PROMOTING INVESTMENT AND PROTECTING COMMERCE ONLINE: THE ART ACT, THE NET ACT AND ILLEGAL STREAMING

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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JUNE 1, 2011

PROMOTING INVESTMENT AND PROTECTING COMMERCE ONLINE: THE ART ACT, THE NET ACT AND ILLEGAL STREAMING

WEDNESDAY, JUNE 1, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:05 p.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Quayle, Sensenbrenner, Coble, Chabot, Marino, Watt, Conyers, Berman, Chu, and Lofgren.

Staff present: (Majority) David Whitney, Counsel; Olivia Lee, Clerk; and Stephanie Moore, Minority Counsel.

Mr. GOODLATTE. Good afternoon. The Subcommittee on Intellectual Property, Competition, and the Internet will come to order.

I have an opening statement.

To advance progress and effectively secure the exclusive rights of authors for a limited time as the drafters of our Constitution intended, Congress must, from time to time, revisit existing authorities and assess their efficacy. When authorities are found wanting, we have a responsibility to take action to update the law to ensure it properly accounts for changed circumstances and anticipates reasonably foreseeable developments.

With the enactment of the No Electronic Theft Act, or NET Act, in 1997 and the Artists Rights and Theft Prevention Act, or ART Act, in 2005, Congress exercised this responsibility in the context of online infringement. In both instances, we took decisive action to update the criminal copyright infringement provisions of Federal law to better secure the rights of authors.

The NET Act was enacted in direct response to the 1994 U.S. district court decision in *U.S. v. LaMacchia*. In that case, the court dismissed an indictment against the defendant because the law did not provide criminal penalties for someone who willfully engaged in large-scale copyright infringement unless there was also evidence they acted with a commercial motive or had benefitted financially. The NET Act closed this loophole and made additional improvements to the criminal code and related provisions to the Copyright Act to better protect copyrighted works online. Its unanimous pas-

sage affirmed the belief that intellectual property is no less valuable than physical property.

Several years later, the predecessor to this Subcommittee, acting under the leadership of Chairman Smith, developed the ART Act. That measure sought to protect pre-release works by targeting infringers who knowingly distributed unauthorized copies prior to their commercial distribution to the public. The ART Act recognized that copyright owners are disproportionately harmed by theft that occurs during these windows and provided prosecutors with an important new tool to deter the reproduction and distribution of such works.

Notwithstanding these authorities, technological advances in recent years have enabled infringers to employ new ways to misuse the Internet in the delivery of unauthorized content. Their success undermines investments by copyright owners and has an outsized impact on independent artists and creators as we will soon hear in more detail from Ms. Aistars of the Copyright Alliance.

Contrary to some beliefs, their success also undercuts innovative companies like Netflix, a licensed provider that developed proprietary technology that allows subscribers to instantly watch movies and TV programs streamed over the Internet to their computers and TV's.

Without objection, I ask that I be permitted to place a May 30, 2011 letter from Netflix to myself and the Ranking Member into the hearing record. Without objection, so ordered.

[The information referred to follows:]

May 30, 2011

The Honorable Robert Goodlatte
Chairman
Subcommittee on Intellectual Property,
Competition, and the Internet
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Melvin Watt
Ranking Member
Subcommittee on Intellectual Property,
Competition, and the Internet
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte and Ranking Member Watt:

With more than 22 million members in the United States, Netflix is the leading Internet subscription service for enjoying movies and TV shows. For $7.99 a month, our members can instantly watch unlimited movies and TV episodes streamed over the Internet to their computers and TV's – and, it's all legal!

We have built a thriving business around the legal distribution of content over the Internet by licensing that content from various producers and distributors. As our subscriber base and revenue grow, we have continued to license more content for streaming, thereby providing an increasingly valuable revenue stream to the producers and distributors of that content.

Theft of copyrighted content, euphemistically called "piracy," threatens our business. It's hard to compete against free. Nonetheless, we believe that consumers, when given the choice between a legal, reasonably priced service, such as Netflix, and an illegal, yet free service, such as Pirate Bay, will choose the legal one. This is the good news. The bad news, however, is that consumers are less equipped to make this distinction as more and more of these illegal sites look legal.

Many of the illegal services run advertisements or require payment for access to the content being distributed, giving them an air of legitimacy. Furthermore, as technology advances and streaming content over the Internet becomes more commonplace, consumers will encounter these illegal content distribution sites in a number of settings that will serve only to increase consumer confusion as to the service's legality and the potential damage to legitimate distributors, like Netflix. More platforms, including computers, game consoles, smartphones and other Internet-connected devices, will be capable of delivering both legal and illegal content.

As such, it is important for Congress to examine the consumer confusion and impact to legitimate businesses arising from piracy.

We believe that the growth and popularity of our service demonstrates that consumers want legally delivered content and that content owners and distributors can make money from such distribution of content over the Internet. But as the Internet delivery of content continues to evolve, it is important that Congress examine the impacts of piracy and help provide tools to limit the negative impacts of copyright theft.

Please do not hesitate to contact me if I can be of assistance.

Sincerely,

David Hyman
General Counsel
Netflix, Inc.

Mr. GOODLATTE. Similar streaming technologies are employed by other services and websites not to generate legal revenue that is used to license existing works and incentivize the creation of new works, but instead to undercut legitimate producers and undermine the legal marketplace. Quite simply, when the NET and ART Acts were under development in this Committee, the technology and in-

frastructure needed to promote large-scale illicit streaming either didn't exist or wasn't deployed. If it had, we would have provided appropriate authorities at that time. As a result, the amendments to the criminal copyright infringement statutes that were adopted were confined to technologies that impacted the exclusive rights of reproduction and distribution, not the public performance right, which is impacted by streaming.

As infringers have moved to adapt technology to more efficiently deliver unlicensed content online and evade prosecution, it is incumbent on Congress to review the law and to adapt it in a manner that permits contemporary prosecutors to meaningfully pursue and deter today's copyright criminals.

My view is that Congress adopted the right policies when it enacted the NET and ART Acts. What is needed is for us to extend these policies to illicit streaming in a similar fashion and to ensure our prosecutors are provided with the necessary tools to meaningfully enforce the law. Going forward, I want to work with interested colleagues to accomplish these purposes.

But for now, I look forward to welcoming our witnesses and hearing their specific thoughts on how we should best approach this matter.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I thank the Chairman for holding the hearing.

I share the Chairman's views that we need to get aggressive on this issue, and I look forward to the witnesses' testimony to help us figure out how best to do that.

With that, I yield back the balance of my time.

Mr. GOODLATTE. That is about as succinct as can be.

I now see that the Ranking Member of the full Committee, Mr. Conyers, is here. Would you like to be recognized for an opening statement?

Mr. CONYERS. No. I will submit my statement.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Intellectual Property, Competition, and the Internet

Copyright owners face unique challenges to enforcing their rights on the Internet. Today, our Subcommittee will consider streaming technology—a subject the Full Committee began consideration of last Congress on December 16, 2009.

More and more of our media—the music we listen to, the TV shows we tune into, and the sports we watch—is moving to the Internet.

Piracy has increasingly injured artists and intellectual property owners as individual consumers have access to faster, more powerful Internet connections.

There is a loophole in current law that makes illegal streaming a misdemeanor instead of a felony and fails to capture all of the bad actors, and I expect that this Committee will begin consideration of what I hope will be bipartisan legislation to solve this problem.

I want to make clear at this point that I am not talking about directing the Justice Department to go after every individual who takes part in illegal streaming with this legislative effort, like college students downloading unauthorized music. We need to first go after the people who profit from these illegal activities; the Justice Department needs to be able to prosecute those who commercially gain from illegal streaming as felons.

As Internet connections become standard features for TV sets and people watch their favorite TV shows from their cell phones, content creators are having to rely more and more on the Internet to market and broadcast their property. The "Information Superhighway" is not just for information; it is a one-stop-shop for every form of media and entertainment.

For content owners and broadcasters, this means new and expanding fan bases, but it also leaves the value of their product vulnerable to piracy.

In a study by the research organization Envisional, it was found that one-quarter of all global Internet traffic is already devoted to video streaming, and it is the fastest growing category of traffic. Unfortunately, as streaming traffic grows, so does the streaming traffic dedicated to infringement.

As we will hear from representatives from the Motion Picture Association and the Copyright Alliance, millions of dollars are lost to the U.S. economy because of streaming and other online piracy.

The copyright and criminal code unfortunately contains a gaping loophole—not because Congress intended to create a carve-out, but because when laws like the ART Act and the NET Act were enacted in this arena, no one anticipated that streaming technology would become such a dominant source of disseminating information.

Because felony penalties require a "reproduction" or "distribution"—as codified in Title 18 Section 2319(b)(1)—federal law has unwittingly overlooked streaming-related infringement.

As the Intellectual Property Enforcement Coordinator, Victoria Espinel, noted in her legislative recommendations to Congress, we should update the copyright code to reflect technology and ensure parity in enforcement provisions.

I would applaud Senator Klobuchar for her efforts in this arena, although I am sensitive to the fact that the concerns of some industries—including making sure that music is adequately covered—should be addressed in a House effort.

I would yield back and thank the Chairman and Ranking Member for this important hearing.

Mr. GOODLATTE. I thank the gentleman.

Without objection, all other Members' opening statements will be made a part of the record.

And we will now turn to our witnesses. We have a very distinguished panel of witnesses today. All of your written statements will be entered into the record in their entirety. And I ask that each witness summarize their testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, you are done.

Before I introduce our witnesses, I ask them to stand and be sworn, as is the custom of this Committee.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you and please be seated.

Our first witness is Maria Pallante, the 12th appointed Register of Copyrights in the history of the United States. Perhaps I should allow that to sink in for a moment. For those of you who haven't heard the news. The Librarian of Congress, Dr. James H. Billington, formally appointed Ms. Pallante as Register in a permanent capacity today. Ms. Pallante takes over leadership of the office at a time of great challenge and transition. Her immediate predecessor, Marybeth Peters, served as Register for 16 years and devoted more than 45 years to public service. We are pleased to share this momentous day with Ms. Pallante and honored that one of her first public acts as Register will be to continue the tradition of having the Register serve as the principal advisor to the Congress on matters of copyright policy.

Mr. CONYERS. Mr. Chairman, can we give her a round of applause for that?

Mr. GOODLATTE. Absolutely. [Applause.]

Now, to tell you more about the person you just applauded, Ms. Pallante has spent much of her career in the office where she previously served as the Associate Register for Policy and International Affairs, Deputy General Counsel and Policy Adviser. In addition, Ms. Pallante spent nearly a decade as Intellectual Property Counsel and Director of Licensing for the Guggenheim Museums in New York. She earned her J.D. from George Washington University and her bachelor's degree from Misericordia University where she was also awarded an honorary degree of humane letters.

Given the significance of today's news and if there is no objection, then I offer Ms. Pallante a moment to address the Subcommittee before introducing our two remaining distinguished witnesses. Ms. Pallante?

Ms. PALLANTE. Thank you very much, Mr. Chairman. I am deeply honored by Dr. Billington's appointment today and it is a privilege to begin my tenure as Register by appearing before this Subcommittee.

Marybeth Peters left behind a tremendous legacy, and it is my goal to continue her work and to build the premier copyright registration system for the United States and one that is the envy of the world.

I also believe that the role of my office is increasingly important—perhaps more important than ever before—in policy and international affairs, and I feel very fortunate to have a talented staff and a diverse and vibrant stakeholder community to draw upon for assistance.

Thank you again, Mr. Chairman, and I look forward to supporting the work of this Subcommittee.

Mr. GOODLATTE. Thank you, Ms. Pallante, and we look forward to working with you as well to advance the interests of authors and the public.

Our second witness is Ms. Sandra Aistars. Am I pronouncing that correctly? The Executive Director of the Copyright Alliance, a nonprofit organization established in 2006. Ms. Aistars took over leadership of the alliance in January of 2011. Immediately prior, Ms. Aistars spent 7 years with Time Warner where she served in a variety of positions. These included Vice President and Associate General Counsel. While there, she coordinated the company's intellectual property strategies, which included taking advantage of new opportunities and responding to the challenges associated with emerging digital technologies.

Before moving to Time Warner, Ms. Aistars spent 12 years as an attorney in private practice here in Washington. She acquired her J.D. from the University of Baltimore School of Law and earned her B.A. in political science, history and philosophy at Bard College.

Our final witness is Michael O'Leary, the Executive Vice President of Government Relations at the Motion Picture Association of America. In that position, Mr. O'Leary is responsible for overseeing all Federal and State legislative and regulatory strategies for MPAA. Before moving to MPAA, Mr. O'Leary served more than a

dozen years at the Department of Justice where he worked on legislative, intellectual property, and enforcement issues. During his tenure there, he served as the Deputy Chief of the Computer Crime and Intellectual Property Section where he prosecuted and supervised some of the most significant domestic and international criminal and IP cases ever undertaken by the Department. Before joining the Department of Justice, Mr. O'Leary spent 5 years serving as counsel to the Senate Judiciary Committee. He grew up in Montana and is a graduate of Arizona State University and the University of Arizona School of Law.

We welcome all of our witnesses to the Subcommittee, and we will begin with the Register's opening statement.

TESTIMONY OF THE HONORABLE MARIA A. PALLANTE, REGISTER, U.S. COPYRIGHT OFFICE

Ms. PALLANTE. Thank you, Mr. Chairman and Ranking Members Watt and Conyers, for this hearing and also for your attention to copyright enforcement these past few months.

At the outset, I just want to underscore that our conversation today is about criminal conduct. In the context of copyright law, this means willful, large-scale, and egregious, and it is the type of activity that does not happen by accident and which inflicts serious economic harm.

Criminal provisions are necessarily stronger than civil provisions, and they are not a recent development. We have had criminal provisions in copyright law since 1897.

As described in your opening remarks, Mr. Chairman, the Internet has brought new challenges for copyright enforcement, and as you noted, Congress has amended the criminal law twice in the past 15 years directly responding to copyright theft online, albeit it for the rights of reproduction and distribution. If I may make an obvious statement, such work is a necessary but never-ending task for Congress. Copyright policy will never be static because technology will always create new business models for authors and new opportunities for infringers.

