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Modernizing Criminal Copyright Law to Combat Online Piracy

by

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Introduction and Summary

Goods and services that are copyrighted, or which depend on copyrighted works, are extraordinarily valuable to our economy. But annual economic losses due to piracy of copyrighted works are staggering. A report by Frontier Economics found that “the global value of digital piracy in movies, music and software in 2015 was \$213 Billion.” Frontier Economics forecasts that the global value of digital piracy in the year 2022 will range between \$289-\$644 billion for movies and \$53-\$117 billion for music.

Copyright owners are often unable to address mass-scale willful infringement operations by entities through civil lawsuits. Confronted with such huge economic losses attributable to theft of intellectual property, criminal prosecution provides a necessary alternative means for stopping black market trafficking of pirated copyrighted content such as video and music.

Although criminal enforcement of copyright law is sometimes subject to attack by critics, criminal enforcement against piracy or willful infringement of copyrighted works has solid constitutional and historical foundations. In order to address growing copyright piracy taking place through online streaming sites and enabled by illicit streaming devices, Congress should

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update criminal copyright law. In particular, Congress should make online piracy via streaming a felony.

Without authorization, stream-ripping websites convert copyrighted music and video content from licensed streaming sites into files that are downloadable by Internet end users. File locker or cyberlocker websites enable unauthorized downloading of copyrighted music and video content by file sharers and Internet users across the world. Rogue websites also make copyrighted music and video content available to Internet users via streaming. Some Internet users own illicit streaming devices – or “ISDs” – that allow them to search for and stream such copyrighted content from rogue sites to their screens.

Many online piracy operations are technically sophisticated and designed to avoid accountability to copyright holders or the civil justice system. Such pirates typically seek financial gain or at least intend to widely disseminate copyrighted content, inflicting steep financial losses on copyright owners. And as the U.S. Trade Representative’s 2017 report on “Notorious Market” observed, many online piracy sites “surreptitiously install malware on users’ computers, commit advertisement fraud, and enable phishing scams that steal personal information, all to increase their unlawful profits.”

Criminal copyright infringement is limited to willful infringement of protected works, undertaken either for commercial gain or for some other personal benefit. Prosecutions are initiated by federal agencies – most notably the U.S. Department of Justice. In general, punishments for misdemeanor copyright infringement include up to a year of prison and a fine of up to \$100,000 or both. Punishments for felony copyright infringement usually include up to 5 years in prison or a \$250,000 fine, or both. As with other crimes, including property crimes, imprisonment and fines for criminal copyright infringement are intended to punish and deter knowingly intentional and inherently wrongful conduct that harms others. Modern criminal enforcement is directed against traffickers in pirated works, not individual Internet users.

Although necessary, criminal prosecutions are not numerous. Federal judicial caseload statistics indicate seven new criminal copyright prosecutions commenced in the twelve-month period ending in mid-2017, with an annual average of 23 over the prior five years. By contrast, a total of 4,197 lawsuits for civil copyright infringement were filed in the twelve-month period ending in mid-2017, with an annual average of 4,050 civil suits over the prior five years.

Importantly, there is a constitutionally principled basis for criminal copyright laws. The U.S. Constitution’s Article I, Section 8 Copyright Clause provides: “The Congress shall have Power To... promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” When the Constitution was adopted, the consensus view held that copyrights are forms of private property that are grounded in the natural rights of authors to the fruits of their labors.

Copyrighted works deserve protections just like other forms of property. Laws prohibit criminal acts that deprive property owners of control, use, and value of their property. Crimes against land and other physical property such as burglary, arson, vandalism, and industrial espionage are prohibited by law, and crimes involving intellectual property such as copyrights similarly should

be prohibited. Also, criminal copyright laws reflect the important national public purpose to “promote the Progress of Science and useful Arts.”

In passing the Copyright Act of 1790, the First Congress established civil enforcement for copyrights. However, by the late 19th century, it became recognized that civil enforcement was inadequate to combat copyright piracy. The Copyright Act of 1909 contained the first general criminal copyright provision, imposing fines and prison sentences for willful and for-profit copying of protected works without authorization. Early criminal copyright provisions and their legislative histories mark the start of what the U.S. Supreme Court in *Dowling v. U.S.* (1985) called a “step-by-step, carefully considered approach” to criminal copyright enforcement.

