The Register of Copyrights of the United States of America
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The Honorable Thom Tillis
Chairman, Subcommittee on Intellectual Property
Senate Judiciary Committee
United States Senate
113 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Christopher A. Coons
Ranking Member, Subcommittee on Intellectual Property
Senate Judiciary Committee
United States Senate
218 Russell Senate Office Building
Washington, D.C. 20510

July 18, 2019

Dear Chairman Tillis and Ranking Member Coons:

I am pleased to deliver the Copyright Office's responses to your recent inquiries regarding potential felony penalties for criminal infringement of the right of public performance, specifically as this applies to illegal streaming of copyrighted content.[1] As you know, streaming is now one of the primary methods to deliver creative content over the internet. Today, all types of creative content—movies, videos, music, live sporting events—are streamed to millions of users each day through a wide variety of platforms.

Unfortunately, the rise of streaming as a primary model for content distribution has coincided with a similar increase in streaming piracy.[2] This type of copyright infringement has serious consequences for the growing streaming industry, undercutting revenues earned by legitimate streaming platforms and content creators. Indeed, a recent industry report noted that, while video streaming of movies and television content is on the rise, with over 500 licensed portals worldwide, digital video piracy causes between $29.2 billion and $71 billion in lost revenue

[1] *See* 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.

[2] *See, e.g.*, Chris Stokel-Walker, *To Compete with Netflix, Online Piracy Is Upping Its Game*, WIRED (Mar. 26, 2019), https://www.wired.co.uk/article/online-video-piracy-is-on-the-rise.

annually, mostly through unauthorized streaming.[3] Music streaming, which constitutes nearly half of the world-wide recorded music market,[4] is similarly affected, primarily by the practice of stream-ripping.[5] The United States Copyright Office and other federal agencies have previously identified gaps in the current legal framework that may prevent authorities from being able to adequately address this problem.[6]

As we discuss in our attached responses, illegal streaming, while it may also implicate the rights of distribution and reproduction under the Copyright Act, primarily is an offense against the right of public performance. While criminal infringement of either the distribution or the reproduction rights can be prosecuted as a felony under current law, criminal infringement of the right of public performance, even when done willfully and for a commercial advantage, is limited to a misdemeanor. Under this system, criminal streaming piracy, no matter the dollar amount it involves or the number of works affected, is *de facto* treated as a lesser crime than the illegal downloading or reproduction of the exact same content.

Federal law enforcement must have effective tools under the copyright law to address streaming piracy, among them up-to-date criminal penalties that are appropriate to the offenses and the digital world in which we operate. The Office has long supported a legislative fix for the "streaming loophole," although we do not endorse any particular method of addressing the problem at this time.

I appreciate your attention to the issue of penalties for the infringement of the public performance right under the Copyright Act and related criminal laws, and look forward to discussing with you how the Copyright Office can best be of assistance moving forward. Attached please find the Office's responses to your specific policy questions.

Respectfully,

Karyn A. Temple
Register of Copyrights and
Director, United States Copyright Office

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[3] DAVID BLACKBURN ET AL., *prepared for* NERA ECON. CONSULTING & U.S. CHAMBER OF COMMERCE GLOB. INNOVATION POLICY CTR., IMPACTS OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY ii, 1 (2019), https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf.

[4] *See* INT'L FED'N. OF THE PHONOGRAPHIC INDUSTRY, GLOBAL MUSIC REPORT 2019, at 6 (2019).

[5] *See* William Glanz, *Music Piracy: No Longer in the Headlines, but Still a Headache*, SOUNDEXCHANGE (Nov. 21, 2018), https://www.soundexchange.com/2018/11/21/music-piracy-no-longer-in-the-headlines-but-still-a-headache/.

[6] *See Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 19-22 (2011) (written statement of Maria A. Pallante, Acting Register of Copyrights, U.S. Copyright Office). *See also Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 24 (2014) (written statement of David Bitkower, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice).