So against this backdrop, I would like to make three brief points.

First, streaming implicates the exclusive right of public performance, which is fundamentally important to authors of certain kinds of works, for example, movies, television programming, live sporting events, and music. And thanks to improved bandwidth and innovative business models, it is of growing importance in the marketplace.

Second, there is a disparity in how the law treats criminal violations of the exclusive rights of reproduction and distribution on the one hand and infringement of the exclusive right of public performance on the other. The disparity was once appropriate, but it is now outdated.

Third, there are important policy reasons to give prosecutors the necessary tools to combat illegal streaming, allowing them in their discretion to bring felony charges.

So starting with my first point, today authors and other copyright owners license streaming of all kinds of creative content, often directly to consumers. Performances can be pre-recorded and streamed to customers on demand or streams can provide access to

live content such as basketball and football games on a subscription or a pay-per-view basis including from websites. Customers can also store licensed content or content they have created themselves in the cloud and access it through their smart phones and video game consoles.

So all of this suggests that new products and platforms relying on streaming are a growing segment of the information and entertainment markets and, therefore, of increasing consequence for copyright owners. Indeed, according to one recent study, which I cite in my written testimony, video streaming traffic accounts for more than one-quarter of all Internet traffic.

Turning to the disparity under current law, in our analysis, current law is insufficient to provide a basis for prosecutions in cases where the primary cause of action is infringement of the exclusive right of public performance. This is because an unauthorized public performance is at most a misdemeanor under current law, even where the conduct is undertaken purposely and with a profit motive.

So what are the policy issues for Congress? Simply put, the disparity in treatment requires attention. Illegal streaming—just like illegal downloading and copying and distribution—has the capacity to ruin the economic market for a copyrighted work. Recognizing that, as a practical matter, prosecutors have little incentive to file charges for a misdemeanor, we believe the Department of Justice should always have the tools necessary to file felony charges against infringers when infringement meets the standards of criminal conduct and causes great harm to copyright owners and to the global marketplace that is so important to the United States.

To be clear, the Copyright Office is not offering an opinion on when it might or might not be appropriate for the Department of Justice to bring criminal felony charges under any particular set of circumstances. Rather, we are underscoring the fact that prosecutors have a handicap when pursuing egregious cases of unauthorized streaming. Moreover, Congress may have a chance here to get in front of the issue of illegal streaming before it proliferates further.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Pallante follows:]

Statement of

Maria A. Pallante

Acting Register of Copyrights

Before the

Subcommittee on Intellectual Property, Competition, and the Internet

Committee on the Judiciary

United States House of Representatives

112th Congress, 1st Session

June 1, 2011

"Promoting Investment and Protecting Commerce Online:
The ART Act, the NET Act and Illegal Streaming"

Introduction

Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee, thank you for the opportunity to appear before you this afternoon to discuss some of the problems created by illegal streaming of television programs (including broadcasts of sporting events), motion pictures and other copyrighted works and the current impediments to effective prosecution of those who infringe the right to publicly perform such works by willfully streaming them to the world at large, sometimes at the same time as the legitimate broadcast or release. We also appreciate the continued work and attention of Chairman Smith and Ranking Member Conyers of the full committee on these important issues.

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 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.

Congress has worked diligently to keep pace with technological developments relating to the Internet, including by amending the criminal copyright statutes to permit prosecution of large-scale infringers when appropriate. Up to now, those efforts have focused on the unauthorized transmission of copies of works over the Internet because the bulk of Internet-based infringement has taken the form of violations of the reproduction and distribution rights.[1] In recent years, however, it has become easier to infringe by streaming directly to the computers or television sets of end-users. As streaming becomes an increasingly popular means of accessing creative works (for information and for entertainment), it will continue to be attractive to infringers. Unfortunately, the problem of unauthorized streaming is here to stay.

My testimony today will: (1) trace the history of Congress's efforts to permit criminal prosecution of serious acts of copyright infringement on the Internet; (2) discuss the development of streaming technology, which has created a growing market for legitimate providers of entertainment and information but which also enables new forms of copyright infringement; (3) set forth policy reasons for updating the law, namely to ensure the same tools exist for prosecution with respect to the exclusive right of public performance as currently exist for the exclusive rights of reproduction and distribution; and (4) outline some possible legislative

[1] The copyright owner's exclusive rights, set forth in section 106 of the Copyright Act, 17 U.S.C. § 106, include the rights to reproduce, distribute, publicly perform, and publicly display the copyrighted work, as well as the right to make a derivative work (such as an adaptation or revision of the original work).

steps that the Committee should consider as it decides whether to make unauthorized streaming of copyrighted works a felony criminal offense under appropriate circumstances.

(1) The Legislative Background

In the context of copyright law, Congress has considered and addressed the benefits and challenges of the Internet for more than 15 years now, enacting, for example, an exclusive right of public performance in sound recordings for digital transmissions; passing legislation governing circumvention of technological measures used by copyright owners to protect their works; providing Internet service providers with safe harbors from liability for damages in cases where persons using their services engage in copyright infringement; and providing exemptions from liability for distance learning, among other statutes.[2] Both Congress and the courts have upheld the rule of law on the Internet, recognizing both civil and criminal remedies for copyright owners. Congress has also worked to stay in front of the most egregious forms of infringement, amending the criminal provisions of Titles 17 and 18 twice to ensure that prosecutors are equipped to confront certain willful actors – specifically those who cause great harm despite the absence of a commercial motive and those who cause great harm by disseminating valuable works prior to public release.

The NET Act-1997

The first copyright legislation enacted by Congress specifically in response to infringement on the Internet was the No Electronic Theft Act (NET Act), introduced in 1997. It addressed the reality that infringers on the Internet can instill tremendous damage with relative ease and with little to no monetary investment, despite the absence of a commercial purpose.

When this Subcommittee was considering the NET Act in 1997, then-Register of Copyrights Marybeth Peters testified that "[a]s it becomes easier to transmit large amounts of information quickly over the NII [National Information Infrastructure], it becomes easier for those without a commercial stake or profit motive – a disgruntled former employee, a dissatisfied customer, an Internet user opposed to the fundamental concept of copyright law – to inflict tremendous damage to the market for a copyrighted work."[3]

Chairman Goodlatte noted that, "through a loophole in the law [those] who pirate works willfully and knowingly, but not for profit, are outside the reach of our Nation's law enforcement officials," further stating:

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[2] *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, enacted November 1, 1995; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887, enacted October 28, 1998; and Technology, Education, and Copyright Harmonization Act of 2002, Division C, Title III, Subtitle C of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758, 1910, enacted November 2, 2002.

[3] *Copyright Piracy, and H.R. 2265, the No Electronic Theft (NET) Act: Hearing before the H. Comm. on the Judiciary, Subcommittee on Courts and Intellectual Property*, 105th Cong. 12 (1997) (statement of Marybeth Peters, Register of Copyrights) (September 11, 1997) ("NET Act Hearing").

> The Internet allows a single computer program or other copyrighted work to be illegally distributed to millions of users, virtually without cost, if an individual merely makes it available on a single server and points others to the location. Other users can contact that server at any time of day and download the copyrighted work to their own computers. It is unacceptable that today this activity can be carried out by individuals without fear of criminal prosecution.[4]

The NET Act was a direct response to the 1994 decision in *United States v. LaMacchia*,[5] in which a federal district court made clear that the existing criminal provisions of the Copyright Act were inadequate to address serious forms of copyright violations on the Internet. To be clear, the copyright law has included criminal penalties since 1897. However, these were available only when infringement was "willful and for profit." In the words of the Copyright Act of 1976, a finding of profit motive required that the infringement be "for purposes of commercial advantage or private financial gain."

In *LaMacchia*, the court dismissed an indictment against an MIT graduate student who operated an electronic bulletin board on the Internet and encouraged and enabled the unauthorized transfer of copies of copyrighted computer games among persons who accessed the electronic bulletin board. The Department of Justice had prosecuted LaMacchia under the federal wire fraud statute because at the time the criminal copyright statute required proof that the defendant acted for commercial advantage or private financial gain, and LaMacchia did not meet those requirements. In dismissing the indictment, the district court held that the wire fraud statute did not cover copyright infringement and noted that a criminal copyright prosecution would have failed because LaMacchia lacked a commercial motive. Note the court's description of LaMacchia's actions and its recommendation to the legislature:

> 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.[6]

Congress responded to the *LaMacchia* decision decisively by redefining the crime of copyright infringement in three ways. First, it revised section 101 of the Copyright Act to provide that "[t]he term 'financial gain' includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works." This enables prosecution of criminal

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[4] 143 Cong. Rec. E1529 (July 25, 1997) (statement of Rep. Goodlatte).

[5] *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

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

copyright infringement so long as the defendant *expected* to receive *something* of value as a result of the infringement, even when the defendant receives no money from the transaction.[7]

Second, Congress provided an independent basis for criminal prosecution regardless of whether the defendant had any expectation that he would receive anything of value. Thus, section 506(a)(1)(B) of the Copyright Act now provides that it is a criminal offense to engage in willful infringement of a copyright "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," even if the perpetrator does not benefit or expect to benefit from the infringement. The Report language of the NET Act underscored Congress' intentions on this point, noting that, "[t]he practical significance of these changes is that they criminalize *LaMacchia*-like behavior; that is, 'computerized' misappropriation in which the infringer does not realize a direct financial benefit but whose actions nonetheless substantially damage the market for copyrighted works."[8]

Third, the NET Act amended section 2319 of the Criminal Code, 18 U.S.C. § 2319, which already provided that it was a felony to reproduce or distribute at least 10 or more copies with a total retail value of at least $2,500, by adding the words "by electronic means" after "reproduction or distribution." This language, along with the similar language in newly enacted section 506(a)(1)(B), made "explicit that reproduction and distribution of electronic copies via the Internet can qualify for criminal sanctions."[9]

Congress did not address the issue of infringement of the public performance right in 1997, either in the NET Act itself or the legislative history. As discussed below, that is not surprising, given both the state of technology and the means by which copyrighted works were packaged and delivered to the public 14 years ago.

The ART Act-2005

Seven years later, Congress revisited the criminal provisions of the copyright law when it enacted the Artists Rights and Theft Prevention Act (ART Act).[10] Among other things, the ART Act addressed a new phenomenon on the Internet: the making available for distribution on the Internet copies of motion pictures and other audiovisual works, musical works and sound recordings, and computer programs *prior* to their authorized release to the public. It was – and is – not infrequent that days or even weeks before the premiere of a motion picture or the release of

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[7] *See also* NET Act Hearing (statement of Rep. Goodlatte) (noting that the NET Act made clear "that receiving other copyrighted works in exchange for pirated copies, bartering, is as unlawful as simply selling pirated works for cash.").

[8] H.R. Rep. No. 105-339, at 8 (1997).

[9] NET Act Hearing at 13 (statement of Marybeth Peters, Register of Copyrights).

[10] The ART Act was enacted as part of the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (2005).

a sound recording, illicit copies are made available for downloading on the Internet (as well as in physical copies) by persons who acquired them unlawfully. The commercial harm to the market for such works was obvious. This Committee's report on the ART Act stated:

> The Committee has been made aware of numerous examples of efforts to camcord new movies during their opening days of release followed immediately by either mass duplication and distribution of DVD copies or Internet distribution of the same movie. Although the harm to the distribution of physical or Internet copies of works when legal copies are available has long been established, the Committee notes the larger harm caused by those who distribute copies of works even before they are legally available to the consumer. . . . . Finally, the Committee is aware of, and encouraged by, Department of Justice investigations and prosecutions of pre-release cases involving motion pictures, sound recordings, business software, videogame software, and book publications once the works have been released in final form.[11]

In recognition of the harm caused by prerelease infringement, Congress updated the work begun with the NET Act by adding a third basis for criminal prosecution in cases involving infringement of a "work being prepared for commercial distribution." Specifically, a new subparagraph (C) was added to section 506(a)(1) of the Copyright Act, making it a crime to distribute "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."

The ART Act addressed some other related issues as well. A definition of "work being prepared for commercial distribution" was added to section 506. With respect to a computer program, musical work, motion picture or other audiovisual work, or a sound recording, the definition applies if at the time of the unauthorized distribution, the copyright owner had a reasonable expectation of commercial distribution and copies or phonorecords of the work had not yet been commercially distributed. For motion pictures, the definition includes works that have already been theatrically released but have not yet been made available in copies for sale in formats such as DVDs or downloads. The purpose of the latter definition was to penalize the unauthorized exploitation of the market for the sale of copies of a motion picture in such formats before the copyright owner had entered that market while or after the motion picture was in theatrical release. Chairman Smith summarized the objectives of the ART Act as follows:

> Such activity is clearly wrong; yet existing law does not create a penalty targeted at this activity. Title I creates a minimum penalty of 3 years in jail for those who undertake such activity. Combined with the camcording provisions in Title I, this legislation will impose new and significant penalties on organized groups that camcord movies on the

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[11] H.R. Rep. No 109-33, at 4. (2005).

first day of their release and then distribute pirated DVDs the following day on streets worldwide.[12]

As with the NET Act, the legislative history of the ART Act reveals no concern about streaming or any other transmissions of performances of copyrighted works. In early 2005, when the ART Act was enacted, piracy was still almost exclusively a matter of infringing reproduction and distribution. Today, we are here to consider the ways in which Internet bandwidth and streaming technology have changed the importance of the public performance right in recent years relative to infringement and, correspondingly, the ability of the law to reach nefarious actors.

