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Pirates in the Family Room: How Performances from Abroad, to U.S. Consumers, Might Evade Copyright Law

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Abstract

What will international copyright law look like in ten years? It will doubtless offer many different facets and will, as at present, elude any comprehensive portrait. This brief paper thus focuses on just one plausible and interesting scenario: Parties overseas will come to offer unauthorized performances of copyrighted works to consumers in the United States, a practice that will rouse the ire of copyright holders but that the Copyright Act will do little to stop. Depending on where the transmitted performances take place, legally speaking, they might not qualify as infringing under the Act. Even if they do qualify as infringing, moreover, unauthorized cross-border performances will in practice prove very hard to stop. Technological advances in media devices and growth in bandwidth will soon bring pirated performances to every family room—indeed, to every laptop, digital tablet, and smartphone. This prospect of unauthorized performances from abroad, to domestic consumers, stands to teach us about both the present and future of copyright law.

Introduction

What will international copyright law look like in ten years? Then as now, it will doubtless present issues too many, too various, and too fluctuating to sum up in a comprehensive survey. This brief paper thus focuses on a single, illuminating scenario: Parties from locations abroad will offer unauthorized performances of copyrighted works to consumers in the United States. Despite the strident objections of those who hold copyrights in such works, the Copyright Act will offer no effective remedy. That will not be simply because pirates always prove hard to catch; depending on where the transmitted performances take place, they might not even qualify as infringing. Though cross-border performances have long posed a challenge for the theory of copyright, they have not been so prevalent as to challenge day-to-day business practices. Technological advances promise to change that by providing every family room, laptop, and smartphone

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2 The arguments made here about unauthorized performances apply with equal force to unauthorized displays; the Copyright Act condemns both. See 17 U.S.C. §§ 106(4), (5). I focus on performances, however, because pirates and consumers will probably do likewise.
with high-bandwidth access to content streaming in from all over the world. The prospect of unauthorized performances from abroad, to domestic consumers, stands to teach us about both the present and future of copyright.

The puzzle presented by overseas performances that entertain domestic consumers has already become a reality, albeit still in a charmingly nascent form. Consider the somewhat obscure “Public Domain Archive,” a website evidently produced by an Osaka-based company called Digirock, Inc. The site offers a smattering of classical music recordings free for the listening, via streaming audio, and accompanied by this charming caveat: “In Japan, All files open to the public on this site are certainly lawful. But, if you do not live in Japan, You might not have to use files. You should check the law of your country.”

If we did check U.S. copyright laws, what would they say about the Public Domain Archive? The underlying musical works, from such long-dead composers such as Bach, Beethoven, and Brahms, of course belong in the public domain. The legal status of the sound recordings, which appear to date from the 1940s and 50s, poses a somewhat thorny question, as evidenced by the case of Capitol Records, Inc. v. Naxos of America. Let us set that particular puzzle aside, though, to focus on this one: Even assuming that the Public Domain Archive hosts works protected under U.S. copyright law, would someone in the U.S. who merely listens to a streaming version those works, without saving a copy for later use, thereby violate any of the exclusive rights enumerated in the Copyright Act? Somewhat surprisingly, and for reasons set forth more fully below, the answer is probably, “No.”

As Part I explains, a foreign party, such as Digirock, that engages in unauthorized performances to U.S. consumers of works restricted by the Copyright Act probably thereby commits infringement. Many such parties will not care about that supposed liability, however; if Digirock has no personnel or assets in the United States, it will not likely suffer any practical consequences of its actions. As Part II explains, local users will probably not care, either, given that the Act does not appear to forbid merely watching an infringing performance. Copyright holders would have more luck going after the domestic intermediaries that convey the offending signals from foreign pirates to local consumers but, as Part III explains, the Copyright Act would still allow only very limited injunctive relief. The conclusion: an offshore copyright-free zone—one set up by intellectual pirates or in a stubbornly independent country—might give U.S. residents ample, free, and legal access to all sorts of copyrighted performances—even ones that would normally win the protection of U.S. law.

I. Liability of Foreign Instigators of Unauthorized Performances

To understand the legal puzzle presented by performances from abroad, to U.S. consumers, consider this fanciful hypothetical: Suppose that a mad genius built a giant projector, placed it in orbit around the moon, and used it to cast images visible from earth onto the lunar surface. Residents of the U.S. could then look up into the sky on clear nights and see, projected on the moon’s face, movies or television programs. Would such performances take place on the moon, on the earth, or somewhere else?

