

New Law Criminalizes Streaming: What Businesses Need to Know

Streaming is a widespread form of entertainment for millions of Americans and its popularity has soared during the pandemic. However, according to a study by the U.S. Chamber of Commerce and the Global Innovation Policy Center from June of 2019, "global online piracy costs the U.S. economy at least \$29.2 billion in lost revenue each year." This significantly affects the stakeholders of major motion pictures, television programs, music, audiobooks, live sports, and pay-per-view programming. After years of pressure from many copyright owners and other entertainment content stakeholders, Congress passed the Protect Lawful Streaming Act (the Act) as part of the December 2020 COVID-19 relief package. The new law addresses a "loophole" in criminal copyright law, under which infringing acts of reproduction or distribution triggered felony penalties yet infringing public performances (such as streaming) merely amounted to misdemeanors.

New Criminal Provisions and Penalties

18 U.S.C. §2319C makes it a felony for anyone who willfully, and for the purposes of commercial advantage or private financial gain, offers or provides to the public a digital transmission service[1] of pirated material that:

- Is primarily designed or provided for the purpose of publicly performing[2] protected works without authorization.
- Has no commercially significant purpose or use other than to publicly perform protected works without authorization.
- Is intentionally marketed by or at the direction of that person to promote its use in publicly performing works without authority.

A person convicted under this section faces up to three years imprisonment. The maximum penalty increases to five years where the offense was committed in connection with one or more "works being prepared for commercial public performance," and the offending party "knew or should have known that the work was being prepared for commercial public performance." The Act defines "work being prepared for commercial public performance" as a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, as to which at the time of the offense, (a) the copyright owner has a reasonable expectation of exploiting via a commercial public performance and (b) no copies or phonorecords[3] of the work have yet been authorized by the copyright owner. In the case of motion pictures, the enhanced penalty also applies where (a) the work has been made available for viewing in a theater and has not been made available in copies for sale to the general public with the copyright owner's authorization in a format intended to permit viewing outside theaters, or (b) the work has not been commercially publicly performed with the copyright owner's consent more than 24 hours prior to the unauthorized public performance. The maximum penalty jumps to 10 years for subsequent offenses.

Certain unauthorized public performances like performances through analog transmission or by legitimate digital transmission services, while not mentioned in the bill, do not appear to be covered by this provision so these performances likely remain subject only to misdemeanor liability where the act is committed for commercial gain.

Effect on Other Areas of Copyright Law

Although the Act was intended to deter illegal streaming, the Act is not without limits. The Act contains a "rule of construction" providing that the Act does not affect any other provision of civil copyright law, including the Digital Millennium Copyright Act or principles of secondary copyright liability.

Additionally, U.S. Senator for North Carolina Thom Tillis, who introduced the bill, said that he did not intend the law to target ordinary business disputes more properly addressed through civil litigation, noncommercial activities, or individuals who merely access pirated streams. He also did not intend the bill to criminalize broadband internet access providers simply because others could misuse its services. However, how litigants will attempt to use the Act and how broadly courts will interpret the new statute remains to be seen.

Endnotes

[1] "Digital Transmission Service" means a service that has the primary purpose of publicly performing works by digital transmission. See, 18 U.S.C. § 3219C.

[2] "Public Performance" refers to the exclusive rights of a copyright owner under paragraphs (4) and (6) of §106 (relating to exclusive rights in copyrighted works) of title 17, as limited by sections 107 through 122 of title 17.

[3] "'Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed." 17 U.S. Code § 101.

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