(2) Streaming over the Internet

Today, as technology has developed, network bandwidth has increased, and products and delivery platforms have become more varied, the streaming of copyrighted content over the Internet is becoming a popular choice among consumers. Streaming technology allows users to view or listen to public performances over the Internet without necessarily requiring a full download of the file containing the performance to be made to the recipient's computer. While at the time of the NET Act and ART Act streaming was largely limited to music, all types of creative content, including performances of movies, television programs and sporting events, can now be streamed via the Internet. Performances can be pre-recorded and streamed to the user on demand, or streams can provide access to live content, such as basketball and football games. According to one recent study, video streaming traffic alone now accounts for more than one quarter of all Internet traffic and is among the fastest growing areas of the Internet.[13] YouTube, a popular video streaming site, now streams more than three billion videos per day which, according to the site, is the equivalent of every U.S. resident watching nine videos per day.[14]

Streaming technology itself is content neutral. Indeed, today there are many ways for users to enjoy streamed content legally, through legitimate video streaming websites like Hulu or Netflix, user generated content sites like YouTube and streaming music services. Streamed content is also often provided legally by content owners through their own websites and Internet portals such as ABC.com and HBO GO. And now users can even stream content through applications on their smart phones or their video game consoles.

As with any technology that provides access to creative content, however, this technology can be *misused* in ways not originally intended by the developers – to provide the means for thieves to steal huge amounts of copyrighted works. And the technology to do so is surprisingly

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[12] 151 Cong. Rec. H2118 (April 19, 2005) (statement of Rep. Smith).

[13] Envisional, *Technical Report: An Estimate of Infringing Use of the Internet* 3, 19 (2011) ("Every recent report which examines the recent past and immediate future of internet usage . . . identifies streaming video as the fastest growing segment of bandwidth consumption worldwide.") ("Envisional Report").

[14] Broadcasting Ourselves, The Official YouTube Blog, http://youtube-global.blogspot.com/2011/05/thanks-youtube-community-for-two-big.html (May 25, 2011).

simple. Often with nothing more than an additional cable or satellite line connected to a television set and readily available (and often free) streaming software, an infringer can capture television programming signals or Internet streams and re-transmit popular television shows and live sporting events over the Internet through unauthorized unicast websites, cyber lockers or peer-to-peer applications.

Unicast websites transmit streams through a central computer server directly to an end user's computer where software on the computer converts it for viewing.[15] Unauthorized unicast sites often collect paid subscriptions or are supported by advertising because the technology requires significant computer processing and bandwidth.[16] More recently, peer-to-peer technology has developed to allow users to create a video stream that can be passed on to other users who join the network, without having to maintain the significant bandwidth costs of a central server.[17] Cloud computing services (which allow all types of digital media to be stored, accessed and synced from any web-connected device, including computers, personal tablets and smart phones), cyber-lockers (a particular type of cloud-based service), user-generated content sites (which allow users to upload self-created digital content that is then made widely available) and life-casting sites (which allow users to upload and stream live videos of themselves and those around them) all have legitimate, lawful uses, but can also be used as a mechanism by which users can transmit public performances of copyrighted content without permission of the copyright owner.

The Copyright Office is not aware of any studies focusing solely on the overall impact of illegal streaming on the Internet ecosystem. However, it is clear that unauthorized streaming of copyrighted content is a significant problem that will only increase in severity if technology outpaces legal reforms. Two years ago, this committee held a comprehensive hearing on the subject of piracy of live sports broadcasting over the Internet. Various industry representatives testified to the very real harm arising from this method of copyright infringement. Witnesses noted among other things that tens of thousands of hours of live television programming from networks around the world were being pirated, and that "entire bouquets of pay-tv channels" were being made available through pirate streaming services in China.[18] An OECD 2009 study noted that on just one day in December 2007, nearly 1.2 million viewers were registered to view an unauthorized stream of a Dallas Mavericks versus Houston Rockets game.[19]

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[15] Organisation for Economic Co-operation and Development (OECD), *Piracy of Digital Content, Case Study: the Sports Owners Sector*, 90 (2009) ("*Piracy of Digital Content*").

[16] *Id.* at 90-91.

[17] *Id.* at 95.

[18] *Piracy of Live Sports Broadcasting Over the Internet: Hearing before the H. Comm. on the Judiciary*, 111th Cong. 8 (2009) (statement of Michael J. Mellis, Senior Vice President and General Counsel, MLB Advanced Media) (December 16, 2009) (*citing* Cable and Satellite Broadcasting Ass'n of Asia Comments, Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Feb. 17, 2009)).

[19] *Piracy of Digital Content* at 111 (the vast majority of these viewers were located in China).

Since that time the problem has not gone away. For the past four years, the United States Trade Representative has noted the growing impact of illegal streaming of live sporting events in the 2008-2011 Special 301 Reports.[20] During its 2009-2010 professional basketball season, the NBA identified 2,975 unauthorized streams on just eight websites/services, while in the current 2010-2011 NBA season, the NBA identified more than 2,700 unlawful streams of games on just one foreign website alone.[21] According to industry sources, monthly traffic to ten of the cyber lockers that provide unauthorized access to streamed content grew by 13 million separate users per month during 2010, to 105 million separate users per month.[22] And a recent NBC Universal-commissioned study found that one site that provided access to pirated movie streams had 6.5 million unique users each month, while another similar website had 5 million unique users each month.[23] Recent legal challenges involving claims of unauthorized streaming include a complaint by the Ultimate Fighting Championship (UFC) against life-casting website Justin.tv alleging that more than 50,000 viewers watched illegal streams of a live UFC bout, "UFC 121 Lesnar v. Velasquez" through the site, and that UFC vendors removed over 200 infringing feeds during just that live event.[24]

(3) Policy Considerations in 2011

Congress amended the law in 1997 and 2005 in order to protect and ensure the exclusive rights of reproduction and distribution. However, there are six exclusive rights afforded to authors under copyright law – and the right of public performance is of major and growing importance for television programming, motion pictures and other works that may be delivered to consumers through streaming technologies and products.

It's not that streaming hasn't been around for a little while. Indeed, RealPlayer, the pioneer in making streaming available on the Internet, first streamed an audio performance to the public over the Internet in 1995, and in 1997 it launched its video streaming technology. However, for years the bandwidth available to the public has not supported the high-quality video streaming that we have come to know today. Only in the past few years has the widespread proliferation of high-speed Internet connections and the advancement of new transmission protocols made online streaming a viable alternative to delivering video content on traditional television or on DVD copies. When the NET Act and ART Act were enacted, nobody

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[20] *See, e.g.*, Office of the United States Trade Representative, *Special 301 Report*, 11 (2011) ("Unauthorized retransmission of live sports telecasts over the Internet continues to be a growing problem for many trading partners, particularly in China, and 'linking sites' are exacerbating the problem."); Office of the United States Trade Representative, *Special 301 Report*, 11 (2010); Office of the United States Trade Representative, *Special 301 Report*, 5 (2009); Office of the United States Trade Representative, *Special 301 Report*, 10 (2008).

[21] Data provided by NBA Properties, Inc.

[22] ComScore (April 2011).

[23] Envisional Report at 20, 23 (2011) (recognizing the difficulty in fully measuring streaming content, the study provided a "cautious estimate" that infringing streaming is 5.34% of all streaming traffic).

[24] *Zuffa, L.L.C. v. Justin.tv, Inc.*, No. 11-CV-00114 at ¶ 46 (D. Nev. January 21, 2011).

perceived streaming as a vehicle for serving (or threatening) the commercial marketplace for public performances of copyrighted works. And no other technology existed that easily permitted the large-scale piracy of performances – versus reproductions or distributions – of copyrighted works.

In the context of criminal activity, depending on the specific contours of the alleged conduct, unauthorized streams may infringe upon multiple exclusive rights protected under the Copyright Act. First of all, the act of streaming a performance is an exercise of the public performance right, and unauthorized streaming infringes that right. The Copyright Act defines "to perform a work publicly" as, among other things, "to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[25] Streaming, which transmits a performance to members of the public, fits comfortably within this definition. And the unauthorized retransmission of a stream simultaneously over the Internet to a user's computer or other device infringes the public performance right, whether the stream is a retransmission of a live broadcast or a transmission of a performance of prerecorded material.

In the case of streaming of prerecorded material, the transmission is typically made from a copy of the audiovisual or other work that has been made on a server. The making of such server copies without authorization constitutes infringement of the reproduction right. And in some cases, streaming can also implicate the distribution right: some forms of streaming actually transmit a copy of the entire work to the recipient's device, where the copy will remain for some period of time and can be used for subsequent replays of the copyrighted work.

Although streaming can implicate various exclusive rights, our current law could potentially apply vastly different penalties to this conduct simply based on the unique technology involved and regardless of the ultimate result – the illegal and unauthorized dissemination of copyrighted works. The Copyright Office believes that this disparity deserves consideration as Congress considers whether to amend the criminal copyright statutes to address streaming that causes serious harm to the legitimate market for performances of works of authorship.

The Copyright Office is not opining on when it might or might not be appropriate for the Department of Justice to bring criminal felony charges for streaming under any particular set of circumstances. Rather, we are underscoring the fact that prosecutors have a handicap when pursuing egregious cases of infringement when that infringement is accomplished via streaming.

(4) Possible Legislative Action

The Copyright Office commends the Subcommittee for holding this hearing today. It is our view that the Department of Justice should always have the tools necessary to prosecute infringers when such infringement causes great harm to copyright owners and the global marketplace that is so important to the United States. In our analysis, the current criminal provisions of the Copyright Act and related provisions in Title 18 are insufficient to provide a

[25] 17 U.S.C. § 101 (definition of "to perform or display a work 'publicly'").

basis for such prosecutions in cases where the primary cause of action is infringement of the exclusive right of public performance.

As indicated earlier in my testimony, there are currently three bases for criminal prosecution for copyright infringement. All three require that the infringement be willful. The first basis – infringement for purposes of commercial advantage or private financial gain[26] – may in many cases justify prosecution of one who engages in infringement of the public performance right by means of streaming.

However, existing law provides a disincentive for prosecutors to take action under this provision because it is not possible to charge a felony for criminal infringement of the public performance right – only a misdemeanor. Section 2319(b)(1) of the criminal code permits felony prosecution under this prong only when the crime 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 (emphasis added)."

To be clear, there may well be instances in which the act of streaming implicates not only the public performance right but also the reproduction right, and perhaps in some cases also the distribution right, but the outcome will greatly depend on the facts and, possibly, future judicial interpretations of the statutory language. And while it is usually, and perhaps always, true that streaming requires a reproduction of the streamed work on a server,[27] it is not clear whether that kind of reproduction would qualify under section 2319(b)(1) or whether such reproductions in the form of server copies would have a retail value of more than $2,500. Given the circumstances under which section 2319(b)(1) was enacted, it seems much more plausible that Congress intended that the $2,500 threshold apply to the value of copies that are distributed.

The second basis for criminal prosecution – "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"[28] – requires reproduction or distribution, and does not apply to public performances. Again, it is conceivable

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[26] 17 U.S.C. § 506(a)(1)(A).

[27] Streaming may also entail the making of what are known as buffer copies. Streaming involves the transmission of small packets of information (which may be audio or audiovisual information, depending on the nature of the performance being streamed). The software used to play the streamed performance maintains a "buffer" – a portion of memory set aside to store that information until it has been rendered. Inconsistencies in the rate at which audio packets are delivered over the Internet are thus evened out, so that the software can render the information at a constant rate. As information is rendered, it is discarded and new information is put into the buffer as it is received. U.S. Copyright Office. *Section 104 Report* 108 (2001). Cumulatively, all of the buffer copies made in the course of streaming a performance of a work would constitute a copy of the entire work, although those buffer copies would not exist at the same time. Whether the buffer copy is a "copy" under the Copyright Act is a matter of some dispute, and may depend on the particular facts in any given case. In any event, it is difficult to imagine that the buffer copies made in the course of streaming would have a value that would meet the threshold for felony prosecution.

[28] 17 U.S.C. § 506(a)(1)(B).

that making a server copy for purposes of streaming might qualify for this provision, but such an interpretation is subject to the same uncertainties that apply to the application of section 2319(b)(1). Moreover, a violation of section 506(a)(1)(B) would be a felony only in cases where "the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of $2,500 or more."

Finally, the third basis for prosecution – "the distribution of a work being prepared for commercial distribution"[29] – requires distribution and therefore is not applicable to streaming.

One might ask why it is not sufficient to prosecute streaming as a misdemeanor. The fact is, as a practical matter, prosecutors have little incentive to file charges for a mere misdemeanor. This means that, compared to similar infringing conduct involving the large-scale making or distributing of copies (e.g. DVDs of a movie), streaming is not only a lesser crime on the books, it is a crime that may never be punished at all. As 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.

If Congress concludes that sections 506 and 2319 should be amended to enable prosecution of unauthorized streaming, there are a number of ways to accomplish that end. One means would be to amend section 506(a)(1)(B) to add "public performance" to the "reproduction or distribution" which currently provide a basis for prosecution, with a similar amendment to section 2319(b)(2). Another means would be to amend section 506(a)(1)(C), which currently penalizes prerelease distribution, by adding prerelease public performances to the acts that provide a basis for prosecution. Moreover, an amendment to section 2319(b)(1), adding "public performance" to the "reproduction or distribution" that provide a basis for felony prosecution for willful infringement for purposes of commercial advantage or private financial gain, would likely make it possible to prosecute many cases of unauthorized streaming.

Further thought would also have to be given to the current quantitative and monetary thresholds imposed by section 2319(b) for felony prosecution. 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.

Finally, the concept of works being prepared for commercial distribution may need to be reconsidered in cases involving infringement of the public performance right rather than the distribution right. Many works that copyright owners offer for public performance are not prepared for commercial distribution. For example, many television programs, including many broadcasts of sports events, are never distributed in copies to the public. Yet, it is logical, if not obvious, that the unauthorized streaming of a television program before its authorized broadcast would cause just as much harm to the market for that program as the unauthorized distribution of copies of a motion picture would cause to the market for legitimate copies of that motion picture. Moreover, it seems likely that even the unauthorized streaming of a broadcast program, such as a

[29] 17 U.S.C. § 506(a)(1)(C).

live broadcast of a sports event, at the same time as the authorized broadcast would cause great harm to the legitimate market for the works being broadcast. This would be especially likely in cases where authorized performances are transmitted to the public by cable networks or by means of pay-per-view and similar services. A person who offers unauthorized streaming of such programs for no cost or a lower cost at the same time as the authorized transmission – or even within a few hours of the authorized transmission – could cause significant harm to the legitimate market.