U.S. COPYRIGHT OFFICE RESPONSES TO SPECIFIC QUESTIONS

July 18, 2019

Responses to Questions from Chairman Tillis and Ranking Member Coons, United States Senate

Question 1: *Does unauthorized streaming violate the copyright holder's right to public performance? If so, why?*

Answer: Yes, unauthorized streaming implicates the right of public performance.[1] Streaming is the delivery of digital media content to members of the public in real time, so that it may be watched, listened to, or played contemporaneously with the transfer of the media to a recipient's device.[2] As former Register of Copyrights Maria A. Pallante explained in her 2011 testimony to the House Subcommittee on Intellectual Property, "[s]treaming, which transmits a performance to members of the public, fits comfortably within [the statutory definition of public performance]."[3] Indeed, the Supreme Court reviewed the question of the proper contours of the public performance right in the 2014 *Aereo* case and concluded that, reading the statutory provisions in light of the purposes articulated by Congress, the public performance right encompasses streaming.[4] The Copyright Office also concluded that streaming implicates the right of public performance in our 2016 report, *The Making Available Right in the United States*.[5] Thus, unauthorized streaming, absent an applicable exception or limitation, infringes the right of public performance.

As a recent industry report illustrates, there has been an explosion of consumer demand for streamed video content—today there are over 500 licensed online video portals worldwide—providing television, motion pictures, and, as highlighted in your letter, sports.[6]

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[1] Public performance is one of the bundle of rights set forth in the Copyright Act, and a key part of the definition of "to perform a work publicly" is "to transmit or otherwise communicate a performance . . . of a 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." 17 U.S.C. § 101.

[2] *See* U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 36 n.171 (2016) ("MAKING AVAILABLE RIGHT REPORT"), https://www.copyright.gov/docs/making_available/making-available-right.pdf.

[3] *Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 19 (2011) (written statement of Maria A. Pallante, Acting Register of Copyrights, U.S. Copyright Office).

[4] *See Am. Broad. Cos., Inc. v. Aereo*, 573 U.S. 431, 438–39 (2014) ("Considered alone, the language of the Act does not clearly indicate when an entity 'perform[s] [a work] . . . . But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo's performs.").

[5] *See* MAKING AVAILABLE RIGHT REPORT 40–43.

[6] DAVID BLACKBURN ET AL., *prepared for* NERA ECON. CONSULTING & U.S. CHAMBER OF COMMERCE GLOB. INNOVATION POLICY CTR., IMPACTS OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY ii (2019) ("NERA/GIPC"), https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf.

This report also notes that the digital video industry is plagued by piracy, to the tune of losses of at least $29.2 billion per year, 80% of which are from unauthorized streaming.[7] Likewise, streaming continues to grow as a source for public access to recorded music, with its share of global music revenue reaching 46.9% in 2018;[8] at the same time, stream-ripping continues to present significant piracy problems.[9] Internationally, the United States Trade Representative this year included eight sites that primarily or partially engage in streaming piracy in its list of notorious online markets, which is designed to "highlight[] prominent and illustrative examples of online and physical marketplaces that reportedly engage in and facilitate substantial piracy and counterfeiting."[10] These sites may host pirate streams, distribute stream-ripped files, or make available illicit streaming devices ("ISDs").[11]

Question 2: *Does unauthorized streaming violate the copyright holder's right to control reproduction and distribution? If not, why not? If so, under what circumstances?*

Answer: Although the streaming of copyrighted content most obviously implicates the public performance right, depending upon the technology at issue, there may be instances in which the rights of reproduction and/or distribution also will be implicated.[12] Which copyright right(s) are implicated in a particular case will depend on the applicable factual situation. It is partially for this reason that it is important that penalties for violation of the public performance right mirror those for violation of the reproduction and distribution rights: in a criminal infringement situation, prosecution should not be hindered by some infringements qualifying as felonies and others not, based solely on the illicit delivery method chosen for the creative content.

[7] NERA/GIPC ii, 1.

[8] INT'L FED'N. OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2019, at 6 (2019). In the United States, streaming constituted 75% of the legitimate recorded music market in 2018. RECORDING INDUS. ASS'N. OF AM., MID-YEAR 2018 RIAA MUSIC REVENUES REPORT 2 (2018), https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf.

[9] *See* Recording Industry Association of America and National Music Publishers' Association Comments Submitted in Response to Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement 5 (Nov. 13, 2018). "Stream-ripping" is the practice of extracting an audio file from a licensed audiovisual work and making it available to a user as a free permanent download. *See* Press Release, Int'l Fed'n. of the Phonographic Indus., Stream Ripping Site Convert2MP3 Shuts Down Following Global Settlement with Recording Industry (Jun. 21, 2019), https://ifpi.org/news/Convert2MP3-shuts-down.

[10] U.S. TRADE REPRESENTATIVE, 2018 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 2, 14–30 (2019) (discussing those online markets), https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf.

