streaming accounted for 32% of all original series, with broadcast and basic cable both falling to 30% or less.¹⁵

With the continued deployment of advanced broadband services, the video game industry also appears to be on the cusp of a streaming revolution. Google recently launched its Stadia platform, which allows anyone with a device supporting a web browser to stream games, and Microsoft's XCloud service "aims to eliminate the hardware barrier between its library of games and potential players."¹⁶

The streaming revolution also continues to reshape how sporting events are transmitted and watched, with more and more services entering a flourishing global market. There has been a steady increase in services and apps being deployed by sports leagues and sports television networks that allow fans to stream content all over the world, but it's not only these traditional sports organizations and broadcasters that recognize that streaming sports media is the way of the future. Tech powerhouses such as Twitter and Amazon have been experimenting with live sporting streams, and Amazon now has ambitious plans to build out its sports streaming capabilities through partnerships with the English Premier League, the NFL, U.S. Open Tennis, and a number of other leagues.¹⁷

Taken together, the accelerating deployment of streaming technologies across entertainment industry sectors reveals a remarkable shift in the way entertainment is distributed and consumed. At the same time, the proliferation of streaming is helping to spur investment in high-quality storytelling, creating a virtuous cycle of creativity, innovation, investment, experimentation, and jobs.

¹³ See Brooks Barnes, *AMC Theater Chain Gets Into Streaming With On-Demand Movies*, New York Times (October 14, 2019), <https://www.nytimes.com/2019/10/14/business/media/amc-theaters-streaming.html>.

¹⁴ See John Koblin, *Peak TV Hits a New Peak, With 532 Scripted Shows*, New York Times (January 9, 2020) <https://www.nytimes.com/2020/01/09/business/media/tv-shows-2020.html>.

¹⁵ See Jason Lynch, *495 Scripted Shows Aired in 2018 as Streaming's Output Surpassed Basic Cable and Broadcast*, Adweek (December 13, 2018) <https://www.adweek.com/tv-video/495-scripted-shows-aired-in-2018-as-streamings-output-surpassed-basic-cable-and-broadcast/>.

¹⁶ Gabe Gurwin, *The Best Game-Streaming Services for 2020*, Digital Trends (June 3, 2020) <https://www.digitaltrends.com/gaming/best-game-streaming-services/>.

¹⁷ See Audrey Schomer, *Amazon Will be Streaming the Yankees for Prime Members*, Business Insider (March 5, 2020) <https://www.businessinsider.com/amazon-expands-sports-streaming-ambitions-2020-3>.

This shift to streaming has not been lost on bad actors, who have quickly adapted. According to piracy tracking firm MUSO, streaming websites are the most popular outlet for accessing pirated content today. For television programs, streaming sites accounted for 96.1% of the piracy market, compared with less than 5% for torrent (P2P) sites. And these numbers are on the rise – global data show almost 190 billion visits to piracy sites in 2018.¹⁸

Streaming piracy directly substitutes for legitimate content. Some have argued in the P2P context that not all piracy constitutes a lost sale for the entertainment industry. Whatever truth that may hold for P2P, the data are different for streaming content. A recent first-of-its-kind report by the Technology Policy Institute¹⁹ found that every minute spent downloading or streaming pirated video crowds out about the same amount of time spent using legitimate services like Netflix and Hulu – suggesting that streaming piracy undermines the legitimate streaming economy and chills innovation that would benefit consumers.

The growth of streaming piracy has predictably alarmed entertainment industry stakeholders including movie studios, broadcasters, cable networks, sports leagues, satellite operators, cable companies, telcos, and unions and guilds – and rightly so. The US Chamber of Commerce Global Innovation Policy Center recently published a report that found that “all of the benefits that streaming brings to our economy have been artificially capped by digital piracy . . . global online piracy costs the U.S. economy at least \$29.2 billion in lost revenue each year.”²⁰

It’s not just the creative economy that is threatened by streaming piracy – consumers are put in danger too. The Digital Citizens Alliance (“DCA”), an online safety group, conducted research into the link between piracy and malware, and found that “one out of every three content theft sites contained malware,” and “consumers are 28 times more likely to get malware from a content theft site than on similarly visited mainstream websites or licensed content providers.”²¹ DCA also found instances of pre-loaded malware; apps sharing users’ Wi-Fi network and password details with a server in Indonesia, a scheme to pose as Netflix in order to gain access to a legitimate Netflix subscription, and more.