Conclusion

Copyright policy is never finished. As technology makes it possible for authors to deliver their creative works in new formats and through new platforms, nefarious actors devise new ways to play the spoiler, sometimes seeking to divert profits and amass wealth illegally, other times merely to bask in the glory of interfering with and doing great harm to the investments of others. Congress has repeatedly legislated to confine these bad actors and hold them accountable, including giving prosecutors the tools necessary to do their jobs. By updating the law, Congress ensures the constitutional bargain that promotes the progress of our culture by giving authors the exclusive rights to their works for limited times.

The issue of unauthorized streaming is a growing threat to the livelihood of authors and copyright owners and, as discussed above, requires the attention of Congress. As you further consider the issues, the Copyright Office will be pleased to assist you in your work.

# # #

Mr. GOODLATTE. Thank you.
Ms. Aistars, welcome.

TESTIMONY OF SANDRA AISTARS, EXECUTIVE DIRECTOR, COPYRIGHT ALLIANCE

Ms. AISTARS. Thank you. Chairman Goodlatte, Ranking Member Watt and Ranking Member Conyers and Members of the Subcommittee, it is an honor to appear before you today on behalf of

the Copyright Alliance to discuss illegal streaming and its impact on the creative community.

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, we have more than 7,000 individual, one-voice artist advocates who give their personal time and creativity to support our work.

To be specific, we support harmonizing the laws applicable to criminal streaming of copyrighted works with those applicable to criminal reproduction and distribution of copyrighted works. This is an issue of great importance to many of our members, including independent filmmakers, songwriters and composers, sports leagues and creators of live events, sound recording artists, and unions and guilds in the creative community.

In truth, 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.

On a grander scale, however, this issue is another phase in the battle between creators and lawful distributors of copyrighted works on the one hand and parasitic websites on the other. Operators of these websites expropriate the property of creators, diminish the compensation and benefits of creators and workers and harm communities across the United States by depriving them of jobs and of tax revenues.

The Copyright Alliance represents the copyright holder next door. Our members are living and working in all 50 States and include, among others, the independent filmmakers who self-finance films that tell as-yet-untold stories, the talented crafts people who are behind every television show and motion picture you enjoy, the tens of thousands of professional photographers and videographers across the country who run their own studios, employ a handful of workers, and contract with a dozen more, and there are people working in unexpected places on extraordinary projects, like a music producer living in Wrightsville, North Carolina, who is working from his home studio with musicians as far away as Glasgow and as recognized as Neil Young.

Copyright Alliance members unreservedly embrace the technologies that enable our works to be seen and heard by our audiences. Nevertheless we are daily faced with an ever-changing parade of unlawful website operators who stream our members' works, yet stand little risk of criminal prosecution under today's laws.

Just like the legitimate marketplace, which has embraced streaming technology, illegitimate distributors are increasingly turning to streaming because it is faster, cheaper, and more convenient for the consumer.

Enacting legislation to ensure that such sites can't avoid criminal prosecution based purely on their choice of technology is critical. Bringing penalties for illegal streaming online with other forms of infringement would send a message that operators of and large-scale contributors to rogue streaming sites are not immune from

serious prosecution. It would also provide the Justice Department the same tools to battle infringing streaming sites as they use to battle physical or download operations.

When considering issues of copyright infringement, the public often thinks about large copyright owners and distributors, but digital theft, regardless of the methods that are employed to accomplish it, affects all creators and it has an outsized impact on independent artists and creators.

The experience of Copyright Alliance member, Ellen Seidler, is representative of the experiences of other independent artists and is instructive. Ms. Seidler is the director and creator of the film "And Then Came Lola." She and her co-director financed the film by taking loans from their families, by putting liens on their homes, and by borrowing against their retirement savings. While the total budget for the movie would be considered small in terms of major Hollywood productions, the $250,000 of personal capital invested by Ms. Seidler and her colleague is a huge amount for an individual creator to put at risk for a single project. Ms. Seidler released the movie approximately 1 year ago and it was very popular. Within a few days, illegal copies began circulating online and within a couple of months, Ms. Seidler had counted 35,000 illegal streams and downloads, and she was overwhelmed and stopped counting.

The film could be viewed legally for less than the cost of a latte, and Ms. Seidler had spared no effort to ensure that it was available conveniently in multiple languages and formats. Yet, the film popped up on illegal streaming sites in the U.S. and throughout the world. She counted the film on one Chinese streaming site which claimed 300,000 views and on another site in Spain claiming more than 60,000 views. Often the sites that were streaming her works were monetizing her work by selling advertising against the streams, and ironically on one of the sites, Google's AdSense program was placing ads for legitimate streaming services including Netflix, a legitimate distributor of her film.

When she contacted the sites and the advertising networks that were placing ads on them, she got very dismissive responses. One website in Russia basically responded your laws don't apply here, and she is still involved in an unresolved exchange with Google about the use of AdSense by such sites.

Ms. Seidler describes the remedies available to her and to other independent artists as the equivalent of being handed an umbrella and being told to stand under Niagara Falls.

Despite the diligent efforts of creators to police against illegal streaming of their works, the problem is only growing, in part, because the risk to operators of such sites is so low. Law enforcement agencies don't readily take on such cases because with limited resources, misdemeanor crimes are just not a priority.

So we applaud the Subcommittee for its focus on harmonizing the penalties applicable to illegal streaming with those applicable to other forms of infringements, and we stand ready to assist you in your work.

[The prepared statement of Ms. Aistars follows:]

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE INTERNET

U.S. HOUSE OF REPRESENTATIVES

"Protecting Legitimate Commerce Online: The ART Act, the NET Act and Illegal Streaming"

Statement of Sandra Aistars, Executive Director, Copyright Alliance

Chairman Goodlatte, Ranking Member Watt and Members of the Subcommittee, it is an honor to appear before you today on behalf of the Copyright Alliance to discuss the important issue of illegal streaming and its impact on the creative community.

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, we have more than 7,000 individual "One Voi©e Artist Advocates" who give their personal time and creativity to support our work.

We applaud the Chairman and Subcommittee members for holding this hearing on the important topic of protecting legitimate online commerce from illegal streaming. This is an issue of great importance to many of our members, including independent filmmakers, videographers, and those individuals who work on their projects; sports leagues and creators of live events; motion picture studios; sound recording artists, songwriters and record labels, and unions and guilds of creators, film artists and workers in the creative community.

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.

The Copyright Alliance quite literally represents the copyright holder next door. Our members are living and working in all 50 states and include, among others,

- The independent filmmakers who borrow against their retirement income to finance films that capture unique voices, tell untold stories and contribute to our understanding of ideas and communities often not adequately reflected by mainstream media;

- The "below the line" workers – that army of talented craftspeople who are behind every television show and motion picture you enjoy – whose health insurance and retirement benefits are typically determined by credits earned on legitimate sales of works to which they have contributed;
- The tens of thousands of professional photographers and videographers across the country who run their own studios, employ a handful of workers, and contract with dozens more. These entrepreneurs make a middle class living, and contribute to the tax base of their local communities, but see their ability to continue to make a living eroded daily by digital thieves who steal their images, commercialize them and pass them off as their own.
- And they are people working in unexpected places on extraordinary projects, like a music producer living in Reidsville, North Carolina, who is working from his home studio with musicians as far away as Glasgow and as recognized as Neil Young.

Copyright Alliance members unreservedly embrace all of the new technologies that enable our works to be seen and heard through a wide range of methods, including –

- traditional broadcast methods like TV, cable, satellite and radio;
- online methods including both download and streaming services, as well as cloud storage and delivery models; and
- apps for mobile phones and tablet computers that allow consumers to obtain works directly from the author or legitimate distributor even in territories where major distributors like iTunes are not offering the work.

Nevertheless, we are daily faced with an ever-changing parade of unlawful website operators who stream and otherwise distribute our members' works, stand little risk of criminal prosecution under today's laws, and erode legal commerce.

Just like the legitimate marketplace, which has long embraced streaming technology, illegitimate distributors are increasingly turning to streaming to deliver works because it is faster, cheaper and more convenient. As a result, 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.

Enacting legislation to address felony streaming is an important battle in this war. Bringing penalties for illegal streaming in line with other forms of infringement would send a message to operators and large scale contributors to rogue streaming sites that they are not immune from serious prosecution. It would also provide the Justice Department the same tools to battle fraudulent streaming operations as it uses to battle infringing physical or download operations.

The proposal to harmonize penalties for illegal streaming operations with those applicable to other copyright infringements is supported not only by artists and creators like our members, but is consistent with the recommendations of all of the relevant Federal agencies, including the Departments of Commerce, Health and Human Services, Homeland Security (DHS), Justice (DOJ), and State, and the U.S. Trade Representative. In suggesting this change in March of this year, the Administration rightly noted that:

> 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.

We urge this Subcommittee to act to implement these recommendations.

The Impact of Illegal Streaming on Independent Artists and Creators

When considering issues of copyright infringement, the public often thinks in terms of its impact on the largest copyright owners and distributors. But digital theft – regardless of the means used to accomplish it – affects all creators and has an outsized impact on independent artists and creators. [1]

The experience of Copyright Alliance member independent filmmaker Ellen Seidler is representative of the experiences of other independent artists. As in many creative disciplines, young directors, actors and craftspeople often work on independent projects to develop their skill and gain entry to larger projects. These independent films represent the great diversity of the filmmaking community. Sadly, they are also the most at risk of vanishing if the directors and producers of such films cannot make a return on their investment, so Ms. Seidler's story is instructive.

Ms. Seidler is the director and creator of the critically acclaimed film "And Then Came Lola". She and her co-director financed the film by taking loans from their families, putting liens on their homes, and borrowing against their retirement savings. While the total budget for the movie would be considered small in terms of major Hollywood movies (where production costs can often run into the hundreds of millions of dollars), the $250,000 of personal capital invested by Ms. Seidler and her colleague is a huge amount for an individual creator to put at risk for a single project. Based on research and experience in the field, Ms. Seidler nevertheless reasonably anticipated breaking even on the project, and even hoped for a modest profit.

To understand the magnitude of the threat illegal streaming operations pose to independent filmmakers, it is important to understand that many independent films are typically shown at

[1] It is also worth noting that illegal streaming sites have a similarly profound impact (but for somewhat different reasons) on those who own or license the rights to live events such as concerts and sporting events. This is because much of the value of such programming is inherent in the live (or pay per view broadcast) nature of the event. With streaming of live events in particular, remedies available after the fact, such as notice and takedown, are ineffective in preventing or remedying the harm.

festivals, but often do not have any theatrical release. Instead they depend entirely on "back end distribution" through DVD sales and legitimate online and other channels to earn returns and recoup investment that they cannot secure through theatrical release.[2] Knowing this, Ms. Seidler ensured the film would have the most widespread distribution possible. She secured international distribution, and in addition to DVD sales, lined up distribution on Amazon, Netflix and iTunes. To ensure that the film would be available even in jurisdictions where the services she licensed did not distribute it, Ms. Seidler additionally created an app which was made available worldwide for free to give viewers access to behind-the-scenes video, extras, interviews and clips, and enable them to rent or purchase the movie inside the app.

Ms. Seidler released the movie approximately one year ago, and it was popular. Within days illegal copies began circulating on line. Within a couple of months Ms. Seidler had counted 35,000 illegal streams and downloads. At that point, overwhelmed, she stopped counting. Despite the fact that the film could be viewed legally for less than the cost of a latte, and Ms. Seidler had spared no effort to ensure that it was available conveniently in multiple formats and languages via a variety of delivery models (including streaming), the film popped up on illegal streaming and download sites not only in the U.S. but throughout Europe, Asia and the Arab world. It appeared in Arabic, Finnish, Korean, Mandarin, Russian, Turkish, and other languages (see Appendix 1a and 1b).

Ms. Seidler found the film on one Chinese streaming site which claimed 300,000 views, and on another site in Spain claiming more than 60,000 views (see Appendix 2). Often, the sites streaming and offering downloads of her film were monetizing her work by selling advertising against the streams. Ironically, on one of the sites, www.videocave.net Google's AdSense program was placing ads for legitimate streaming services including Netflix, a legitimate distributor of "And Then Came Lola" (see Appendix 3).

Ms. Seidler has documented her efforts to get her film removed from these illegal sites on her website www.popuppirates.com . When she contacted the operators of such sites and the advertising networks that were placing ads on them to seek help in stopping the illegal distribution of her film, she received many dismissive responses. They ranged from websites in Russia that responded "your laws don't apply here," to a still unresolved exchange with Google. In that instance, Google refused to remove an illegal site from its AdSense program despite having received extensive documentation from Ms. Seidler establishing that the site persists in illegally streaming her works and those of other copyright holders. She describes the remedies available to her and other independent artists as "the equivalent of being handed an umbrella and being told to stand under Niagara Falls."

Despite the diligent efforts of creators like Ms. Seidler to police against the illegal streaming of their works, the problem is only growing, in part because the risk to the operators of such sites is so low. Legitimate third parties do business with such sites and thus help perpetuate their existence, and law enforcement agencies are loathe to prosecute such sites for their criminal activities because of the lack of clarity about what remedies are available against them, and also

[2] But the effect of global piracy is similarly felt by even Oscar-nominated independent work that likewise depends on downmarket sales to recoup investment

because misdemeanor crimes are often not perceived as having a great enough return on time and resources invested.

Along with illegal streaming and download sites, illegal cyberlockers are now emerging as another threat. Indeed, some rogue operators are even recruiting the general public to help them steal works by offering cash incentives for every 1,000 streams or downloads a file generates (see Appendix 4). These illegitimate websites are creating the infrastructure to expand the digital theft problem exponentially, and they rely on the relatively low risk associated with operating an illegal streaming site to do so.

Many Legal Streaming Services are Available

There is no excuse for allowing illegal streaming services to flourish, when so many legal alternatives are available. All creative sectors of the economy have long ago moved online, and are at the forefront of delivering news, entertainment, and information to consumers in creative, cutting edge formats including by streaming, and cloud computing.

For example:

Most professional sports leagues offer subscription streaming services that give fans access to their favorite teams on their favorite devices.