[11] *See id.* at 14–30.

[12] *See* MAKING AVAILABLE RIGHT REPORT at 51–52.

Question 3: *Do you believe that increasing the criminal penalty for the unauthorized streaming of copyrighted material from a misdemeanor to a felony would better deter illicit streaming? If yes, what specific statutory changes would you recommend?*

Answer: The Copyright Office has previously supported statutory amendments that would provide the same felony-level penalties for criminal streaming as for criminal reproduction and distribution.[13] Despite the fact that streaming may, in some factual situations, constitute a reproduction or distribution of a work, there are also many instances where it primarily constitutes public performance of the work. As noted above, there may be other instances where it is not immediately clear which right is at issue. Hence, the Copyright Office believes that consistent felony-level penalties for violation of the public performance, reproduction, and distribution rights would provide the most comprehensive tools for federal authorities. We believe this can be achieved in a way that does not bear upon the activities of individual users of streaming services.

Currently, there are three bases for prosecution of criminal copyright infringement set forth in the Copyright Act. All require that the infringement be willful.[14] The first basis, which covers infringement "for purposes of commercial advantage or private financial gain,"[15] may be used to prosecute infringements of the right of public performance. However, under the U.S. Criminal Code, only violations of the rights of distribution and reproduction can form the basis of a prosecution for felony infringement.[16] In contrast, violations of the right of public performance can be prosecuted only at the misdemeanor level.[17] The other two bases for criminal infringement in the Copyright Act explicitly mention only reproduction and distribution.[18]

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[13] *See Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 19–22 (2011) (written statement of Maria A. Pallante, Acting Register of Copyrights, U.S. Copyright Office).

[14] 17 U.S.C. § 506(a)(1) ("Any person who willfully infringes a copyright. . . .").

[15] 17 U.S.C. § 506(a)(1)(A).

[16] *See* 18 U.S.C. § 2319(b)(1) ("Any person who commits an offense under section 506(a)(1)(A) of title 17 (1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than $2,500.").

[17] *See* 18 U.S.C. § 2319(b)(3) (stating that a person who commits any other offense under section 506(a)(1)(A) of title 17 "shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, in any other case.").

[18] *See* 17 U.S.C. § 506(a)(1)(B) (concerning infringement committed "by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000"); § 506(a)(1)(C) (concerning infringement committed "by the distribution of a work being prepared for commercial distribution ").

The Copyright Office supports the same level of felony penalties for violation of the public performance right as for the reproduction and distribution rights, a position reinforced by the combination of the growing importance of streaming to the U.S. economy and the failure of the current law to effectively address unauthorized streaming. This policy recommendation has been endorsed previously by the Department of Justice,[19] the Intellectual Property Enforcement Coordinator ("IPEC"),[20] and the Department of Commerce Internet Policy Task Force.[21] We also note that a bill in the 112th Congress was proposed in response to unauthorized streaming,[22] and the Office stands ready to assist Congress in developing future legislative language to address this issue.

Question 4: *Are there additional legislative solutions that you believe would address the growing issue of unauthorized streaming of copyrighted content?*

Answer: The Copyright Office remains ready to work with the Subcommittee and its members, as well as our colleagues in the Department of Justice, in order to develop effective enforcement tools to combat the unauthorized streaming of copyrighted content.

One tool that may be beneficial in enabling smaller copyright owners to enforce their rights civilly is a small copyright claims tribunal.[23] The Copyright Office is also in the process of studying the section 512 notice-and-takedown system, and may have additional recommendations as part of that process.[24] We look forward to working with you on these and any other issues.

[19] *See Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 24 (2014) (written statement of David Bitkower, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice) ("Specifically, we recommend the creation of legislation to establish a felony charge for infringement through unauthorized public performance conducted for commercial advantage or private financial gain.").

[20] *See* OFFICE OF THE INTELLECTUAL PROP. ENF'T COORDINATOR, ADMINISTRATION'S WHITE PAPER ON INTELLECTUAL PROPERTY ENFORCEMENT LEGISLATIVE RECOMMENDATIONS 10 (2011), https://www.whitehouse.gov/wp-content/uploads/2017/11/ip_white_paper-1.pdf.

[21] *See* INTERNET POLICY TASK FORCE, U.S. DEP'T. OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 45 (2013), https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf.

[22] S. 978, 112th Cong. (2011).

[23] *See generally* U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

[24] *See Section 512 Study*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/policy/section512/.