The history of criminal copyright enforcement offers law and policy insights for today. Since its inception, federal criminal copyright law has recognized the shortcomings of civil litigation in addressing willful infringers. Individual copyright owners often lack means of financing expensive lawsuits. Pirates that are geographically mobile or that mask their identity are difficult or near impossible to hold accountable through the civil justice process. Moreover, there is a strong public interest in ensuring copyrights are secure, just like other forms of private property. Piracy undermines the value of copyrighted works as well as the incentives for investing and laboring to create new creative works for public consumption. The historical record reveals that criminal copyright enforcement provisions previously have been amended to reflect the effects of changing technologies on copyrighted protections. Over time, criminal penalties have increased, coinciding with increased value of copyrighted works in our economy. But the law now needs new amendments that reflect Digital Age realities.

Congress should update criminal copyright law to better address growing copyright piracy taking place through online streaming sites and enabled by illicit streaming devices. Currently, willful copyright infringement via online streaming is only a misdemeanor, whereas willful infringement via digital downloading is a felony when statutory minimums are satisfied. This disparate treatment of streaming and downloading has no principled basis. Consumers increasingly access copyrighted video and music through streaming.

Congress should clarify that willful infringement of the public performance rights of copyright holders via streaming is a felony. Additionally, Congress should consider providing federal law enforcement with more tools, including the authority to seek wiretaps to obtain evidence of suspected criminal copyright activities, to combat online piracy. Similar wiretap authority already exists in the case of theft of trade secrets and economic espionage.

Criminal copyright prosecution may be supplemental to civil litigation in enforcing exclusive rights, but it is nevertheless necessary to combat piracy. Congress should tailor criminal enforcement provisions to address emerging challenges posed by market trends and new technologies. By making willful infringement of multiple or high value copyrighted works via online streaming a felony, Congress would empower law enforcement to better combat black market online traffickers in copyrighted content. And by updating existing law regarding piracy through online streaming, Congress can better secure the exclusive rights of copyright owners and thereby “promote the Progress of Science and useful Arts.”

Online Piracy: Copyright Infringement in the Digital Age

Copyrighted works are extraordinarily valuable to the U.S. economy. An International Intellectual Property Alliance report, titled “Copyright Industries in the U.S. Economy,” attributed \$1.2 trillion in economic activity and employment of 5.5 million workers for the year 2015 to industries whose main purpose is to create, produce, distribute, or exhibit copyrighted works. But piracy of copyrighted works results in staggering economic losses to creative artists and other copyright owners.

A 2017 report by Frontier Economics found that “the global value of digital piracy in movies, music and software in 2015 was \$213 Billion.” Digital piracy of movies resulted in economic losses of \$160 billion and piracy of music resulted in losses of \$29 billion. Frontier Economics forecasts that the global value of digital piracy will range between \$384 and \$568 billion in the year 2022, with the value of digital piracy reaching \$289-\$644 billion for movies and \$53-\$117 billion for music.

Digital technology and Internet connectivity have had a force-multiplier effect on the value and demand for motion pictures, sound recordings, and other copyrighted content. At the same time, online piracy is a pervasive economic and social problem.

File locker or cyberlocker websites enable unauthorized downloading of copyrighted music and video content by file sharers and Internet users across the world. Stream-ripping sites, without authorization, convert copyrighted music and video content from licensed streaming sites into files that are downloadable by Internet end users. Rogue websites also make music and video content available to Internet users via streaming rather than downloading.

Some Internet users own equipment referred to as illicit streaming devices (“ISDs”) that allows them to search for and stream or download copyrighted content from rogue websites. According the Office of the U.S. Trade Representative’s report on “Notorious Markets” for 2017, ISDs use piracy apps to stream or download pirated content from the Internet. The report observed that ISDs can be “fully loaded” at the time of sale with piracy-enabling capabilities or ISDs can be “combined with add-ons after purchase” to access pirated content.

As the U.S. Trade Representative’s report explains: “The growth of ISDs is a troubling threat to the pay TV and other content industries and undermines incentives for companies to improve services or offer a greater selection of content in more markets.” Citing findings published by Sandvine in November 2017, the U.S. Trade Representative’s report also states: “ISD piracy ecosystem, including unlawful device sellers and unlicensed video providers and video hosts, stands to bring in revenue of an estimated \$840 million a year in North America alone, at a cost to the entertainment industry of roughly \$4-5 billion a year.” And the report deems it “critical” for governments and private industries to fight threats from growing ISD piracy.