Collectively, the harms posed by streaming piracy to consumers, the economy, and innovation make a powerful case for legislators to consider updating the law to mitigate these threats.

¹⁸ See Robert Briel, *Global Piracy Hits 190 Billion Visits in 2018*, BroadbandTV News (March 23, 2019) <https://www.broadbandtvnews.com/2019/03/23/global-piracy-hits-190-billion-visits-in-2018/>.

¹⁹ See Technology Policy Institute, *Do Pirated Video Streams Crowd Out Non-Pirated Video Streams? Evidence from Online Activity*, available at https://techpolicyinstitute.org/wp-content/uploads/2020/01/Oh_Wallsten_Lovin_Streaming-Video-Piracy.pdf.

²⁰ Global Innovation Policy Center, *Impacts of Digital Piracy on the U.S. Economy*, available at <https://www.theglobalipcenter.com/report/digital-video-piracy/>.

²¹ Digital Citizens Alliance, *Fishing in the Piracy Stream: How the Dark Web of Entertainment is Exposing Consumers to Harm*, available at https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/DCA_Fishing_in_the_Piracy_Stream_v6.pdf

II. Criminal Copyright Law

Copyright law in the United States is governed by Title 17²² of the United States Code, which includes the Copyright Act. The Copyright Act, enacted in 1909 and overhauled in 1976, grants to the owner of a copyrighted work certain exclusive rights, including the rights to reproduce the work, distribute copies to the public, publicly display the work, and perform the work publicly.²³ The public performance right includes both showing a work in a public place to a group of people (*e.g.*, exhibiting a movie in a theater) and broadcasting or streaming it, whether over the airwaves or the internet.²⁴

When a copyright owner discovers that someone has exercised any of its exclusive rights without permission, they may bring a civil lawsuit against the infringer.²⁵ Typically, the copyright owner will demand an injunction against further infringement and monetary damages. Depending on the particular facts and circumstances of infringement, the damages the copyright owner will recover may vary – for example, the more copies a defendant makes or the more times they stream the plaintiff’s works, the higher the damages will typically be. But the available remedies do not vary based on the nature of the right infringed upon.

In the most serious cases of copyright infringement, the infringer may also be subject to criminal prosecution. Section 506 of the Copyright Act²⁶ provides:

(a) CRIMINAL INFRINGEMENT —

(1) IN GENERAL — Any person who *willfully* infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain;

(B) by the *reproduction or distribution*, including by electronic means, during any 180-day period, of . . . 1 or more copyrighted works, which have a total retail value of more than \$1,000; or

(C) by the *distribution* of 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.

²² See 17 U.S.C. § 101 *et seq.*

²³ *Id.* § 106.

²⁴ *Id.* § 101.

²⁵ *Id.* § 501.

²⁶ *Id.* § 506(a)(1) (emphasis added).

Importantly, in order for criminal liability to attach, the defendant must have acted “willfully,” which means they must have intended to infringe the copyright.²⁷ As the Department of Justice’s (DOJ) Criminal Resource Manual notes, in the criminal copyright context, the willfulness element “require[s] the government to demonstrate a ‘voluntary, intentional violation of a known legal duty’ (citation omitted) . . . provid[ing] a rare but significant exception to the maxim that ‘ignorance of the law is no excuse.’”²⁸ The remainder of this provision sets out that the defendant must have a commercial intent, or if they had no commercial motive that they nevertheless reproduced or distributed works with a significant retail value²⁹ or before they were commercially available for sale.³⁰ However, the provisions that provide criminal liability where the defendant has no commercial motive apply only to the reproduction and distribution of copyrighted works. If the defendant has engaged in copyright infringement through some other means (e.g. public performance), those provisions are not applicable and therefore commercial motive must be demonstrated.

