

Making Sense of S. 978: Streaming as Felony?

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You may have heard about a new bill introduced by Senator Amy Klobuchar (D-MN) that would make illegal streaming of copyrighted works a felony. If not, you can take our word for it when we say that it's produced some strong reactions on blogs, message boards and social networks.

Currently, unauthorized streaming is only a misdemeanor offense. Klobuchar's bill would amend the No Electronic Theft Act (NET Act) of 1997, which provides for criminal prosecution of infringers in narrow circumstances, even when they don't necessarily profit financially from the infringement. As the NET Act currently stands, unauthorized copying and distribution are felony offenses. The proposed amendment would do the same for any illegal "public performance by electronic means" (i.e. illegally streaming copyrighted content).

Opinions about Senator Klobuchar's amendment range from neutral to hysterical. Some believe that bringing the punishments for illegal streaming in line with those of criminal copying and distribution only makes sense. Others worry that the amendments will have unintended consequences. Such modifications of the NET Act, critics say, would allow the government to charge individuals with felonies — including, for example, YouTube users who upload videos of themselves lip-synching over copyrighted songs. In the midst of all this speculation, we took a close look at Senator Klobuchar's bill and hopefully can help to allay some of the more outrageous fears while outlining areas of possible concern.

Current Law Under the NET Act

As it stands, the NET Act lays out the criminal penalties for some types of copyright infringement:

First, if an individual "willfully" illegally reproduces or distributes a copyrighted work for "purposes of commercial advantage or private financial gain," s/he may be convicted of a misdemeanor (if the financial gain is less than \$2,500 or there were less than 10 copies or distributions) or a felony (if the financial gain exceeds \$2,500 and there were at least 10 copies or distributions made). If this instance is the individual's second felony offense, the punishment is even more severe. All other acts of copyright infringement "for purposes of commercial advantage or private financial gain" are misdemeanors. Therefore, an illegal public performance (such as streaming copyrighted works without permission), may only amount to a misdemeanor under the current version of the Act, carrying a penalty of not more than 1 year of jail time or a fine, or both. There is no stricter penalty for larger amounts of illegal streaming as there is for large-scale copying and distribution. You can see why rightsholders would want more tools to combat bigger players (especially movie and TV studios, whose properties are natural targets for infringing activity.)

Second, the NET Act punishes some instances of criminal infringement even when those acts are not committed for purposes of commercial or financial gain. An individual who “willfully” makes copies or distributes a copyrighted work totaling more than \$1,000 in retail value is guilty of a criminal offense even if s/he didn’t intend to profit from their actions. Depending on the total retail value of the works infringed, the individual may be convicted of a misdemeanor (for retail value between \$1,000 and \$2,499) or a felony (for retail value totaling \$2,500 or more). The NET Act also punishes the distribution of copyrighted works before their release dates, regardless of whether the infringer expected to profit from the distribution. Illegal pre-release distribution always results in a felony offense, and the severity of the punishment depends upon whether or not the infringer intended to profit from the infringement and whether the infringer is a repeat offender.

What the Amendments would Change

If Senator Klobuchar’s bill passes, the NET Act’s penalties for illegal copying and distribution would remain intact and penalties for illegal streaming would be added to the mix.

First, if an individual “willfully” infringes by illegally streaming a copyrighted work “for purposes of commercial advantage or private financial gain,” he may be convicted of either a misdemeanor (as he would under the law as it currently stands) or a felony (the new provision). If the illegal streaming (1) consists of ten or more public performances *and* (2) the total retail value or “economic value” of the performances would exceed \$2,500 *or* the total “fair market value of licenses” for the public performance would exceed \$5,000, the crime is a felony. If the streaming does not meet these requirements, it is only punishable as a misdemeanor.

Second, the amendments would make illegally streaming an unreleased work a felony, regardless of whether or not the infringer intended to profit from that public performance.

Is it a Big Deal?

If all this bill does is bring the criminal penalties for illegal streaming into line with those for illegal copying and distribution, why are some people so opposed to it? Streaming a song or movie over the Internet without the permission of the copyright owner *has always been illegal* (though only carrying a misdemeanor penalty). For the sake of consistency, it makes sense to streamline the law and apply the same punishments across the board. FMC believes that creators’ rights should be protected (we can question whether the big content companies always have the artists’ best interest at heart), and we generally support consistency in the Copyright Act. However, no bill is without its problems, and some of critics’ concerns carry a hint of validity. That said, we don’t think our jails will be filling up with YouTube users anytime soon.

Existing problems not fixed by the bill

Some of the issues raised have less to do with Senator Klobuchar's amendments and more to do with the existing language of the Act. For example, one of the safeguards to keep YouTube users out of criminal trouble is the requirement that infringement must be "willful." The statute reads: "Any person who *willfully* infringes a copyright shall be punished" under the statute. The hope is that your average YouTube lip-syncher isn't consciously uploading a video with the intent to infringe the rights of copyright holders. The problem, however, is that the term "willfully" hasn't exactly been interpreted consistently by the courts in the context of copyright law. Some courts have held that the infringer must have actually known his actions were illegal. Others set a lower standard, suggesting that an individual willfully infringes even when s/he only "should have known" the works were protected by copyright — ignoring the infringer's actual intent.