Moreover, Internet end users seeking unauthorized access to copyrighted content can be directly harmed by online piracy operations. According the U.S. Trade Representative’s report, online piracy sites “actively and surreptitiously install malware on users’ computers, commit advertisement fraud, and enable phishing scams that steal personal information, all to increase

their unlawful profits.” A July 2016 report by the Digital Citizens Alliance estimated that one-third of copyrighted content theft sites “expose consumers to malware and other risks.” Its report also found that approximately 45% of malware from piracy websites is delivered via “drive-by downloads” that are invisibly transmitted to the consumer’s computer without the consumer ever having to click on a link. The Digital Citizens Alliance and RiskIQ estimated that such malware activities generated about \$70 million annually for piracy websites.

Despite suffering substantial harm on account of online piracy, copyright owners are often ill-equipped and financially unable to combat such piracy through civil lawsuits. Pirates of copyrighted content are not often amenable to service of process and to civil litigation. Unsurprisingly, many technically sophisticated online piracy operations are designed to avoid accountability to copyright holders and to the civil justice system. After all, such pirates seek financial gain by disregarding the exclusive rights of copyright owners. And as indicated, online piracy operatives also seek illicit gain by using malware to steal or otherwise scam Internet users who seek access to pirated copyrighted content. Thus, circumstances clearly exist in which the civil justice system is inadequate or unable to address or combat online piracy operations.

Criminal Copyright Infringement in the U.S. Code

Section 106 of the Copyright Act recognizes copyright owners’ exclusive rights over sound recordings, motion pictures, audiovisual works, and other creative works. Those exclusive rights include rights of reproduction, distribution, and public performance. Criminal copyright law extends to all of the exclusive rights belonging to copyright owners. Unauthorized use of copyrighted works that conflict with one of those exclusive rights constitutes copyright infringement. Although any infringement of a copyright typically makes an infringer potentially civil liable, only knowing and intentional infringement makes an infringing person potentially criminally liable. Prosecutions are initiated by federal agencies – most notably the U.S. Department of Justice. Modern criminal enforcement is directed against traffickers in pirated works, not individual Internet users.

The primary criminal copyright infringement provision is 17 U.S.C. section 506. According to section 506(a)(1):

- Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed —
- (A) for purposes of commercial advantage or private financial gain;
 - (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or
 - (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

As explained by the U.S. Department of Justice’s manual, *Prosecuting Intellectual Property Crimes* (4th ed. 2013), the common factors of all three basic copyright crimes set out in section 506(a)(1) are: “(1) there must be a valid copyright, (2) there must be an infringement, and (3) the infringement must be willful.”

Criminal copyright law reflects the basic distinction between felonies – more serious crimes with stronger punishments – and misdemeanors – less serious crimes with lesser punishments. Under 18 U.S.C. sections 2319(b)(3) and 3571(b)(5), if a person has willfully infringed an exclusive right other than reproduction or distribution, or if a person has reproduced or distributed less than the specified number of copies or with a retail value below the specified retail value, that person can be convicted of a misdemeanor and be sentenced up to one year and fined up to \$100,000.

The Justice Department’s manual further explains that it is a felony when a willful infringement of copyrighted work via reproduction or distribution occurs:

1. by (a) reproducing or distributing, “including by electronic means;” (b) “during any 180-day period;” (c) “at least 10 copies or phonorecords, of 1 or more copyrighted works;” (d) that have a “total retail value of more than \$2,500.” 18 U.S.C. § 2319(b)(1); OR
2. by (a) distributing a work; (b) that is “being prepared for commercial distribution;” (c) by “making it available on a computer network;” (d) “[knowing it] was intended for commercial distribution.” 17 U.S.C. § 506(a)(1)(C); 18 U.S.C. § 2319(d).

Under 18 U.S.C. section 2319, felony convictions for copyright infringement carry punishments of up to 5 years imprisonment or \$250,000 in fines or both. Maximum penalties for felony copyright infringement increase from three to five years if such infringement is committed “for commercial advantage or private financial gain.” Repeat criminal offenders are subject to increased maximum penalties. It should also be noted that willful infringements of exclusive rights other than reproduction and distribution are not included within the felony provisions of current criminal copyright law. Willful infringements of public performance rights for copyrighted works through online streaming, for instance, are only misdemeanors under current law.

The Constitutional Foundations of Criminal Copyright Enforcement

There is a constitutionally principled basis for criminal copyright laws. According to the logic and history of American constitutionalism, copyrighted works are a type of property. And copyrighted works are deserving of protections just like other forms of property. Criminal laws prohibit willful acts that deprive property owners of control, use, and value of their property, such as burglary, arson, vandalism, and industrial espionage. Crimes involving copyrighted property can and should similarly be prohibited by law.