Turning to the penalties for violations of section 506(a)(1), the federal Criminal Code provides a jail sentence up to 5 years for a first offense and up to 10 years for a subsequent offence “if the offense consists of the reproduction or distribution” of a sufficient number of works.³¹ Prison time of that duration classifies the offense as a Class E felony³² and confers a fine of up to \$250,000.³³ For “any other case” covered by section 506(a)(1)(A) of the Copyright Act – in other words, when the reproduction or distribution rights are not implicated -- the Criminal Code provides a jail sentence

²⁷ A willful act is “an act intentionally done in violation of the law.” *United States v. Wise*, 550 F.2d 1180, 1194 (9th Cir. 1977). Courts have differed in their interpretation of which of the two acts --copying or infringing -- requires willful intent. The majority view looks for an intent to infringe rather than intent to copy. See *U.S. v Liu*, 731 F.3d 982 (9th Cir. 2013) (“we, and numerous other circuits have assumed that proof of the defendant’s specific intent to violate someone’s copyright is required”); *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991) (the “voluntary, intentional violation of a known legal duty”).

²⁸ U.S. Department of Justice Criminal Resource Manual § 1850, available at <https://www.justice.gov/jm/criminal-resource-manual-1850-copyright-infringement-third-element-willfulness>; see also U.S. Department of Justice, Prosecuting Intellectual Property Crimes (4th Ed. 2013) at 26-34 (further explicating “willfulness” standard), available at https://www.justice.gov/sites/default/files/criminal_ccips/legacy/2015/03/26/prosecuting_ip_crimes_manual_2013.pdf.

²⁹ § 506(a)(1)(B) was added in 1997 with the passage of the No Electronic Theft Act (NET Act), after the unsuccessful prosecution of David LaMacchia, who facilitated massive copyright infringement online as a hobby. The NET Act closed the so-called “LaMacchia Loophole” by defining “commercial advantage of private financial gain” to include the receipt of anything of value including other copyrighted works (17 U.S.C. § 101); and added criminal liability for the reproduction or distribution of valuable works even if the infringer had no commercial incentive.

³⁰ § 506(a)(1)(C) was added in 2005 with the passage of the Artists Rights and Thefts Prevention Act (ART Act) which recognized that making copyrighted works available to the public on the internet before their official release to the public constitutes a uniquely damaging form of infringement that merits criminal penalties even if § 506(a)(1)(A) or (B) could not be satisfied.

³¹ 18 U.S.C. § 2319(b)(1)-(2).

³² *Id.* § 3559(a)(5).

³³ *Id.* § 3571(b)(3).

of not more than one year and no increased time for subsequent convictions.³⁴ That qualifies the offense as a Class A misdemeanor³⁵ and confers a fine of up to \$100,000.³⁶

III. Legislative History

The disparate treatment for violations of the various exclusive copyright rights was not the result of Congress drawing intentional, carefully considered distinctions. Ironically, when Congress first created criminal penalties for unauthorized public performances of dramatic works and musical compositions in 1897, the criteria for criminality were if the infringement was “willful” and undertaken “for profit.”³⁷ When it enacted the Copyright Act of 1909, Congress extended criminal penalties to infringements of the other exclusive rights for all works protected by federal copyright at the time.³⁸ In 1971, Congress included sound recordings in the list of works covered by copyright, and in 1974 increased the maximum fine for sound recording piracy to \$25,000 for a first offense and \$50,000 for subsequent offenses.³⁹ In conferring this substantial increase in penalties, Congress noted that “record piracy is so profitable that ordinary penalties fail to deter prospective offenders.”⁴⁰ When Congress enacted an entirely new copyright statute in 1976, it again increased the criminal penalties for infringement. It extended to motion pictures the enhanced penalties that had previously only been available for sound recording piracy, and increased the financial penalty for infringement of all other works to a maximum of \$10,000.⁴¹ Congress considered increasing the penalties to include imprisonment of greater than a year for certain infringements but declined to do so.⁴²

The advent of new analog recording technologies in the 1970s led to an eruption of infringement, particularly of sound recordings and motion pictures. Congress responded with the Piracy and Counterfeiting Amendments Act of 1982, adding section 2319 to the United States Criminal Code. That provision made it a felony to commit significant infringement of sound recordings or motion pictures – defined as the *reproduction or distribution* of no less than a specified number of works, while all other violations of section 506(a) were punishable as misdemeanors.⁴³ In increasing the penalties to the felony level, the Senate Judiciary Committee explained that piracy of recorded music and motion pictures was growing at an “alarming” rate and that financial losses were “significant.”⁴⁴ The

³⁴ *Id.* § 2319(b)(3).