- MLB.com offers a subscription streaming service that lets consumers watch every out-of-market game live from devices such as the Roku and PlayStation 3. Premium packages offer the ability to choose home or away team video broadcasts, DVR functionality, and split-screen viewing.

- NHL GameCenter is a subscription streaming service that lets fans watch up to 40 out-of-market games every week live online.

- The National Basketball Association's (NBA) "League Pass Broadband" lets fans follow seven teams, and a premium option lets viewers watch games from all 30 teams, amounting to more than 40 games a week during the season.

- Motion picture companies are daily releasing their works on virtually every digital device and format, including in apps and through Facebook. These efforts ensure that consumers around the world can receive their content legally, and with additional features and functionality, even in cases where the content may not be available in their jurisdiction via popular services such as iTunes.

- The recording industry likewise delivers legal content via innovative services, partnering with technology companies. For instance, Sony has recently launched a new subscription-based music service, Music Unlimited powered by Qriocity. The service will give subscribers access to more than 6 million songs through the cloud-based network used by more than 60 million PlayStation gamers. Music Unlimited subscribers can stream

millions of songs infinitely on Internet-connected devices like personal computers, as well as Sony's Playstation 3 game console, Blu-ray Disc player and Bravia televisions. Fans can also import their personal music collections and iTunes libraries into their Qriocity accounts to access all of their music in one place and receive personalized music recommendations.

Despite the Herculean efforts taken by individual entrepreneurs and corporate stake holders to bring high quality, professional work to audiences on line legally and in multiple formats, individual livelihoods and corporate investments alike are jeopardized by relentless battles with rogue streaming site operators. These individuals steal and redistribute the content, often profiting handsomely by monetizing the content through payment systems and subsidizing it by advertising.

Numerous studies released recently demonstrate the devastating impact of parasitic sites on legitimate commerce.

- According to the Organization for Economic Cooperation and Development, international trade in counterfeit and pirated physical goods was as high as $250 billion in 2007; but if the significant volume of online distribution of pirated goods via the Internet were included, the total could be "several hundred billion dollars more."
- According to research by Envisional, nearly 25 percent of Internet traffic consists of pirated copyrighted works. According to the study: 23.8 percent of global internet traffic is infringing; more than 17 percent of internet traffic in the U.S. is infringing; bitTorrents account for around half of the global and U.S. infringing traffic; and cyberlockers and infringing video streaming sites also contribute significantly. It is notable that this study confirms earlier research by Princeton Professor Edward Felten, who is often critical of the creative industries, and his student Sauhard Sahi that approximately 99 percent of content shared on a bitTorrent system they surveyed last year was infringing.
- Finally, building on the OECD's research, Frontier Economics issued a report predicting that by 2015, the annual global economic impact of piracy and counterfeiting will reach $1.7 trillion and put 2.5 million jobs at risk each year. According to Frontier's research the total global economic and social impact of counterfeiting and piracy is $775 billion every year.

At a time when communities and individuals across the country are struggling to recover from a lengthy recession, when not only individual but local, state and Federal budgets are stressed beyond measure, these data points demonstrate that the case for combating piracy in all its forms, and improving IP protection and enforcement could not be more clear.

We applaud the Subcommittee for its focus on harmonizing the penalties applicable to illegal streaming with those applicable to other forms of infringement, and stand ready to assist in the Subcommittee's consideration of this important topic.

Appendix 1 a.


Full movie streaming on Spanish blog (via blogspot.com)
Solo las Peliculas que te Gustan
BROOKLYN'S FINEST
And Then Came Lola - Estrenos / Drama
VOLVER AL INICIO
click
click
Toda la información en

Appendix 1 b.


Full movie streaming on
www.depeliculasub.webcindario.com (Spanish site)
DePeliculaSub
PLAY FOR FREE
THE ONLINE ACTION GAME
DEPELICULASUB.COM
Siempre soy buena al principio.
Soy buena en los comienzos.
$348
Los ahorros promedio anuales al cambiar tu seguro de auto a Allstate.
Allstate

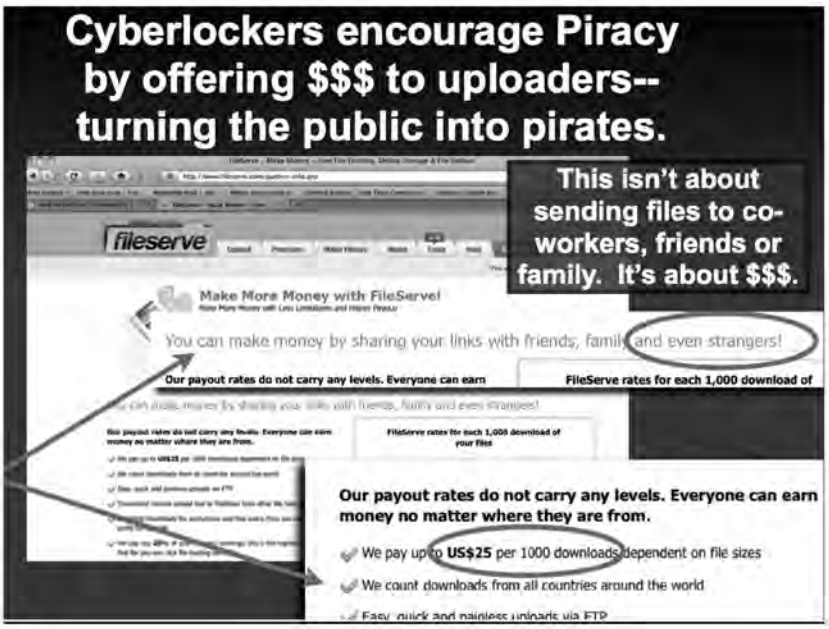
Appendix 2.


One page (out of dozens) of search results for Chinese streams for the full film
1 PAGE OF RESULTS FOR FULL MOVIE ON CHINESE WEBSITES
TOTAL VIEWS
CHINESE JOB
喜年华为你省油更省钱

Appendix 3.


Full movie streaming via videocave.net
VideoCave.net
Watch Movies From Netflix
VideoCave.net
Watch this
Click play and watch the film for free
And Then Came Lola (2009)

Appendix 4.



Mr. GOODLATTE. Thank you.
Mr. O'Leary, welcome.

TESTIMONY OF MICHAEL P. O'LEARY, EXECUTIVE VICE PRESIDENT, GOVERNMENT AFFAIRS, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. O'LEARY. Thank you. Mr. Chairman, Ranking Member Watt, Members of the Subcommittee, I appreciate the opportunity to testify today on behalf of the Motion Picture Association of America and our member companies regarding online streaming and the role that it plays in global theft.

The U.S. motion picture industry plays a unique role in today's American economic infrastructure. We provide high-paying jobs to workers in all 50 States. We fuel small business growth. We inject capital at the State and local level, and we are one of the few industries in the United States that has a consistently positive balance of trade around the globe.

High-speed broadband networks present tremendous opportunities for exchanging information and ideas. Unfortunately, as you have heard today, the laws and regulations put in place to protect consumers and innovation in the physical marketplace have not kept pace with the growth of illegal conduct online. As a result, a key foundation of American industry, the expectation that hard work and innovation is rewarded, is imperiled by thieves that steal America's creative products and enrich themselves along the way.

Currently the most pernicious forms of digital theft occur through the use of so-called rogue websites. These are increasingly sophisticated websites that look to the untrained eye to be legitimate. They use legitimate payment processors like Visa and MasterCard and PayPal, and they run legitimate advertising. Frequently they offer reward programs for frequent buyers who purchase their illegal wares. Streaming technology is rapidly becoming the most popular mechanism for transmitting stolen content on these rogue sites.

I want to be very clear at the outset, that the subject that we are here to talk about today is not a debate between technology and innovation and the creation of content. The issue before us today is about crafting a policy that favors legitimacy over theft, about promoting and preserving creativity and production and punishing people that seek to profit through stealing the hard work of others.

Streaming technology is an emerging way to deliver content and information to consumers the world over, and it is a technology being used and embraced by our industry. There are more than 35 legitimate business ventures such as Hulu, Crackle, Netflix, and HBO GO using streaming to deliver their products today.

In December of 2009, the full Judiciary Committee held a hearing on this very issue in the context of live sporting events. In the year and a half since that hearing, the problem has gotten worse. And it is a problem that doesn't just affect live sports events but all forms of audiovisual entertainment from live transmission of television programming to streaming of major motion pictures.

In preparation for today's hearing, I visited one of the websites that I was talking about. If you go to that website, you will see a number of interesting things. For example, there were a number of comments by users that are waiting in anticipation for an illegal copy of a movie that will be released this coming Friday. It is not

in the theaters until Friday, but they anticipate that they will be able to see an illegal copy in the next 24 to 48 hours.

It also had the top three box office films from last week available, Hangover II, Kung Fu Panda, and Pirates of the Caribbean. There is really something for everybody in that trio. And they were all available from multiple links to other sites where you could watch any of those movies.

What was particularly interesting was a "coming soon" page which detailed the movies that will be available in the coming days. It listed four blockbusters which will be released in the United States between June 10th and July 1st of this year. There are over 800 people who have put comments on the site saying that they can't wait to see those movies. Those are movies that won't even be out for 3 or 4 weeks and people are already queuing up to see an illegal copy.

A recent review of this very same site found that 33 percent of all traffic generated from the search query "free streaming movies" ended up on this site. This site and the people who run it are not engaged in innovation in any way, shape, or form. What they are engaged in is theft. And this is just one example of the types of criminal infringement we confront every day.

As you have heard through the other witnesses and through the Chairman's statement, the law in this area in the past has gone through different changes. We have typically focused on distribution and reproduction. There was the NET Act which was very important, and there was also the ART Act which was very important. But today, as copyrighted content is increasingly streamed online, uncertainty remains whether Internet streaming can be prosecuted as a felony. This results in a significant gap in the enforcement of this Nation's intellectual property laws which must be addressed legislatively.

This point was made clear earlier this year by the U.S. Intellectual Property Enforcement Coordinator when she recommended that the Congress clarify that infringement by streaming or by other means of similar technology is a felony or should be made a felony in appropriate circumstances. This is a real problem with real consequences for American creators and workers. And we applaud the Committee's decision to address this threat.

If we fail to address this problem now, in addition to leaving a sizeable gap in the U.S. law, we will promote additional theft of America's creative work by allowing emerging means of illegal distribution to persist without remedy.

We will permit an unjustified technology-specific disparity between the forms of infringement that have increasingly similar commercially destructive impacts.

Third, we will ensure that very few, if any, Federal prosecutions, even for the most blatant and notorious global intellectual property criminals, will go forward as Federal prosecutors and investigative agencies will be unlikely to devote limited resources to cases that will net, at most, a misdemeanor conviction.

Fourth, failure to act will harm America's long-held role as a world leader in protecting and promoting creativity by signaling to the rest of the world that our products are not protected in the online world in the same manner that they are in the physical world.

The failure of the United States to move against criminals engaged in streaming will undoubtedly result in less enforcement around the world, and that will be particularly true in cases where you have an American victim.

Fifth, the failure to move forward at this time will stifle innovation and creativity by allowing thieves that utilize streaming to continue to have an advantage in the online marketplace. We must set policies that favor legitimate business models over theft.

These are consequences which are all avoidable if we work to fashion a comprehensive and focused legislative response. We look forward to working with this Committee to achieve this critically important goal.

Again, I want to thank the Committee on behalf of the members that I represent for holding this hearing and for allowing us to testify today.

[The prepared statement of Mr. O'Leary follows:]

STATEMENT OF EXECUTIVE VICE PRESIDENT, GOVERNMENT AFFAIRS, MICHAEL P. O'LEARY ON BEHALF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

SUBMITTED TO THE HOUSE JUDICIARY COMMITTEE'S INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET SUBCOMMITTEE HEARING:

"PROMOTING INVESTMENT AND PROTECTING COMMERCE ONLINE: THE ART ACT, THE NET ACT AND ILLEGAL STREAMING"
RAYBURN HOUSE OFFICE BUILDING, ROOM 2141
WASHINGTON, D.C.
JUNE 1, 2011, 2:00 PM

A. Background and Introduction

I want to thank the Committee for holding this important hearing on protecting the legitimate online market and for addressing the increasing misuse of streaming technology to facilitate illicit online activity. I appreciate the opportunity to testify on behalf of the Motion Picture Association of America, Inc.[1] and its member companies regarding the role online streaming plays in the global theft and unauthorized dissemination of America's creative content, and the negative impact that theft has on the lives of our creative community.

[1] The Motion Picture Association of America and its international counterpart, the Motion Picture Association (MPA) ,serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA. MPAA members are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

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.

The U.S. motion picture and television industry plays a unique role in today's American economic infrastructure, providing high-paying jobs to workers in all 50 states; fueling small business growth; injecting capital into local, state, and national revenue pools and consistently generating a positive balance of trade. Of the over two million American workers who depend on the entertainment industry for their jobs, about 12 percent are directly employed in motion picture and television production and distribution—from behind-the-scenes production technicians to make-up artists and set-builders—across all 50 states. These jobs pay an average salary of nearly $76,000, 72 percent higher than the average salary nationwide.

In addition, more than 95,000 small businesses—93 percent of which employ fewer than 10 people—are involved in the production and distribution of movies and television. On-location filmed productions infuse, on average, $223,000 per day into a local economy. Nationwide, our industry generates more than $15 billion in public revenue. As one of the few industries that return a positive balance of trade, our industry is critical to the U.S. export economy.

Every day we are pursuing new and innovative ways to deliver content to our consumers. In the last three years we have launched numerous on-line distribution models to make content available legally to consumers when they want it, where they want it, wherever they are.

B. Websites Trafficking in Stolen Digital Content Create Consumer Confusion, Harm the Online Marketplace and Damage the Motion Picture and Television Industry

High-speed broadband networks present tremendous opportunities for exchanging information and ideas; unfortunately, the laws and regulations put in place to protect consumers and innovation in the physical marketplace have not kept pace with the growth of illegal conduct online. The illicit use of online networks can facilitate the anonymous theft and rapid, ubiquitous, illegal distribution of copyrighted works. The key foundation of American industry—the

expectation that hard work and innovation is rewarded—is imperiled when thieves, whether online or on the street, are allowed to steal America's creative products and enrich themselves along the way.