Additionally, criminal copyright laws reflect the important national public purposes of the Copyright Clause. Those public purposes are expressed in the Copyright Clause’s concern to

“promote the Progress of Science and useful Arts.” Moreover, the public purposes of the Copyright Clause go hand-in-hand with the private benefits they secure to individual copyright owners. This mutuality of public and private purposes was recognized by James Madison in *Federalist No. 43*, when he wrote that, with regard to the copyright of authors, “[t]he public good fully coincides... with the claims of individuals.”

In our *Perspectives from FSF Scholars* paper, “[The Public Contract Basis of Intellectual Property Rights](#),” we examined the institutional mechanism by which the public and private purposes of the Copyright Clause are mutually secured. American constitutionalism has long recognized that copyrights are secured by a public contract between the federal government, on the one hand, and creative artists, on the other. When copyrightable works are registered, the public receives the benefits of the creative artists’ pursuit and production of such works. In exchange, creative artists – whether authors, sound recording artists, motion picture studios, or other copyright owners – enjoy exclusive rights concerning the use and reproduction of their creative works. In the case of copyright, registration of the creative work constitutes the valuable consideration given to the public. The public receives the benefits resulting from creative artists’ pursuit and production of such works.

Through this exchange between the public and private owners of creative works, the public trust is pledged to secure exclusive rights in creative works offered by those public contracts. To the extent willful infringements or piracy of copyrighted works significantly harms or threatens to harm those exclusive rights, criminal copyright enforcement is a logically necessary means of upholding that public trust.

The Historical Context for Considering Updating Criminal Copyright Enforcement

The history of federal criminal copyright laws offers an important frame of reference for reforming and updating criminal copyright enforcement. Importantly, the historical record reveals that criminal prosecution is secondary to civil litigation as a means of preventing and seeking redress for copyright infringement. Even so, history reveals that criminal enforcement is a necessary means for combatting willful infringement or piracy of copyrighted works.

Since the inception of federal criminal copyright law, willful infringement or piracy of copyrighted works has been punishable by incarceration and fines. These criminal sanctions reflect the interests of public justice in punishing and deterring deliberate attempts to interfere with or undermine copyright owners’ exclusive rights to use, reproduce, and seek financial returns on their intellectual property.

Indeed, the historical record reveals Congress’s consistent recognition that copyrighted works are valuable forms of property and that pirating of copyrighted works – whether through unauthorized public performances of dramatic performances or unauthorized reproduction of motion picture content or sound recordings – results in severe economic and social harms. Piracy produces unjust gain for willful infringers while reducing legitimate returns for copyright owners, thereby reducing the value of copyrighted works to their owners. Aside from inflicting serious financial opportunity losses on copyright owners, another critical effect of piracy is to undermine the incentives for creative artists and other would-be copyright owners to undertake

the labor and expense of creating, producing, and distributing new works for public consumption.

Congress has repeatedly recognized the shortcoming of the civil justice process in securing recovery or preventing piracy of copyrighted goods. Evasion of the civil justice system by pirates of copyrighted works is not infrequently cited as a reason for the necessity of criminal prosecution. The deliberateness and, consequentially, moral blameworthiness of such infringement also sets criminal copyright infringement apart from civil copyright infringement. Congress has also recognized that copyright litigation against willful infringers is uneconomical in many instances, with the costs of such litigation outweighing any potential recovery. Many copyright owners simply lack the financial resources and incentives to pursue civil litigation to recover their losses and protect their intellectual property.

Perceiving the increased value of copyrighted works in our economy, over time Congress has lengthened prison sentences and the amount of fines for criminal copyright infringement. Market developments, including new technologies, often enable new forms of piracy to take place and require revisions of criminal copyright laws in order to address such piracy. Specifically, the opportunities and challenges presented by digital technology and the Internet have called for careful examination and revision of criminal copyright laws in order to combat piracy operations.

Early History of Criminal Copyright Enforcement Legislation

As described in our *Perspectives from FSF Scholars* paper, “Modernizing Civil Copyright Enforcement for the Digital Age Economy: The Need for Notice-and-Takedown Reforms and Small Claims Relief,” the First Congress established the initial enforcement provisions for implementing the Article I, Section 8, Clause 8’s provision “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The Copyright Act of 1790 provided copyright holders a civil cause of action for infringement of their copyrighted works. Beginning in 1819, jurisdiction over lawsuits involving questions of federal copyright law, including copyright infringement civil suits for damages, were vested exclusively in federal circuit courts. Our *Perspectives* paper discussed the subsequent development of civil copyright enforcement provisions in federal law, as civil causes of action brought by copyright holders remain the primary means of enforcing copyrights.