The answer to that question would have legal ramifications if the works projected on the moon were protected by U.S. copyright law and used without the permission of their copyright holders. The Copyright Act of course gives each author of a movie, play, or like work “exclusive rights to . . . perform the copyrighted work publicly.” But if we say that the mad genius’s performances take place on the moon (or, equivalently for present purposes, in the giant projector), the Copyright Act would have no bite. U.S. law does not have extraterritorial effect in other countries, much less in space. Nor would the complicity of earth-bound Americans in watching the shows of the mad genius, and thereby making them “public” as defined in the Act, suffice to validate a claim of domestic infringement, given that infringement does not arise even when a resident of the U.S. authorizes overseas infringements.

If, to the contrary, we say that the mad genius’s performances take place on earth, where received, aggrieved copyright holders face not an impossible problem, but merely a very difficult one. In that event, their copyrights would suffer infringement actionable under the Copyright Act each time a resident of the U.S. viewed one of the offending performances. That is not to say that domestic copyright holders could very easily bring the mad genius to justice, of course; so long as he remained outside the jurisdiction of U.S. courts, he would escape the Copyright Act’s reach. In theory, though, those lunar shows would violate U.S. copyright rights.

Where, then, would copyright law place the suspect performances—in space or in the U.S.? We can seek the answer in how copyright law has grappled with the rather less esoteric area of cross-border television and radio transmissions. That, in turn, will tell us not only how the law would treat the mad genius but also, and more importantly, how it might treat the sort of pervasive streaming piracy predicted for 2021.

The Ninth Circuit addressed the question of the locus of infringement in cross-border broadcasts in the case of Allarcom Pay Television, Ltd. v. General Instrument Corp. The plaintiff, Allarcom Pay Television, Ltd., had the exclusive right to exhibit programs of MCA, Paramount, Touchstone, and others via subscription services in

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7 17 U.S.C. § 106(4). Similarly, with regard to photographs, paintings, or other non-moving works, the Act covers the right “to display the copyrighted work publicly.” Id. § 106(5).

8 Los Angeles News Service v. Reuters Television International, Ltd., 149 F.3d 387 (9th Cir. 1998).

9 17 U.S.C. § 101 (defining “publicly” in terms of “a substantial number of persons outside of a normal circle of a family and its social acquaintances”).

10 Subafilms, Ltd. v. MGM-Pathe Communications, Co., 24 F.3d 1088, 1094 (9th Cir. 1994) (en banc), cert denied, 513 U.S. 1001 (1994).

11 69 F.3d 381 (9th Cir. 1995).
Western Canada. Defendant Showtime Networks, Inc., had the right to exhibit many of the same programs in the United States, though no license to do likewise in Canada. Defendant General Instrument Corporation sold of the “VideoCipher II” system to customers in the United States and Canada, allowing them to descramble satellite television signals of Showtime and other programmers in the U.S. and Canada. Allarcom complained in the U.S. District Court for the Central District of California that Showtime and General knew that VideoCipher II systems were being sold and used extensively throughout Allarcom’s Canadian territory to descramble Showtime signals carrying programs licensed there exclusively to Allarcom, thus depriving Allarcom of potential customers and income in violation of the Copyright Act (as well as of other U.S. laws).

The Ninth Circuit Court of Appeals held that no cause of action for copyright infringement could obtain under those facts. Under the Copyright Act, said the court, “at least one alleged infringement must be completed entirely within the United States.” In Allarcom, however, the supposed infringement of the public performance right was completed only in Canada, “once the signal was received and viewed.”

What does that holding tell us about how the 9th Circuit would regard the sort of mad scientist scenario described earlier? Allarcom effectively reverses the facts of that hypothetical, dealing with a case of signals leaving the U.S. rather than entering it. The question thus becomes: Would the Allarcom court have found a violation of the Copyright Act if plaintiff had suffered loss of customers and income in the U.S. due to extraterritorial transmissions received here? In other words, would the public receipt of those transmissions create at least one alleged infringement completed entirely within the United States? It is hard to be sure, but the most likely answer seems, “Yes.” To hold otherwise would have the court adopting an analysis under which cross-border performances never infringe copyrights—not a logical impossibility, but not one that wise public policy would recommend.

What about other circuits? The Second Circuit expressly disagreed with Allarcom and held, in National Football League v. PrimeTime 24 Joint Venture, that parties who make solely intermediate transmissions can still be held liable for such transmissions as eventually reach the public—even if that receipt occurs solely abroad. Defendant PrimeTime, charged with retransmitting NFL games to Canadian viewers, argued that any public performance of the protected works occurred solely in a foreign country, thus escaping the reach of the Copyright Act. The court disagreed, holding instead that a public performance does not occur only once an audience gets involved but instead “includes ‘each step in the process by which a protected work wends its way to its audience.’”