Rampant theft of American intellectual property puts at risk the livelihoods of the workers who invest time, energy and fortune to create the filmed entertainment enjoyed by millions. To these men, women, and their families, digital theft means declining incomes, lost jobs and reduced health and retirement benefits.

Currently, the most pernicious forms of digital theft occur through the use of so-called "rogue" websites. The sites, whose content is hosted and whose operators are located throughout the world, take many forms, including downloading and streaming, but all materially contribute to and facilitate the illegal distribution of copyrighted works, such as movies and television programming.

These websites weaken the film and TV industry by undercutting, eliminating or reducing the legitimate market for filmed entertainment, and thus the financial support for additional film and television production, which millions rely on for jobs and support for the U.S. economy as a whole. In addition, these often legitimate-looking 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. Furthermore, legitimate companies that want to invest in and develop new and innovative business models centered around high-quality online content and greater consumer choice have a limited potential for growth when they are forced to compete with entities that are distributing the exact same content through illicit means.

C. Streaming Technology Makes Content Theft Quick, Easy and Virtually Risk-Free

In addressing the subject of illegal streaming, it is important to note what this debate is not about. It is not a debate between technology and innovation and the creation of content. That is a false choice raised by too many people. This issue is really about favoring legitimacy over theft – about promoting and preserving creativity and production and punishing people that seek to profit through stealing the hard work of others. Technology and content should agree on that point.

Streaming technology is an emerging way to deliver content and information to consumers the world over, and it is a technology being embraced by our industry - more than 35[2] legitimate business ventures such as Hulu, Crackle, Netflix and HBO GO use streaming to deliver their products today.

The activity that is the subject of today's hearing is not innovation, it is theft. Streaming technology is rapidly becoming the most popular mechanism for transmitting stolen content on rogue sites. Users have instant access to illegally distributed movies and television shows without the risk or inconvenience of sometimes lengthy downloads.

In December of 2009, the full Judiciary Committee held a hearing on this very issue in the context of live sporting events. In the year and a half since that hearing, the problem has gotten worse, and it is a problem that affects not just sports, but all forms of audiovisual entertainment from live retransmission of television programming to streaming of major motion pictures. Illegal sites such as quicksilverscreen.im, solarmovie.com and 10starmovies.com link U.S. consumers to illegally streamed content. Streaming cyberlockers, like videobb.com, novamov.com and Loomboo.com, offer illegal storage and streaming of copyrighted content and encourage the uploading of this content as the primary means of driving monetizable traffic to their sites. This is not innovation, its theft.

While existing law makes an infringement of any of the copyright owner's exclusive rights a criminal act when done willfully and for commercial advantage or private financial gain, felony penalties only apply to defendants engaged in the illegal reproduction or distribution of copies of one or more copyrighted works meeting specified numerical and monetary value thresholds. Similarly, the NET Act ensured the availability of criminal penalties against willful acts of infringement engaged in without profit motive but on a commercial scale, but defined those acts in terms of acts of unlawful reproduction and distribution. And the ART Act provided for felony penalties against those engaged in the unlawful electronic distribution of pre-release works. As these have historically been the dominant means of commercial-scale infringement, it is perhaps not surprising that the criminal code focuses on these acts in defining felony conduct. As technology has advanced since enactment of these penalty provisions, however, so too have the means of willful and commercially destructive infringement. While copyrighted content is increasingly illegally streamed, not just downloaded online,

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[2] A list of legitimate sites for film and television can be found at http://www.mpaa.org/contentprotection/get-movies-tv-shows

uncertainty remains whether Internet streaming can be prosecuted as a felony based on the distribution of copyrighted works. This results in a significant gap in the enforcement of this nation's intellectual property laws that must be addressed.

D. Legislative Action and Administration Enforcement Is Necessary to Clarify Consequences of Online Theft via Streaming Technology

Legislation is necessary to make it clear that criminal streaming is eligible for felony treatment under U.S. law. In fact, earlier this year, the U.S. Intellectual Property Enforcement Coordinator recommended that Congress clarify that infringement by streaming, or by means of other similar technology, is a felony in appropriate circumstances. The report transmitted to Congress in March 2011, entitled "White Paper on Intellectual Property Enforcement Legislative Recommendations" stated the following:

> ***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.

The failure to address this problem legislatively, in addition to leaving a sizeable gap in the U. S. law, will:

1. Promote additional theft of America's creative works by allowing an emerging means of illegal distribution to persist without adequate remedies.

2. Permit an unjustified, technology specific, disparity between forms of infringement that have increasingly similar commercially-destructive impacts.

3. Result in very few, if any, federal prosecutions, even for the most blatant and notorious global intellectual property criminals, as federal prosecutors and investigative agents will be unlikely to devote scarce resources to cases that will net, at most, misdemeanor penalties.

4. Harm America's long-held role as a world leader in the protection and promotion of creativity by signaling the rest of the world that our products are not protected in the online world in the same manner as they are in the physical world. The failure of the United States to move against criminals engaged in streaming will undoubtedly result in less enforcement around the world – particularly in cases where the victim is an American creator.

5. Stifle innovation and creativity by allowing thieves that utilize streaming to continue to have an advantage in the online marketplace. We must favor legitimate business models over theft.

We look forward to working with this Committee to craft comprehensive and focused legislation that will help address this growing threat. Again, I thank the Committee on behalf of our member companies for the opportunity to testify today. We look forward to working with you, Chairman Goodlatte, Ranking Member Watt, and other Members of the Subcommittee to ensure adequate remedies are available to deal with and deter this criminal activity.

Mr. GOODLATTE. Thank you, Mr. O'Leary.

I will begin the questioning with a general one directed to all of you.

Do you agree with the principles and policies embodied in the NET Act and ART Act. And specifically, do you agree that a prosecutor should have discretion to pursue a felony indictment in a streaming case where the evidence shows a violator willfully com-

mitted large-scale infringement but there is no evidence of a commercial motive?

Ms. Pallante, we will start with you.

Ms. PALLANTE. Yes, thank you for the question.

I do. I think the NET Act and the ART Act were quite responsive to evidence of online infringement in 1997 and 2005, respectively. But today we know that streaming is a primary and growing market for copyright owners. And I will say as a person who has young teenagers in my house, not everybody thinks in terms of copies anymore. Streaming is a major way of receiving content and only likely to get bigger.

So as a pure policy issue, it is a question of parity. We have certain tools available to prosecutors for reproduction and distribution which once were the primary means of exploitation. We don't have the same tools available for the right of public performance.

Mr. GOODLATTE. Thank you.

Ms. Aistars?

Ms. AISTARS. Yes. Thank you, Mr. Chairman.

I agree with Ms. Pallante's comments and I would also add that I think that the ART Act and the NET Act were both motivated by very important policy considerations and that the Committee was very thoughtful in crafting a solution to those policy questions.

I know from our experience that there are definitely hard core uploaders, hard core opponents of copyright issues who sometimes work in organized release groups to upload content for purposes of notoriety or who otherwise aren't necessarily motivated by private commercial gain. And those sorts of uploads and distribution by streaming by these rogue websites are equally harmful to creators like Ms. Seidler and independent creators throughout this country who don't have the resources to go after those sites and don't have the ability to be taken seriously by those sites when they raise their concerns with them.

Mr. GOODLATTE. Indeed, those were the facts in the LaMacchia case that motivated the NET Act, which I introduced almost 15 years ago.

Mr. O'Leary?

Mr. O'LEARY. I would answer yes to both of your questions. The policy base that went into both the decision to pass the NET Act and the ART Act were sound at the time, and they are still sound today.

Mr. GOODLATTE. Let me direct another question to all three of you.

Are you satisfied that the pre-release provision in current law clearly addresses unauthorized streaming of live performances such as live pay-per-view sporting events? If not, how would that provision need to be amended in order to encompass infringement occurring simultaneously with the live performance, and do you think it should be clear that these types of performances should be covered?

We will start with you.

Mr. O'LEARY. Mr. Chairman, I think that it should be made clear that those types of performances should be covered. I think that the ART Act is very effective at protecting products which will have a subsequent distribution to the public like a motion picture, but

when you are dealing with live sporting events and also with television programming, it has proven to be perhaps less effective.

And so I would encourage this Committee in your deliberations to look very closely at both of those factors and see if there are not amendments necessary to fulfill the full intent of the ART Act and cover those types of activities. Your hearing in 2009 focused on the harm caused to live sports. It is also a problem caused for people that create television, and we would welcome the Committee looking at that issue.

Mr. GOODLATTE. Thank you.

Ms. Aistars?

Ms. AISTARS. I don't have much to add to Mr. O'Leary's response other than to note the probably obvious to the Committee point that with respect to a sporting event or other live events—it is very hard to have a pre-release of that sort of an activity since you have got to wait for the event to begin in order to stream it.

Mr. GOODLATTE. Quite right.

Ms. Pallante?

Ms. PALLANTE. Yes, I completely agree. The current law is focused on distribution of copies as the intended marketplace, and as we know, that is not always the case for some kinds of works.

Mr. GOODLATTE. Further to you, what exclusive rights under copyright are implicated by the streaming of copyrighted works? What protected rights are infringed by illegal streaming?

Ms. PALLANTE. Thank you for the question.

Potentially three exclusive rights could be infringed but in different ways and potentially with different outcomes under the law.

Starting with perhaps the major right for most streaming, we are almost always going to have the exclusive right of public performance at issue. Beyond that, it is also possible that the right of reproduction could be implicated. For example, there could be a copy on the sender's server. There could be a buffer copy implicated. And it is possible also, though not likely, with the distribution right that perhaps a file is being sent through the stream that resides on the receiving person's computer.

The issue, though, is does Congress want prosecutors to be able to address these kinds of issues, illegal streaming, through the back door or the front door. In other words, even if prosecutors could cobble together a case focused on the reproduction and distribution right, which personally I think is very difficult, is that really the right policy outcome?

Mr. GOODLATTE. Thank you.

And one last question. Mr. O'Leary, you noted in your testimony that illegal streaming is a problem that affects not just sports but all forms of audiovisual entertainment from live retransmission of television programming to streaming of major motion pictures. What industries in particular are impacted by illegal streaming and have these industries taken any action on their own to address the issue such as civil litigation or non-litigation enforcement such as notice and takedown?

Mr. O'LEARY. Absolutely, Mr. Chairman. The industry that I represent, the American motion picture and television production industry—we frequently avail ourselves of civil remedies. In fact, we

are frequently criticized for doing that. But we believe that it is an important part of the IP enforcement regime.

It is important to state up front that what we are talking about today is the criminal enforcement. Criminal enforcement is a very small piece of a much larger IP enforcement regime, and we take our responsibility under the civil part of that very seriously. We have moved against a number of sites that are engaged in this type of activity in different types of civil settings, and we would be happy to provide the Committee with further specifics on that following the hearing.

I think that, as I mentioned in my previous answer, this implicates not just motion pictures. It implicates sports. It implicates television. Television has a significant problem, frankly, with this type of thing. You can have a situation where you could be sitting in your home in Virginia watching a show and it could be streaming to someone on the West Coast before it is even aired on the West Coast, and that has a significant impact.

And so I think also another factor to look at is it is not just the major studios that I represent. This has a significant impact on independents and smaller creators as well, a number of whom Sandra identified in her opening remarks. So there really is no part of the creative community that is immune from the harm of streaming.

Mr. GOODLATTE. Thank you.

I now recognize the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I think I started to develop a reputation on this Committee as one who tries to get diverse views, and we had trouble getting diverse views on this issue, as the panel seems to be all in one location, one position. Even when I disagree with the folks who are on one side or the other, I think the purpose of these hearings is to educate ourselves and understand. But all of you seem to be saying the same thing.

Is there somebody out there who is not a crook who would be saying something different I have asked myself, and I haven't come up with an answer, although there seems to be some mounting objection to a Senate bill that prohibits streaming as a public performance by electronic means. I am advised—this is secondhand, so I apologize to the cable people if I am misrepresenting their position. But they seem to be arguing that public performance by electronic means is too broad a language.

Mr. O'Leary, can you give me your perspective on that? They seem to be saying that it would allow criminal prosecutions of executive managers of companies which are in commercial licensing disputes with programmers. Does that have any credibility? Or am I misunderstanding what they are saying?

Mr. O'LEARY. Mr. Watt, I don't want to characterize what they are saying. From my perspective, you are not misunderstanding what they are saying. From the perspective that I look at this, I do not believe that that is a legitimate concern for a number of reasons.

First of all, if you look at the current situation in the law, there are any number of commercial disputes between producers and distributors of content. And those inevitably always take the form of

some type of civil dispute. There are disagreements over what the contract says, what the license says, those types of arrangements. Under the current law, for reproduction and distribution, to my knowledge there has not been one cable company executive prosecuted as a result of anything that was going on in regard to those disputes.

Looking at the streaming issue, this is, as you have heard from the other witnesses, just the logical extension of the existing law.

Mr. WATT. Well, I can't say that I disagree with you. I just wanted to make sure I understood. And had I known prior to scheduling all the witnesses, I would have invited whoever has a different position to come and state that position. I am just trying to understand it.

The more important question, it seems to me, is how we get to foreign culprits. Can I have each one of you give me your thoughts on how we do that? Because a lot of this stuff that is going on offshore or by websites or through electronic means that are offshore are very, very difficult to get to.

Mr. O'LEARY. Mr. Chairman, I think you raise a very important point. This is a global problem and we need to deal with it in a global way. I think there is a number of things that we can do.

One, this country has historically been a leader in strong enforcement of intellectual property rights. Setting the right precedent here, making it clear to the rest of the world that in the United States we take this seriously and we protect creative works will allow the Administration, any Administration, to go around the world and to spread that message and to get other nations to put similar laws in place.