Although civil enforcement was deemed adequate during the first century under the U.S. Constitution, Congress first made copyright infringement a criminal offense in 1897. The Copyright Act of January 6, 1897, provided that persons whose unlawful public performances of copyrighted dramatic or musical works were “willful and for profit” were guilty of a misdemeanor, and upon conviction infringing persons were subject to up to one year of imprisonment. Congressional debates and the House Committee’s bill report on what would become the 1897 Act indicate that the criminal enforcement provision was deemed a necessary response to so-called “hit and run” performances.

According to the House Committee’s bill report, dramatic productions by American authors were “carefully and elaborately placed upon the stage at very heavy expense to proprietors and

managers.” However, travelling stage performers had, “without the shadow of right or authority, pirated these works, and, confining their operations chiefly to the smaller and more remote towns” publicly performed those “stolen productions for their own individual profit... without making any compensation whatever to authors or owners.” The bill report found that civil copyright enforcement was “inadequate” for at least two reasons. First, “[t]he offenders are almost uniformly men without attachable means,” who “defy all the ordinary processes” by which copyright holders could collect damages. Second, such “pirated productions” were “generally given for a night or two only at a given place,” allowing offenders to move to new towns or states and so “bid defiance to the processes of the courts seeking to restrain their unlawful acts.” In other words, copyright holders lacked financial incentive to pursue costly litigation that would bring them little or no opportunity of financial recompense from the infringers.

And courts lacked jurisdiction over infringers who had promptly departed for distant locations.

The bill further provides that the piracy, i.e., the unlawful production of any duly copyrighted play or opera, if it be determined that such unlawful representation was willful and for profit, shall be a misdemeanor and shall subject the offender, upon conviction, to the liability of imprisonment for a period not exceeding one year.

...

Conceding that for light causes nothing should be added to the jurisdiction or powers of the Federal courts, it would seem that the circumstances in connection with the wholesale piracy of these productions of native authors demand that something more nearly akin to drastic measures should be invoked to remedy the evil.

Believing that productions of the character mentioned constitute property in the fullest and best sense of the term, your committee sees no good reason why this species of literary production should not be surrounded by the same measure of protection as is accorded to other classes of property.

During congressional debates over the bill, Rep. John Fletcher Lacey of Iowa objected that the bill was a “very extreme measure” for making a copyright dispute the subject of a federal statutory crime. In response, Rep. Lemuel E. Quigg of New York stated:

Mr. Speaker, the gentleman from Iowa in offering his amendment says that this bill is drawn up in a severe form. That unquestionably is true. But he should consider that the sort of property which we are seeking to protect in this bill is very easily stolen, and that laws which avail to render other forms of property safe from spoliation are of no service with this kind: and so the law, if it is going to accomplish anything, must be severer than one which applies in the case of an ordinary piece of property that has to be physically picked up and carried off and appropriated in some easily observed way in order to constitute a theft. This is literary property, and we are seeking in this bill to protect the author of it in all the rights that ought to accrue to him on account of his production.

The House Committee Report for what would become the 1897 Act offers insights into the wrongfulness and harm of copyright piracy, the corresponding need to target such piracy with criminal enforcement, and the public interest in protecting private property:

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The Copyright Act of 1909 – the third major revision of U.S. copyright law – incorporated into federal copyright law the first general criminal copyright provision. Section 28 of the 1909 Act provided that “any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement shall be deemed guilty of a misdemeanor.” Infringing persons were subject to imprisonment for up to one year or a fine ranging between \$100 and \$1,000 per violation – or both. Exempted from liability were certain vocal performances of musical compositions for religious or educational purposes and not for profit. Under Sections 17 and 29 of the 1909 Act, persons who fraudulently obtained copyright registrations or who fraudulently inserted copyright notices into uncopyrighted works likewise were guilty of a misdemeanor and subject to similar penalties. And Section 39 imposed a three-year statute of limitations for bringing criminal copyright causes of actions against alleged offenders.

Regarding the 1909 Act’s criminal liability provision, Arthur W. Weil observed in *American Copyright Law* (1917): “It is properly restricted to willful infringement, which must also be for profit.” That is, “innocent infringers” or persons “who do not derive pecuniary or other material benefit from their violation of copyright” are not criminally liable but “they remain civilly liable for the consequences of their acts.”

A half-century after the passage of the 1909 Act, William Strauss observed in a report commissioned by the U.S. Copyright Office:

This section has rarely been invoked. The infrequency of its use, however, does not disprove its efficacy as a deterrent to willful and reckless infringements. It may be that civil actions are preferred by injured copyright owners since they offer a more lucrative result. To “charge an author with willfully infringing a copyright by plagiarism is to charge him with a crime,” and though charges of that nature are sometimes made in civil actions there is seldom any resulting criminal prosecution.