The Supreme Court has declined to resolve that split between the 9th and 2nd circuits, but it is not one that should trouble us much for present purposes. Even on the narrower view adopted by the 9th circuit, our hypothetical lunar madman—and, more to

12 Id. at 384.
13 69 F.3d 381, 387 (9th Cir. 1995).
14 Ibid.
16 Id. at 13 (quoting David v. Showtime/The Movie Channel, Inc., 697 F.Supp. 752, 759 759 (S.D.N.Y. 1988)).
the point, our hypothetical future pirates—would appear liable for violating the Copyright Act. This holds true despite Prof. Geller well-founded claim that “courts have circled around the question: Should infringement by a cross-border broadcast be localized where the broadcast originates or where it is to be received?”17 No court seems to dispute that infringement by cross-border broadcasts happens where they are received,18 the unresolved question is whether infringement also happens where they originate.

Under extant law, those who transmit to U.S. consumers unauthorized performances or displays of works covered by the Copyright Act thereby commit infringement. We can thus fairly call them pirates. But, like pirates throughout history, our hypothetical foreign pirates of 2021 will probably not care what U.S. courts think. They might escape detection on the digital equivalent of the high seas, weigh anchor in a rogue port that disdains copyrights,19 or even operate openly in a country that, while nominally supporting the Berne Convention and other such international obligations, in practice refuses to enforce copyrights.20

II. Liability of Domestic Consumers of Unauthorized Foreign Performances

It does not look too likely that the Copyright Act could be brought to bear against domestic consumers who do no more than observe infringing performances from overseas sites. We assumed that those consumers would make no copies of the works, recall, and merely observing infringing performances would not violate any other of the exclusive rights set forth in § 106 of the Act. Nor would those consumers have to worry about secondarily liability for infringement.

Consumers today might not get off so easy, granted. Under present technologies, anyone who requests a performance or display over the Internet initiates, usually unknowingly, transient copies in system caches.21 Some authority suggests that those

caches would constitute copies for purposes of the Copyright Act. Because consumers do not enjoy the sort of qualified immunity for making caches that system providers have won under § 512 of the Act (about which see more below), consumers who request streaming performances run some risk of liability for making infringing system caches. Those caches represent not a necessary feature of Internet communications, however, but merely a stopgap to cure bandwidth limitations—limitations that technological advances might well overcome.

Could consumers who initiate downloads of unauthorized streaming performances be held secondarily liable for copyright infringement? Not likely. MGM Studios, Inc. v. Grokster, Ltd., the Supreme Court case that recognized liability for inducement of infringement, limited its application to “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement” and who thereby causes infringement by third parties. Even if domestic consumers of foreign performances somehow encourage them—by watching revenue-generating advertisements along with the performances, say—that falls far short of establishing liability under Grokster for any resulting infringements. Older approaches to the problem, premised on contributory or vicarious liability, look even less likely to apply against consumers.

III. Liability of Domestic Computer Networks for Transmitting Infringing Performances

Although copyright holders might win some leverage over domestic computer networks that facilitate infringing performances from foreign sources to local consumers, they would probably not thereby prevail against digital pirates. It might at first seem as if domestic computer networks transmitting unauthorized performances from abroad would, in contrast to domestic consumers, face convincing charges of contributory infringement if, after receiving notice from copyright holders, they failed to cut off pirates’ transmissions. Far more than consumers, after all, such networks would materially contribute to infringing conduct. The Copyright Act caps the liability of computer network providers in such cases, however, immunizing them from all monetary relief and much injunctive relief so long as they comply with various notice and takedown requirements. Aggrieved copyright holders

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22 See, Cartoon Network LP, LLP v. CSC Holdings, Inc., 536 F.3d 121 (2nd Cir. 2008); MAI Systems Corp v. Peak Computer, 991 F.2d 511 (9th Cir. 1993).
25 “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir.1971) (footnote omitted).
26 “[O]ne may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” Ibid.
could thus do little more than demand that domestic computer network providers shut down access to specific sources of pirated performances, leading to an expensive and largely futile game of virtual whack-a-mole.

Conclusion

This paper has illuminated one facet of copyright’s possible future, a future where foreign pirates have surprisingly free reign to transmit unauthorized performances to U.S. consumers. Even if those performances violate the Copyright Act—hardly a foregone conclusion—copyright holders will find it difficult to end them. The overseas pirates responsible for transmitting such performances will, in the habitual manner of pirates, blithely ignore the condemnations of domestic courts. Consumers of pirated performances will not, in contrast, face liability for infringing the works they enjoy. Copyright holders will thus have to rely on seeking what injunctive relief the Act affords against domestic computer network providers, a remedy that will probably not prove very effective against a world of shiftless international pirates. Unless the law changes or technology does not, therefore, we can expect copyright’s future to include unauthorized performances from abroad to the living rooms, laptops, and hand-held phones of domestic consumers.