I also think—and this is based on my experience at the Justice Department—having these laws in place is an enforcement tool that allows our Justice Department to work with their contemporaries in other countries. When I was at the Justice Department, we did one case that involved police activity in 12 nations dealing with an organization which was global——

Mr. WATT. But is there any way we can do this statutorily here? Anybody have any suggestions on that? We are having that problem in a number of different contexts it seems. Is there anything we can do domestically to really get at this?

Mr. O'LEARY. As a practical matter, Mr. Chairman, if you don't have the law in place here, there is virtually no chance that a foreign law enforcement agency will even have a discussion with you. So that would be the first step I would think.

Mr. WATT. Any other ideas from either of the other two witnesses?

Ms. PALLANTE. Well, I would just say as a kind of global issue that the rogue websites discussions that this Committee has already had this session and this streaming issue are related and to some degree overlap, but they are both important. So for streaming, even if the streaming is happening abroad, keep in mind that it is often U.S. programming that we are talking about.

I don't want to prejudge the issue of unintended consequences and whether there should be carve-outs, for example. But my impression is that they are not necessary because, again, we are in the criminal code and we have two safeguards. We have the re-

quirement that the behavior be willful and we have the discretion given to the Department of Justice.

Mr. WATT. I am out of time, but I want to clarify. I am just advised that NCTA was invited to be a part of this hearing and they declined our invitation. I would just say to them publicly if they want me to understand what they are saying, they better come and talk to me because I don't think it has much credibility right about now with me. Maybe I just don't understand it. So I am sending that shot over the bow and publicly right now.

I yield back, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

And to clarify further, I share the gentleman's interest in hearing other perspectives on this. A number of other major companies, cable, satellite, and so on were invited and all declined.

We have a vote on with just 3 minutes remaining, and the Committee will stand in recess until the completion of the votes. We will resume as soon as the votes are over.

[Recess.]

Mr. GOODLATTE. The Committee will reconvene.

And the Chair recognizes the Vice-Chairman of the Subcommittee, the gentleman from Arizona, Mr. Quayle.

Mr. QUAYLE. Thank you, Mr. Chairman, and thank you for holding this hearing.

Ms. Aistars, we have had a couple of hearings on this matter, and a lot of times we were dealing with the large economic implications that affect a lot of U.S. companies. And they are huge and they are broad that happen because of these parasitic websites. But the one thing that you brought up and I wanted to kind of go into a little further is if we don't do anything right now in terms of increasing the penalties, what happens in the future to the creativity that occurs in this process? Because like you said, it is not just the large companies, the large motion picture studios, it is also the individual creators that are getting hit by this because it seems like it will be creating a disincentive for them to actually create things because they won't be properly rewarded for their efforts.

Ms. AISTARS. Thank you for the question, Mr. Quayle.

I think you have outlined it exactly correctly. You can look at the independent artists and creators as the canary in the coal mine for the rest of the creative community. They are the ones that are going to be hit first by any infringement. They are the ones that have the lowest level of resources to combat infringement by these sites.

I know in my past experience I have worked with large teams at big corporate entities that pursue online infringements of copyrighted works, and the resources that those entities devote are astounding in terms of pursuing notice and takedown processes, cease and desist letters, negotiations with sites, and so forth.

If you are an independent artist or creator, you don't have those resources at your disposal. You don't usually have the money to hire a lawyer to help you through the process. And more importantly, these people make their living by actually creating. So if you are spending your whole day on the phone and on the computer trying to knock down these illegal streaming sites, then you

are not doing what you are trained to do. So you are exactly right. It will impact creativity in the United States.

I would also note, for instance, Ms. Seidler's example is a very good one, and it is instructive about the impacts of illegal piracy, streaming by rogue websites on the creative community as a whole. Oftentimes that is where independent artists and creators get their start in these small, independent projects. They cut their teeth on this work and they move on to bigger projects and have more resources to devote to them. So if you cut them off at the very beginning stages of their career, you are also depriving our community across the country of those voices. They just won't be heard.

Mr. QUAYLE. Thank you.

Mr. O'Leary, a lot of the young people right now have come up in an age where they can get pirated music, pirated movies at their fingertips. They don't really realize that there is a place where you are supposed to be paying for them.

Now, if you are going to have felony penalties put on this, how does that actually help dissuade those young people? And actually on the demand side, will it have the effect necessary to actually be able to make a dent in the piracy that is going on right now?

Mr. O'LEARY. It is a good question, Mr. Quayle. I think that we don't look at felony penalties as a silver bullet. They are part of a larger effort to deal with this problem.

You are exactly right when you talk about the problem of young people wanting things now, wanting them for free. I have two young boys. They have grown up in that environment. And as a parent, obviously, you do the best you can and you tell them not to steal. But there are a lot more temptations perhaps than there were when I was a kid.

But what this deals with is kind of a different part of the same issue, and that has to do with people that are putting massive amounts of illegal content into the environment which people can then ultimately see. So you would take different approaches in regard to both of the groups that are in your question.

Obviously, dealing with the criminal element, there is probably no amount of education in the world that is going to stop a rogue website operator from being one. He is in it for the profit and trying to do the different things that he is trying to do to make money off of other people's hard work.

With young people, I think you are starting to see a recognition that there—a part of our responsibility and it is something we take very seriously is educating kids at a younger age and teaching the difference between right from wrong and showing them that there are legitimate alternatives out there. In my testimony, I mentioned that there are at least 35 legitimate sites in our industry alone that are now using streaming. We have a responsibility to get that message out there so that kids have someplace else to go and that they can actually get things in a legitimate fashion.

So these are all part of a large puzzle that we are trying to deal with. The felony piece that we are talking about today is very important, but so is the educational piece that your question references.

Mr. QUAYLE. This isn't about streaming, but do you see any other technological advances that we should be addressing with this com-

ing up on the horizon? We are dealing with streaming now and technology advances very quickly, but do you see any other mode of transmission that we should be taking notice of?

Mr. O'LEARY. Well, I would suspect that right now somewhere in the city there is probably a 14- or 15-year-old who has already got the next iteration in his head and it is bouncing around and probably 6 or 7 years from now he will be a multi-millionaire because he is able to bring that to fruition.

But I think that your question evidences an important part of this debate which is that if we do deal with this problem, it is important to maintain kind of the tech-neutrality approach that the copyright code has because if you don't do that, then in 5 or 6 years, when there is the next version of streaming, we will be right back in this room trying to deal with that, and 5 years after that, the next iteration. So I suspect that there are smarter people out there than me who can tell you what the next version will be. I think from a policy perspective, we need to put down kind of a broad imprint that allows us to deal with whatever that is.

Again, we are not against technology. We support technology. This is not a debate between us and the technology industry. This is a debate between the creators and the people who are stealing from the creators.

Mr. QUAYLE. Thank you.

Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from California, Mr. Berman, for 5 minutes.

Mr. BERMAN. Since I came late, if it is all right, I would yield to my—without waiving my——

Mr. GOODLATTE. We will come back to you.

Ms. Chu, are you also going to defer down to Ms. Lofgren? She was here before you, but I was instructed to go by seniority on your side of the aisle. It is your choice.

We are going to recognize the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. I just want to make it clear I would be happy to go in seniority order, but I appreciate being recognized.

Professor Seidler has been mentioned. I had a chance to meet with her for an extended period of time in my district office which was very helpful. And what happened to her was completely wrong. It is just not right what happened to her. There is no question about it.

In our extensive conversations, it is clear to me, given what happened to her, if this had been the law, it wouldn't have kept that from happening to her. And really, we got into a big discussion about the need to follow the money really. That is the answer. You follow the money. You are not going to prevent all crime through criminal law statutes. I mean, we know that from everything else. But if you follow the money, that is our best chance I think to get ahead of this whole situation.

I have a couple of questions, and I am going to direct them all to the Register because she is the neutral party. And that is not negative about the other witnesses. They are advocates. They have

every right to be advocates. But the Register is the neutral party here.

I wanted to explore potential for collateral damage on innovation. It has been suggested—and I agree—that we do not want to deter creators. We also do not want to deter innovators. And so here is the question about how the statute could play out. I am going to go where the Ranking Member did not. There are two cases that I know of—there may be others—where there is an argument about whether something is infringing or not.

In one case, Viacom sued Time Warner Cable over its iPad app. Now, Time Warner Cable thinks that this just allows their own cable customers to watch their cable content on the iPad. Viacom says no. And they are in court, and that will be settled in court hopefully, whatever the proper way is. I don't have a side in that litigation.

The other has to do with the MPAA has sued a company called Zediva. Zediva has come up with a novel way to stream movies, and it is based on the ability to rent an individual DVD. And what they have done, apparently from the press reports is they have bought physical DVD's and they have a whole bunch of machines, and they are streaming them. And they think that that fits within the copyright law. MPAA disagrees. And again, that is in court. It will be settled there.

Here is the question. The companies that are engaging in these activities are certainly doing it willfully. They know what they are doing, but they don't believe that they are infringing. I don't want to just trust the prosecutors. I want to make sure that we have some protections in here so that people who believe in good faith that they are pursuing a lawful business model don't get caught up in the criminal justice system when really it is a civil dispute. It needs to be settled civilly.

I also have concerns about liability for people who are not directly infringing, and let me give you an example. YouTube has lots of stuff, and I think they do—it has been acknowledged by other witnesses on other panels. They are making an aggressive effort to try and get infringing content off of their site. However, they get lots of notice and takedown notices, and they comply readily. The volume of notice and takedown really is an indicator of knowledge, and the question is with that level of knowledge, could they be prosecuted because they did not successfully remove all content.

And the reason why I am asking this question is that John Morton, the Director of ICE, in a letter to me said they completely disregard the DMCA in the prosecution of crime. And the fact that a technology company has made every effort to stem infringement is meaningless to them, they are going to prosecute them anyhow. And so the question is on innovation, if you know that somebody might be using your site—say you are Facebook or Twitter or Google or YouTube—that there could be infringing sites despite your best efforts, you are going to be afraid to innovate. You are going to be afraid to have that new technology.

So do we need a safe harbor here as we did in DMCA? Do we need to closely define—because you can't just say we will trust the prosecutors, they would never do a bad thing because the chilling aspect is the possibility of criminal obligation. And it is not just

that the individuals who are largely like 23 years old might be deterred but they will never get venture capital to actually build the business. And so you could end up destroying tech innovation even though I am absolutely sure that is not the motivation of any party here.

Could you address those issues?

Ms. PALLANTE. Yes, thank you, Congresswoman Lofgren.

Those are very important questions, particularly the issue of unintended consequences, and that is why we are having this discussion.

But let me maybe step back and at the risk of sounding like a copyright lawyer start again with what we are looking at as a matter of statutory law. So nobody is suggesting that the Department of Justice should, even if they were inclined to and had the resources, start going after actors who, as part of their business model, inadvertently may implicate the right of public performance and, for that matter, already may implicate the rights of reproduction and distribution.

There are two threshold prongs. One is willfulness and that is not defined in the Copyright Act, but I can read to you for some peace of mind from Nimmer on Copyrights. It is in my view a pretty high standard. So willfulness in terms of copyright infringement is voluntary, intentional violation of a known legal duty, not accidental, not inadvertent.

Ms. LOFGREN. Could I interrupt? If I may indulge the Chairman, on the duty part, if you could address that issue because this is a new frontier in some of these areas. And I think it is still an unknown issue. ICE and the DOJ—well, ICE went after—I don't know that the prosecution has occurred—search engines. Nobody ever thought search engines had any liability, and yet there was a law enforcement action. So what is the duty there? Because we had a whole different scheme that we put in place in the DMCA when we acted in the 1990's.

And I am sorry for interrupting, but if you could address that as well, it would be very helpful.

Ms. PALLANTE. Certainly. And yes, the standard for civil infringement is very different from the standard for criminal prosecution.

But in addition to willfulness and understanding that there is a clear duty, say, in this instance to obtain permission before streaming because it implicates the copyright interest that is the public performance right—under current law. Let me do it in reverse.

Under current law, even if you are implicating the public performance right and you are doing it for commercial advantage and with a profit motive, at most that is a misdemeanor, and that is at odds with the law for the same activity with respect to reproduction and distribution. So I really do see it as a parity issue. I see it as an extension of the work begun with the NET Act in 1997 and the ART Act in 2005, and it is timely now because streaming is——

Ms. LOFGREN. I understand that. And I actually supported those measures as you may or may not recall.

But what is new here is prosecution for activity that no one ever thought was a violation of law.

Mr. GOODLATTE. The time of the gentlewoman has expired.

The Chair recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Ms. Aistars, you refer in your testimony to an outsized impact on independent artists and creators. Elaborate on that, if you will, in a little bit more detail.

Ms. AISTARS. Sure. As I was referring to in my testimony, Ms. Seidler is a very good example of what independent artists across the country face when dealing with these companies and websites that stream their works. It is an outsized impact on these independent creators because of the lack of resources they have to pursue these bad actors civilly and because of the lack of attention that these types of websites are willing to afford them as independent creators.

It is also an outsized impact on creativity in this country generally because these independent projects are where creators kind of get their start and hone their skills and their craft.

These are also the projects that are difficult to fund. They are self-funded. They are independent voices that probably wouldn't be heard in a big studio environment perhaps. So if those voices disappear from our culture and our communities, we will all be the poorer for it.

Mr. COBLE. Thank you.

Mr. O'Leary, piracy has a chilling effect on innovation. Can you predict any consequences that we should expect if illegal streaming continues unabated?

Mr. O'LEARY. Thank you, Mr. Coble.

I think certainly one of the consequences if it continues unabated is that you will see a dramatic—the shift is already happening. People engaged in content theft are shifting to streaming, and that will become probably the primary and the most often used means for engaging in this type of piracy not just in the United States but on a global basis.

I think that the amount of resources that are put into trying to deal with content theft right now, certainly for the studios that I represent, is an enormous number, and that is money that is not going into production. That is money that is not going into innovation. One of the things that we like to talk to people about—you are talking about the impact of content theft. It doesn't impact the names you see on the marquis when you walk into the theater, but if you sit through the movie and you watch the credits at the end, that long list of people that you have never heard of that go by, they are the ones who feel the pinch because there is less production. There is less opportunity to work. A lot of those people work project to project. They may string together six or eight projects a year. If a studio has to cut back because they are not having a chance to recoup their investment, those are the people who are going to feel it the most acutely. So that is going to be the impact overall.