Similarly, the U.S. Supreme Court observed in *Dowling v. U.S.* (1985): “This provision was little used.”

Criminal liability provisions of the 1909 Act did not apply to infringement of music copyrights by mechanical reproductions. But the Sound Recording Act of 1971 recognized federal copyright protections in sound recordings made after February 15, 1972. The 1971 Act provided that unauthorized manufacture, use, or sale of interchangeable parts, such as discs or tapes, used for reproducing copyrighted sound recordings “shall constitute an infringement of the copyrighted work rendering the infringer liable... in a case of willful infringement for profit, to criminal prosecution.”

The Copyright Act of December 31, 1974 – called the “Short Bill of 1975” by Register of Copyrights Barbara Ringer – substantially increased penalties for music piracy. It provided that any person who “willfully and for profit” infringed a copyright in sound recordings would be fined up to \$25,000 or imprisoned up to one year, or both. According to the House Report on the Short Bill, “record piracy is so profitable that ordinary penalties fail to deter prospective offenders.” In *Dowling*, the Supreme Court explained: “The legislative history demonstrates that in increasing the penalties available for this category of infringement, Congress carefully calibrated the penalty to the problem.”

Modern History of Criminal Copyright Enforcement Legislation

In the Copyright Act of 1976 – the fourth major revision of U.S. copyright law – Congress changed the “for profit” requirement for criminal copyright infringement to infringement conducted “willfully and for purposes of commercial advantage or private financial gain.” Sensibly, federal prosecutors were no longer required to prove that a criminal defendant profited from infringing activity but merely that he or she intended to profit or gain from such activity. Further, the 1976 Act increased fines for criminal copyright infringement from \$1,000 to up to \$10,000, in general. And fines could go up to \$50,000 if the infringement was of a copyrighted sound recording or motion picture.

In the years since that last major revision of the Copyright Act, Congress has amended federal criminal copyright provisions several times. Among the most significant, the Piracy and Counterfeiting Amendments Act of 1982 made first-time criminal infringement punishable as a felony. The 1982 Act made criminal infringement of rights of reproduction and distribution in motion pictures, audiovisual works, and sound recordings a felony punishable of up to 5 years in prison and with fines of \$250,000. Infringing activities classed as felonies were based on the number of unauthorized reproductions or distributions made or sold within a period of 180 days.

The No Electronic Theft Act of 1997 (“NET Act”) was passed in order to address copyright piracy emerging on the Internet. The NET Act amended Section 506(a)(1) to clarify that the “private financial gain” element of criminal infringement includes barter or other situations in which a person receives or expects to receive anything of value in exchange for unlawfully distributing or reproducing copyrighted works. Among other things, the NET Act added Section 506(a)(2), which also made it a misdemeanor to willfully infringe on copyrights by reproducing or distributing, one or more copyrighted works, including by electronic means, even if there is no commercial purpose or financial motive involved. The NET Act made it a felony punishable by

up to 3 years and \$250,000 in fines or both where willful infringement under Section 506(a)(2) – even without commercial purpose or financial motive – involves the reproduction or distribution, in any 180-day period, of ten or more copies of one or more copyrighted works with a retail value of \$5,000 or more. Additionally, persons who willfully infringed copyrights for commercial gain or with personal financial motive could receive heightened penalties, including up to five years in prison. And the NET Act provided for increased maximum penalties for repeat offenders, including up to 10 years where there is commercial or private financial motivation and up to six years where there is no such motivation.

The Artists’ Rights and Theft Prevention Act of 2005 made bootlegging motion pictures inside movie theaters a felony. It also established the option of copyright pre-registration for creative works that have a history of being infringed pre-release, and amended Section 506(a) to make willful infringement of a “work being prepared for commercial distribution” a felony.

The Prioritizing Resources and Organization for Intellectual Property Act of 2008 (“PRO-IP Act”) provided that repeat felony violations for different copyright-related crimes are interchangeable for purposes of imposing heightened criminal penalties. The PRO-IP Act also established provisions authorizing courts to order copyright criminals to pay restitution to victims of criminal copyright infringement.

Surveying federal criminal copyright reforms passed by Congress, the Supreme Court in *Dowling* observed:

Thus, the history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress’ part before subjecting copyright infringement to serious criminal penalties. First, Congress hesitated long before imposing felony sanctions on copyright infringers. Second, when it did so, it carefully chose those areas of infringement that required severe response - specifically, sound recordings and motion pictures - and studiously graded penalties even in those areas of heightened concern. This step-by-step, carefully considered approach is consistent with Congress’ traditional sensitivity to the special concerns implicated by the copyright laws.