³⁵ *Id.* § 3559(a)(6),

³⁶ *Id.* § 3571(b)(5).

³⁷ Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 *Denv.U.L.Rev.* 671, 673 (1994).

³⁸ See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 at ch. 320, § 28 (March 4, 1909) (“Any person who willfully and for profit shall infringe any copyright . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both . . .”).

³⁹ See Pub. L. No. 93-573, 88 Stat. 1873 (Dec. 31, 1974).

⁴⁰ H.R. Rep. 93-1581 at 4 (1974).

⁴¹ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2548 at § 506 (October 19, 1976).

⁴² See S. Rep. 94-473 § 506 (1975); *Dowling v. United States*, 473 U.S. 207, 221-23 (1985) (discussing the history of criminal copyright provisions).

⁴³ See Pub. L. No. 97-180, 96 Stat. 91 (May 24, 1982).

⁴⁴ S. Rep. 97-274 at 4 (1981).

Committee further explained that existing misdemeanor penalties were inadequate as a deterrence, being viewed by criminals “as a rather insignificant cost of doing business,” and by prosecutors who are reluctant to bring minor cases as too trivial.⁴⁵ When it enacted 18 U.S.C. § 2319, Congress did not have an intent to exclude public performances; it was simply responding to the concerns of the then-affected industries and the particular forms of piracy prevalent at the time.

The provision was amended once again by the Copyright Felony Act in 1992, which extended the felony provisions to all copyrighted works, not merely sound recordings and motion pictures, in response to the software industry’s concerns about rampant copying and distribution of its works.⁴⁶ Finally, Congress modified the criminal provision of the Copyright Act in 1997 to cover situations where the defendant’s motive was not obviously pecuniary, and in 2005 to include enhanced penalties for pre-release infringements.⁴⁷ These provisions are also tied to reproduction and distribution of copyrighted works because the situation that triggered those amendments – the proliferation of unauthorized digital downloads online – was tied to reproduction and distribution, not streaming.

In *Dowling*⁴⁸, the Supreme Court declined to apply the logic behind section 2319 to another criminal statute dealing with stolen property, noting that Congress “carefully chose those areas of infringement that required severe response,” and responded in a “step-by-step, carefully considered approach.” We agree that a measured approach is preferable to an ill-conceived broad stroke in drafting legislation. But in this case, Congress has expressed no intent to omit streaming from the felony provisions. It is simply an omission based on historical happenstance. Indeed, the very provision that was written to enhance the penalties for significant infringement of sound recordings and motion pictures no longer applies fully to those works because the most prevalent form of piracy – streaming – does not typically implicate the right of reproduction or distribution. The law simply has not kept pace with the development of technology and should be amended accordingly.

IV. Legislative Solution

A bill that would have amended 17 U.S.C. § 506 and 18 U.S.C. § 2319 to make criminal violations of the public performance right chargeable as felonies was introduced in 2011 as the “Commercial Felony Streaming Act,” or S. 978. Similar to existing provisions regarding reproduction and distribution, under the bill the offense would only have applied where the defendant made at least 10 unauthorized public performances by electronic means of a copyrighted work during any 180-day period, with a total retail value exceeding \$2,500 or a license value exceeding \$5,000. At the time of its drafting, the DOJ and U.S. Copyright Office endorsed the bill as a necessary tool to address a newly predominant form of piracy.

⁴⁵ *Id.* at 6.

⁴⁶ See *United States v. LaMacchia*, 871 F. Supp. 535, 539 (D. Mass. 1994).

⁴⁷ See fns 28-29, *supra*.

⁴⁸ 473 U.S. at 225.

However, opponents warned that such legislation could result in lengthy prison sentences and fines for ordinary people who post copyrighted material to YouTube and other video sharing sites without permission. Opponents gained considerable attention for their (dubious) claim that pop star Justin Bieber – who launched his rise to fame by posting to YouTube videos of himself performing cover versions of others’ songs – could be subject to felony prosecution under S. 978. The content of the bill was ultimately consolidated into the “Stop Online Piracy Act,” which received criticism for other reasons and was never passed. However, the concept behind S. 978 remains valid.