Mr. COBLE. I thank you, sir.

Finally, Ms. Pallante, what exclusive rights under copyright are implicated by the streaming of copyrighted works, and what protected rights are infringed by illegal streaming?

Ms. PALLANTE. Thank you, Mr. Coble.

Three exclusive rights. In the context of streaming, we are talking about one that is of growing importance for certain kinds of works, and that is the public performance right. That is very important to works, for example, like the movies that Ms. Aistars is describing and Mr. O'Leary, as well as music, as well as television programming, and live sporting events. They are streamed. That implicates the public performance right.

It is also possible that the reproduction right is implicated and it is conceivable that the distribution right could be implicated, but probably not in the ways that Congress intended. So, for example, current law talks a lot about the reproduction and distribution of copies of works because that is the way that copyright owners primarily exploited their copyright interest in the past. Today when we talk about illegal streaming, we are talking about buffer copies. We are talking about copies left on servers, not the copies that are out in the marketplace doing damage. The damage isn't coming from the copies. The damage is coming from the streaming.

Mr. COBLE. I thank you.

I yield back, Mr. Chairman.

Mr. GOODLATTE. Thank you, Mr. Chairman.

The Chair will again turn to the gentleman from California, Mr. Berman, and ask if he would like to be recognized for 5 minutes.

Mr. BERMAN. On behalf of the Ranking Member's desire, I will.

Ms. Lofgren and I have had discussions around these issues for many, many years, and I throw out a different scenario. We want to incentivize creators but not necessarily creators of pornography or materials on how to make nuclear weapons. We want to incentivize innovators, but not necessarily all—I mean, our whole export control laws and a lot of other regulations we have are to discourage and disincentivize certain kinds of innovators. So I am not so sure the sweeping generalization will necessarily decide the issue.

On this issue of civil liability under DMCA versus criminal liability, it seems to me—well, first of all, the fact that there is a safe harbor in DMCA done at a certain time, given a certain technology, may not mean that is the exact, correct safe harbor 10 or 20 years later based on the advances in technology. I just throw that out. This issue isn't coming up in this hearing.

But secondly, hypothetically what if someone was marketing a process by which people would put—encouraging people to put infringing material on their site, saying then, oh, and we will comply with the notice and takedown, but they had a willful intent to disseminate copyright protected material. Why under criminal law couldn't that under the right circumstances meet the test of a criminal violation without—why should Customs automatically assume that any conduct should—if you comply with notice and takedown, you have a safe harbor from any of your conduct, even if it has nothing to do with getting a notice and taking it down. I throw that out perhaps to the Copyright Office.

And then just to pursue a line of questioning that I think Mr. Watt got into.

Streaming, by the way, is not exempt from copyright law as Ms. Pallante said. Its offense is a misdemeanor offense.

As we try to make consistent the application of law over different technologies, whether they are viewed as a reproduction, a distribution, or a public performance, what would the person who was against that say here to say there should be a difference between streaming as a public performance—and even that, of course, is a matter under some discussion—versus a reproduction and distribution? The witness who isn't on the panel—what would they give as their most compelling argument?

And is there something—as we draft legislation, if we decide to try and get a consistent approach, are there things we need to be careful of in drafting the legislation?

Ms. PALLANTE. Thank you, Mr. Berman. I will start.

I suppose that a person not on this panel might say there is a reason that the public performance right has been treated differently since 1897 under criminal law. That is because the greatest harm to copyright owners occurs through reproduction and distribution. And I think our answer is the time has come for Congress to be reasonably out in front of this issue, and I say that knowing that the content owners next to me do not believe that we are in front of this issue, but I think relatively speaking, it shouldn't be the case that we wait until the illegal streaming activity has so terribly proliferated that we can hardly make a dent.

They might also say that there haven't been any prosecutions for illegal streaming. There haven't been any attempts that at least we know about. Again, I think that is not a symptom that it isn't an issue so much as it is not easy to get the attention of the Department of Justice to go after illegal streaming and to expend resources when the most that they can do is bring misdemeanor charges.

Ms. AISTARS. Congressman Berman, in answer to the beginning part of your question where you raised the possibility of a site actually going out there and incentivizing people to contribute copyrighted materials to an illegal rogue site, I would just like to comment that those sites actually do exist today. I put an example of one of them in my testimony which was streaming Ms. Seidler's work, as well as the work of many, many other copyright owners. This is only one of numerous such sites. But this particular site was offering cash rewards for people who were uploading the most popular files. So if you got 1,000 streams of a particular file that you had uploaded, you would get a cash incentive from that company. So it shows that you are, in fact, correct, that these sorts of risks do exist today and that there are companies out there that are incentivizing people to aid in their piracy.

Mr. O'LEARY. Mr. Berman, I think that your hypothetical that you posited at the beginning of your question highlights the significant drawbacks to creating exceptions to the criminal law. I think as was alluded to earlier in the hearing, there are a number of safeguards in place that will protect legitimate businesses that are in legitimate business disputes from prosecution. The willfulness standard has been mentioned. There are a number of activities that lawful businesses engage in.

And I think having sat in those conversations where you are making charging decisions, I can also tell you that Federal prosecu-

tors do not make decisions rashly and they do not make decisions without looking at all the evidence.

One of the things which I think is important to note is if you look at the website of the Computer Crime and Intellectual Property Section, there is a victim referral sheet that they would ideally like everyone coming forward with a criminal claim to fill out. Among the list of questions on that sheet are is this part of a civil dispute or do you anticipate this becoming a civil dispute. The reality of it is, most prosecutors—if you answer yes to either of those questions, it is a big red flag and you are not going to get embroiled in something like that.

The hypothetical you were talking about would be that instance where someone maybe is engaging in some type of sham or something. They are actually engaged in a criminal act but they are trying to avail themselves of kind of the patina of legitimacy that a legitimate company would have in order to avoid prosecution. The way the criminal law in this country works is the prosecutors are vested—Congress writes the laws, obviously, and then prosecutors have the discretion to enforce those. The scenario that you are talking about where someone has set up kind of a fraudulent scenario to pretend they are a legitimate company—there is no policy reason that should not be prosecuted if the evidence is there. And that means meeting the elements of the crime: willfulness, commercial or private financial gain, and commercial scale impact, those types of things. So to answer that question, you have highlighted the very problem when we start to carve people out of the criminal law.

I also think to highlight the point that Ms. Pallante made, as a practical matter, having been in these discussions, investigative agencies and prosecutors are just not going to spend resources on cases that are going to yield at best a misdemeanor. It just doesn't get the attention. There is a ton of pressure on law enforcement and they are not going to have the time or the resources to do it. It is not a criticism of them. It is kind of a fact of the world we live in particularly in the last decade. They are given more and more things to do every year and it just doesn't fit with the current approach to things.

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes. The gentleman has no questions.

The gentlewoman from California, Ms. Chu, is recognized for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

Ms. Aistars and Mr. O'Leary, you both talked about cyberlockers and the fact that it is one of the new places for hosting and disseminating illegal content. And there are companies like SideReel that claim that they are nothing more than a specialized search engine. They claim that they only link to content that they think users would find relevant, including legitimate sources like Amazon.com, iTunes, and Hulu. Any illegal content on their sites is hosted by other sources. More commonly they link to cyberlockers such as Megavideo which actually hosts the streaming video files, some legal and some not. SideReel claimed that they immediately remove links whenever they receive notice that it is directing people to infringing content.

So based on your experience, what is the best way to tackle sites that provide the links to the illegal content?

Ms. AISTARS. Is your question what is the best way to handle the sites that provide links you mentioned out to some legal sites, and some sites that aren't legal?

Ms. CHU. Yes, that they are providing the link to some legal sites, but then also to the illegal sites.

Ms. AISTARS. I mean, I guess I would say to begin with that I think the Judiciary Committee as a whole and this Subcommittee in particular has done an excellent job in setting out the criminal penalties that are applicable to all manner of websites in terms of addressing the policy considerations that one looks at to determine whether you should be bringing a prosecution or not, whether someone has met the threshold for being held criminally liable. And what we are looking to adjust here is simply a technical fix that one should not determine that a site is either in or out based on the fact that they are using streaming versus reproduction and distribution of a work.

So I guess I would want to think this through a bit more closely and discuss this a little further, but my initial impression would be that one way to address these issues would simply be by adding the public performance right to all of the currently existing criminal provisions and then you would have the benefit of the protections that are already built into the ART Act and the NET Act that ensure that these are truly large-scale illegal reproduction operations and the infringers are acting willfully and there are commercial motives and that sort of thing.

Ms. CHU. Mr. O'Leary, and then I would like to hear from Ms. Pallante on this.

Mr. O'LEARY. I agree with what Ms. Aistars has said. There are instances out there, hypotheticals and different instances that arise, that are rarely black and white. And that is part of the process.

As I said earlier, the vast majority of enforcement takes place on kind of the civil plane. When we reach out to sites and ask them to stop, the ones that are trying to do the right thing stop. Some don't. Now, that may be a situation where we would proceed against them civilly, and in many cases, if not most cases, that resolves the problem in some fashion, assuming that you can actually get civil jurisdiction over them.

When we make a referral to the Justice Department for criminal prosecution, it is not uncommon—and I did this when I was there and they do it now, as they should, but they will look at a case and say this doesn't meet the requirements for bringing us a criminal case. You should handle this civilly or we are not going to take it. It is not as though the simple referral of a case to the Justice Department will result in it being prosecuted. In fact, I think you would find in a lot of cases there are probably as many cases denied as are accepted, if not more. So I think that depending on the facts and the circumstances, it is kind of a holistic approach to dealing with different facts and different types of activity. Again, though, the vast majority of it is going to be handled civilly.

What we are really talking about here is the willful, massive, clearly criminal type of activity, and that is the distinction that has to be made looking at the specific facts of the specific case.

Ms. PALLANTE. Thank you.

I will just add to that by saying cyberlockers are, in my opinion, the most difficult issue at play in general with online enforcement. They have a lot of very legitimate uses. A lot of people are very excited by the multiple things they can do and the multiple ways they can be used. It is possible that in the rogue website legislation in the follow-the-money approach, depending on the definition of a rogue website, you can get to them that way, at least the ones that, for example, may offer rewards programs to encourage the downloading and sharing of files that are found to be unauthorized. And it is possible in the criminal context that you could get to some kind of aiding and abetting if the providing of links itself is not sufficient for a cause of action. That is kind of the general answer. But it is an extremely difficult issue.

Ms. CHU. Thank you. I see my time is up. I yield back.

Mr. GOODLATTE. I thank the gentlewoman.

Mr. O'Leary, I think you may have been wanting to respond to Ms. Lofgren's question regarding the knowledge of infringement based upon receipt of DMCA notices.

Mr. O'LEARY. Thank you, Mr. Chairman. I think it is a legitimate question and one that is worthy of discussion. I am not familiar with Mr. Morton's letter, so I am not going to address that. I would note that it is the prosecutor who will ultimately make the charging decision, not the investigative agency, and that is true in any case.

At the same time, I think again we keep going back to the fact that there are——

Ms. LOFGREN. Could the gentleman yield on that point? And I will be happy to make a copy of Mr. Morton's letter available to you.

But the point I am making is that if there is an enforcement action, somebody is arrested, that is sufficient to deter. I mean, even if there is no prosecution, that is definitely going to have a chilling effect on people engaging in that activity and certain chill venture financing for a technology developer.

Mr. O'LEARY. Again, your question is well taken. I am not quarreling with your point.

One thing I will say is there has been this notion that has been bandied about that people are going to be arrested. Most of these cases will not result in an arrest. It will be handled in a different way.

But having said that, I think the important thing is within the criminal statutes, within the criminal code that we have now, there are safeguards built in. Ms. Pallante talked about them. They are the elements of the crime, their willfulness. If you have a legitimate business that is truly involved in a legitimate dispute with another legitimate business, as a first principle that is going to send up a red flag with 99 percent of the prosecutors, if not all of them out there.

The second part of it is—let's take the YouTube example that you mentioned. YouTube does a number of things. And I am speaking

generally, not in regard to any specific case, and I am not speaking to the case they are involved in. But they do a number of things that go directly to the state of mind of that organization. For example, they are not members of the UGC principles but they adhere with them, which basically is a process whereby if they are notified that something infringing is there, they take it down. They utilize filters. They utilize notice and takedown. These are all steps that go to their state of mind.

I suppose it is possible that there is a hypothetical that you could somehow ignore all of those facts and say that they are willfully violating a known legal duty and somehow engaging in some type of commercial-scale infringement. I just think it is very unlikely, and I think that that risk exists for them right now, to the extent it exists at all, under reproduction and distribution. That is my only point. I don't know that there is anything new going on here frankly. I think this is just a variation on the same theme that has been in place for decades.

Ms. LOFGREN. Could I do just a quick follow-up on that, Mr. Chairman?

Mr. GOODLATTE. Sure.

Ms. LOFGREN. YouTube—I mean, they have evolved. I mean, there was a time when they didn't do those things. Now they are doing all kinds of things, filtering and the like.

Facebook doesn't do any of that. I don't know, but I assume there is a lot of infringing material on people's Facebook websites. But they don't do filtering. Twitter does a lot of notice and takedown. I don't know how that has really worked with Facebook.

I just think when the next Facebook comes along, you don't want to deter that innovation by chilling the whole tech development environment. By their state of mind, they are not doing any of the things that YouTube is doing now, and so what would their intent be?

Mr. O'LEARY. I don't disagree with anything you just said. I don't want to deter the next Facebook. I would like them to play by the rules, though. That is my point.

Mr. GOODLATTE. I thank the panel and the witnesses because this has been a great discussion and very helpful as we craft this component of legislation that will be forthcoming.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers can be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And with that, I again thank our witnesses and congratulate our new Register of Copyrights and declare the hearing adjourned.

[Whereupon, at 4:22 p.m., the Subcommittee was adjourned.]