The criminal copyright reforms passed by Congress since 1985 conform to this same careful step-by-step pattern. Congress should continue to adhere to this approach in considering the significant harms and technical challenges posed by recent developments in online piracy, including streaming.

Congress Should Update Criminal Copyright Laws to Address Unauthorized Streaming and Other Emerging Online Piracy

Consistent with constitutional principles and historical recognition of the necessity of criminal enforcement to address piracy of copyrighted works, Congress should revise and update federal criminal copyright law to address piracy via Internet streaming sites.

As described earlier, online piracy poses a significant threat to copyright owners and also to the public by diminishing values of copyrighted works and undermining financial incentives critical to the creation of new works. Globally, the value of digital piracy in movies, music, and software exceeded \$200 billion in 2015. The value of those copyrighted goods has likely grown each year since then. Increasingly, online piracy takes place through rogue websites that make copyrighted music and video content available to Internet users via streaming rather than downloading. Furthermore, a growing number of illicit streaming devices (“ISDs”) allow Internet users to stream copyrighted content from such rogue websites.

Unfortunately, criminal copyright law lacks sufficient sanctions for penalizing and deterring unlawful streaming of copyrighted content. According to a 2011 White Paper by the White House Intellectual Property Enforcement Coordinator: “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.” In other words, criminal copyright law treats online piracy differently, depending on whether or not copyrighted content is made accessible via downloading or streaming. As further explained in April 2015 testimony before the House Judiciary Committee by then-Register of Copyrights Maria Pallante: “Currently, criminals who engage in unlawful internet streaming can only be charged with a misdemeanor, even though those who unlawfully reproduce and distribute copyrighted material can be charged with a felony.”

There is no principled reason for differently penalizing piracy because the criminal made copyrighted works accessible through online streaming instead of downloading. In either instance, the wrongful nature of the underlying act is the same. For online pirates, streaming and downloading are simply different technical means of furthering the same willful intent of making copyrighted works available to others without authorization.

Furthermore, the same public harm results regardless of whether online piracy involves streaming or downloading of copyrighted sound recordings or motion pictures. Correctly, Register Pallante pointed out: “As streaming becomes a dominant method of obtaining content online, unlawful streaming has no less of an adverse impact on the rights of copyright owners than unlawful distribution.”

In the time since April 2015, streaming undoubtedly has become a dominant method of obtaining online content. The number of Americans who view motion pictures and TV programming through online streaming has continued to rise sharply. At the end of the first quarter of 2018, Netflix reportedly had 56.7 million U.S. streaming subscribers while Hulu reportedly had 20 million subscribers. Millions of other Americans either subscribe to smaller or niche over-the-top streaming video services or use online streaming options provided by their cable provider or other multi-channel video programmer. And according to research by the Recording Industry Association of America: “Streaming music platforms accounted for almost 2/3rd of total U.S. music industry revenues in 2017, and contributed nearly all of the growth.” Digital downloads constituted just 15% of music industry revenues that year. Coinciding with the sharp rise in streaming of copyrighted content through licensed and authorized online services, the U.S. Trade Representative’s “Notorious Markets” report for 2017 points to increasing online piracy of copyrighted sound recordings and video content through streaming.

These trends in online streaming reinforce the need to end criminal copyright law's disparate treatment of streaming and downloading. In 2011, the Office of U.S. Intellectual Property Enforcement Coordinator (IPEC), under then-Coordinator Victoria Espinel, recommended: "that Congress clarify that infringement by streaming, or by means of other similar new technology, is a felony in appropriate circumstances." Register of Copyrights Pallante and the U.S. Department of Justice also recommended that Congress make online piracy via streaming a felony just like online piracy via downloading.

In 2011, the Senate Judiciary Committee reported to the full Senate the Commercial Felony Streaming Act (S.978), which would have achieved such a result. Specifically, S.987 would make it a felony – punishable of up to 5 years imprisonment and a fine or both – for purposes of "commercial gain or personal financial gain" to make available 10 or more streams of one or more copyrighted works available during any 180-day period, where the retail value to the copyright owner would have exceeded \$2,500 or the fair market value of licensing public performances of those works would have exceeded \$5,000. Whereas existing criminal copyright law is primarily directed toward protecting rights to distribute or reproduce copyrighted content, the bill would have expressly protected public performances of copyrighted works being prepared for commercial distribution. The bill failed to gain further traction.