Similarly, for illegal streaming to be considered a felony, it must be committed for "purposes of commercial advantage or private financial gain." This should provide another safeguard for our YouTube users who probably aren't planning to make millions of dollars in ad revenue. But is that what "commercial advantage" and "private financial gain" really mean? The Copyright Act defines "financial gain" as "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works." This definition is broad enough to include instances where an infringer isn't paid for infringing content, but instead benefits from receiving other content in return (probably aimed at peer-to-peer file sharing sites). The Act leaves the term "commercial advantage" undefined.

Again, the job of interpreting these terms has been left to the courts. Ultimately, the courts have interpreted this requirement (meant to protect minor infringers) very broadly. An infringer need not actually profit from his infringing actions — s/he must only intend to realize some advantage or gain. One court found "financial gain" to encompass grant awards and donations received by a non-profit internet archive site that copied the content of various websites for the purposes of archiving them. Furthermore, a similar strain of cases stretch the term "financial benefit" (specifically in the context of illegal public performances) to include the benefit of attracting customer attention to an establishment or website, which is then tangentially related to later profits.

New questions raised by the bill

Other issues with the bill, however, arise from the new language it would add to the existing statute. Most importantly, when targeting illegal streaming of copyrighted works, the bill fails to define who, exactly, is the "performer." The Copyright Act defines "perform" as "to recite, render, play, dance, or act [a work], either directly or by means of any device or process." To "perform or display a work 'publicly'" includes "to transmit or otherwise communicate a performance or display of the work... to the public, by means of any device or process."

An example may illustrate the problem. Imagine our YouTube user uploads a video of herself lip-synching to a copyright-protected song. She is clearly the one to "recite, render, play, dance or act" the work "by means of [a] device" (her computer camera and

Internet connection). But remember, the law only criminalizes *public* performances, so if she records herself performing a song in her bedroom and saves it to her computer, it's not illegal. Once she makes her video available on YouTube, however, is she publicly performing it by making a copy of it on YouTube's servers? Or is YouTube the performer because it hosts the allegedly infringing work and allows other users to stream it from its website? Or even more troublesome, is each individual user who clicks the play button liable for a public performance? Arguably, the YouTube user pressing play instigates the infringing stream or in legal terms, "transmit[s] or otherwise communicate[s] a performance or display of the work." Unfortunately, the courts seem equally confused on this matter, so Klobuchar's updates may inspire some unforeseen consequences.

Finally, as mentioned above, the bill punishes some instances of illegal streaming as felonies even when there is no intent to profit from the infringement. In these instances, the infringing activity must reach certain financial value thresholds in order to trigger the heightened penalties. This seems fair (the more harm an individual causes, the greater his punishment should be), and it is directly in line with penalties for illegal copying and distribution already contained in the statute. However, there is no way of knowing how the dollar amounts in the bill will play out in the real world. It will be difficult for courts to determine how much each public performance would hypothetically be worth to a copyright holder, and even more difficult to determine the "the total fair market value of licenses to offer public performances" — especially when some copyright owners refuse to license their works for such uses.

The courts have dealt with valuation problems like this before. They generally assume that each party would be willing to "buy" or "sell" the work, even if in reality this isn't the case. The court then attempts to determine the fair market value of a license that would be reached by the hypothetical parties. Often, the courts may look to other parties who have reached similar agreements for guidelines when determining market value. Because there are so many hypothetical factors that go into this calculation, there is no way of knowing how effective a "safeguard" the bill's \$5,000 requirement for felony conviction will be. This is especially true for cases where an illegal public performance would require more than one license from more than one copyright owner.

Takeaways

Senator Klobuchar's bill isn't meant to recast the actions of minor or accidental infringers as felonies. Many critics of the bill, however, argue that, despite its good intentions, such outcomes are inevitable. We would suggest that these critics should keep in mind that the government has limited resources to spend pursuing criminal copyright infringers, so it is unlikely to target minor infringers and fair-use reliance parties. Furthermore, statutory safeguards such as the "willfulness" and "purposes of commercial advantage or private financial gain" should provide at least some baseline protection, even despite the courts' disagreement on definitions. Often it is the courts that inform how statute is interpreted, and we're guessing a reasonable standard would arise eventually.

We do think the legislation could be improved, however. How? By explaining who is a “performer” in the criminal streaming context and clarifying what “willingly” means in a criminal infringement suit. But even as is, we think it’s unlikely the bill will be used to throw YouTube users in jail. The real danger is that the law will be ambiguous enough to chill certain forms of expression on the internet. If this bill is passed, we hope that Senator Klobuchar will play an active role in ensuring that individuals can use the internet to express themselves and that innovators can continue to create the future for the benefit musicians and other creators.