The main argument against S. 978, that ordinary people could be subject to prosecution for posting a small number of files on video sharing sites, is exceedingly unlikely. First, such commonplace activities usually cannot be prosecuted because they do not meet the high thresholds necessary to secure criminal convictions. In a criminal case, the government must prove beyond a reasonable doubt that the defendant “willfully” infringed, that is, they intended to commit copyright infringement.⁴⁹ The government must also prove that the defendant had a commercial motive or included numerous works with significant retail value.

Second, the DOJ brings so few criminal copyright cases that it is not going to waste time or resources prosecuting ordinary citizens who post a few files on YouTube. Furthermore, it is important to note that S. 987 would not have criminalized any acts that were not already criminal under existing law; it would simply have permitted the most serious acts of infringement currently chargeable only as misdemeanors to be charged as felonies.

V. Conclusion

Introduced in 2011, S. 978 was not enacted into law, but as the streaming economy continues to grow – and the attendant streaming piracy problems grows along with it – lawmakers appear interested in revisiting the issue. Indeed, Senators Thom Tillis (R – NC) and Chris Coons (D – DE) recently sent letters to the Copyright Office⁵⁰ and DOJ⁵¹ seeking their views on streaming piracy. Further, the Copyright Office⁵² and DOJ⁵³ have both reiterated their concerns about the rise of

⁴⁹ See pp. 8-9, *supra*.

⁵⁰ Letter from Thom Tillis, Chairman, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, and Christopher A. Coons, Ranking Member, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, to Karyn A. Temple, Register of Copyrights & Dir., U.S. Copyright Office (June 18, 2019), <https://www.tillis.senate.gov/services/files/AC287665-8CEA-489B-A04D-EDD41AF227B8>.

⁵¹ Letter from Thom Tillis, Chairman, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, and Christopher A. Coons, Ranking Member, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, to William Barr, U.S. Attorney General (June 18, 2019), <https://www.tillis.senate.gov/services/files/02EB137B-A877-47F2-8E76-87E9EE4FE319>.

⁵² Letter from Karyn A. Temple, Register of Copyrights & Dir., U.S. Copyright Office, to Thom Tillis, Chairman, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, and Christopher A. Coons, Ranking Member, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate (July 18, 2019), <https://www.copyright.gov/laws/hearings/letter-to-senators-tillis-and-coons-on-felony-streaming.pdf>.

⁵³ Letter from Stephen E. Boyd, Assistant U.S. Attorney General, to Thom Tillis, Chairman, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, and Christopher A. Coons, Ranking Member,

streaming piracy and the lesser remedies available to law enforcement in the streaming piracy context.

The felony streaming loophole is a significant impediment to full enforcement of the rights of any copyright holder with an online streaming business. The loophole was not written into the criminal copyright law by design, and is simply an artifact of the way copyrighted works were distributed in the past. As time passes and the marketplace for streams, and the piracy of those streams, grows, it becomes ever more urgent to fix this unintended hole in the law.

The need to update criminal law to address the undeniable shift to streaming piracy is now more important than ever. In the face of the coronavirus pandemic, people all over the world now find themselves confronting a “new normal” that involves stay-at-home orders and quarantines. With so many people confined to their homes and unable to attend movie theatres, concerts, or live sporting events, both legitimate and illegal streaming numbers are surging. The pandemic has already altered traditional live entertainment and distribution models—with movies skipping the theatre and going straight to video on demand (VOD), artists streaming more live performances, and sports leagues airing events filmed in empty arenas—and it seems likely that these practices will continue for some time.

As the entire content industry, including producers of television and motion pictures, music, software and books, increasingly moves to distribute products through online streams rather than through physical copies or digital downloads, the inability to bring felony charges for commercial-scale unauthorized public performances becomes more outmoded and problematic. There is no principled reason to treat the violation of different exclusive rights differently under the criminal law. This disparity in the law exposes those who violate the performance right to a different measure of justice than those who violate the other exclusive rights under copyright, and discourages creators from distributing content in the way that consumers increasingly desire. Closing the streaming loophole would likely result in more criminal copyright charges being brought against criminal enterprises engaged in streaming piracy, and in additional deterrence against others, thus reducing this type of piracy and bolstering the legal streaming market.

Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate (Dec. 27, 2019), <https://copyrightalliance.org/wp-content/uploads/2020/06/2019-12-27-Illicit-Streaming-Tillis-Coons-4280382.pdf>.