Going forward, Congress should consider similar legislation to bolster criminal copyright law's sanctions for online piracy of copyrighted content via streaming. Such legislation should be directed to online traffickers in copyrighted content, not individual Internet users. Also, future felony streaming legislation should ensure that reasonable safe harbor provisions exist for any online service providers to receive immunity from criminal and civil liability for infringement taking place on their websites if they respond expeditiously to remove or disable access to claimed infringing content.

To that end, Congress should also consider giving federal law enforcement agencies more tools for combatting alleged instances of felony piracy of copyrighted goods. Currently, federal law enforcement agencies lack the authority to obtain warrants for wiretapping suspected criminals pirating works. This despite the fact that federal law allows the government to seek warrants for obtaining evidence regarding alleged theft of trade secrets and economic espionage. To close up this gap in enforcement authority, in 2011, the IPEC recommended: "that Congress amend 18 U.S.C. § 2516 to give law enforcement authority to seek a wiretap for criminal copyright and trademark offenses." Given the importance of the constitutional status of copyrighted works and the increasing economic value of such works to individual owners and to the public, IPEC's recommendation is meritorious and warrants serious consideration by Congress.

Criminal Copyright Enforcement in Practical Perspective

Although criminal copyright enforcement is necessary to combat and sanction willful infringements, it is occasionally under attack by copyright critics. However, copyright enforcement is defensible in practice as well as principle.

It is relatively easy to find website articles by copyright critics that criticize the idea of criminal enforcement as illegitimate or unnecessary. But as explained previously, criminal copyright enforcement has constitutional foundations. And the historical record shows that criminal enforcement is necessary to address copyright piracy by persons who seek to evade the civil justice system and whose unlawful activities cause public harm. Also, it is commonplace to find copyright critic websites or articles alleging that criminal copyright enforcement is growing dramatically. Certainly, a few high-profile criminal copyright prosecutions have made the news in recent years. But criticism of prosecutorial tactics or charging decisions made in one or two cases hardly supports the idea that copyright piracy has become over-criminalized.

To put matters in proper perspective, one must consider current practice concerning criminal enforcement. First and foremost, criminal copyright infringement cases are relatively few. A review of judicial caseload statistics for U.S. district court indicates that criminal copyright enforcement has held stable over the last few years or slightly increased. According to federal judicial caseload statistics, criminal copyright prosecutions were commenced against only seven defendants in the twelve-month period ending June 30, 2017. Over the prior period of five years ending mid-2017, criminal copyright infringement prosecutions were commenced on average less than 23 times per year.

<u>Year</u>	<u>Prosecutions Against Criminal Copyright Defendants Commenced</u>
2017	7
2016	14
2015	22
2014	35
2013	34

Source: US District Courts – Criminal Defendants Commenced, by Offence, During 12-Month Periods Ending June 30, 2013 Through 2017, uscourts.gov

Indeed, criminal copyright prosecutions comprise a miniscule fraction of federal criminal cases. According to federal judicial caseload statistics, for the twelve-month period ending mid-2017, filings against criminal defendants in U.S. district courts totaled 75,861.

Furthermore, criminal copyright infringement cases are far less numerous than civil copyright infringement cases. In fact, civil copyright cases outnumber criminal copyright cases by orders of magnitude. For the year ending June 30, 2017, a total of 4,197 civil copyright infringement lawsuits were filed in federal district courts. And over the past five years ending in mid-2017, the annual number of civil infringement lawsuits filed averaged about 4,050.

<u>Year (June 30)</u>	<u>Civil Lawsuits Filed</u>
2017	4,197
2016	3,581
2015	4,895
2014	3,906
2013	3,675

Source: US District Courts – Civil, Statistical Tables for the Federal Judiciary, uscourts.gov

Certainly, criminal copyright prosecution may be supplemental to civil litigation in enforcing exclusive rights in creative works. At the same time, Congress should proactively yet carefully tailor criminal enforcement provisions to address emerging challenges posed by market trends and new technologies.

Conclusion

Copyright owners are often unable to address mass-scale willful infringement operations by entities through civil lawsuits. Criminal enforcement provides a necessary means for stopping black market trafficking of copyrighted content such as video and music.

Although criminal copyright law is sometimes subject to attack by critics, criminal enforcement against piracy or willful infringement of copyrighted works has solid constitutional and historical foundations. In order to address growing copyright piracy taking place through online streaming sites and enabled by illicit streaming devices, Congress should draw on those foundations and update criminal copyright law. In particular, Congress should empower federal agencies to combat online piracy via streaming by making it a felony offense.

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