

MUSIC STREAMING - LISTENING, LICENSING, AND LEGALITIES



THE PRACTICE MAKES PERFECT

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From Spotify to SoundCloud, Pandora, Tidal, Apple Music, Amazon Music, and more, there are numerous music streaming services to choose from, and today's music lovers will be hardpressed to be found without a favorite tune. However, finding oneself without melodious monetization can be an all-too-common refrain for the creative artist and digital distributor. Recent legislation has served to fine-tune the protections for those upstream and lessen the legal loopholes for listeners.

Previous Digital Rights Management

In 1998, President Clinton signed into law the Digital Millennium Copyright Act (DMCA), implementing the [World Intellectual Property Organization](#) (WIPO) treaties that were intended to thwart the use of technologies or services to circumvent legitimate access to copyrighted works. The DMCA criminalized circumventing of controls over Digital Rights Management (DRM) even where actual copyright infringement could not be proven. A significant feature of the DMCA was the limitations it placed on the liability of internet service providers and other content distributors for copyright violations of those illegally disseminating digital content over their platforms. Despite this combination of criminalization and strengthened protections, widespread creative content piracy continued.

Streaming by the Numbers

To comprehend the impact of piracy on the music industry, US music sales revenues hit approximately \$14.6 billion in 2000, which was only two years after signing the DMCA. However, by 2009, the figure had dropped to a mere \$6.3 billion, despite an exponential increase in the amount of music content being marketed by distributors and acquired by consumers. The industry was hemorrhaging largely

due to the increasingly widespread use of digital music platforms and the illegal counterparts they spawned.

Part of the problem was that, because of a loophole in the law, live streaming was considered an infringement only of the right of public performance and not unlawful reproduction and distribution of a copyrighted work. Therefore, severe criminal penalties related to DRM copyright infringement were not imposed. Clearly, greater control over copyright protection for creative artists is in order.

Protecting against Piracy

It took more than two decades for Congress to re-evaluate how to protect DRM, especially in regulating live streaming of digital music. Estimates of American household use of streaming services cite a figure of 20% of households accessing an illegal pirate website to stream content for which the copyright owner is never reimbursed. In December 2020, President Trump signed the Protecting Lawful Streaming Act (PLSA or Act) to stem the tide of such huge losses. Rather than trying to track down and prosecute the millions of Americans who, admittedly, are breaking the law by stealing pirated content, the PLSA instead focuses on operators of digital service platforms who are the real piracy profiteers. Under the PLSA, unlawful streaming can now be

charged as a felony, the same as other instances of any unlawful reproduction and distribution of copyrighted digital material. Whereas previously, such conduct was classified as a misdemeanor, and as a result, exposure to such light penalties hardly served as a deterrent to streaming piracy.

Key Points of the PLSA

The real targets of the Act are large-scale digital services engaged in illegal streaming for commercial gain. According to the Act, illegal streaming operators must act:

1. Willfully
2. For purposes of commercial advantage or private financial gain
3. Offer or provide the public a digital transmission service, which is defined as one that has the primary purpose of publicly performing works by digital transmission.

In addition, to become subject to the Act, such streaming service must be:

- Primarily designed or provided for the purpose of streaming copyrighted works without the authority of the copyright owner or the law
- Has no commercially significant purpose or use other than to stream copyrighted works without the authority of the copyright

owner or the law

- › Or, is intentionally marketed or directed to promote its use in streaming copyrighted works without the authority of the copyright owner or the law

Violators of the Act may face fines or imprisonment (of not more than three years, or both) for first-time offenders, with serial violators possibly facing up to 10 years of imprisonment and fines. The Act also provides for 'enhanced penalties' in infringement of newly released movies or live streaming of sporting or concert events. Furthermore, a legitimate copyright owner who determines that his or her material has been pirated is afforded tools under the Act to prosecute civil and criminal remedies to have the unauthorized streaming operation shut down.

Additional Musicians' aid proposed

Aside from combatting digital piracy, there is also a need to address the lack of a level playing field for small and independent musicians who need a better bargaining position when going up against large, legitimate streaming operators. Under existing laws, these creative artists have little ability to bargain for market value rates when their music is used by giant online streaming platforms, and they are left to accept whatever terms are offered by such platforms.

However, legislation recently introduced by Representative Ted Deutsch of Florida seeks to remedy that situation. His proposed Protect Working Musicians Act is slated to grant

more power to musicians by allowing them to band together in a sort of collective bargaining framework, without the risk of transgressing anti-trust laws. Rep. Deutsch noted, "Through the pandemic, streaming services became even more indispensable, allowing us to enjoy the music we love, even when live performances were shut down. But with the exponentially increasing market power of a few tech platforms, the voices of independent musicians are getting harder to hear. By empowering a more diverse chorus of voices to negotiate fair terms and rates for their music, the Protecting Working Musicians Act recognizes the fundamental value of music and gives working artists a fair shot."

Listeners and Loopholes

Ultimately, loopholes, whether deemed to be 'legal', or by way of technological schemes and shenanigans, will be hard to close as long as there exists a music-loving population that continues to patronize piracy platforms. The challenge for the industry, therefore, is to close the loopholes while fairly enforcing the licensing that protects artists.

Executive Summary

1. The Issue

How to satisfy the burgeoning on-demand market for live digital streaming while protecting the copyrights of the artists?

2. The Gravamen

Loopholes allowing a \$29 billion loss in revenue must be closed by enforcement of the legislative tools available to industry stakeholders.

3. The Path Forward

By delegitimizing and shutting down piracy platforms, equitable licensing of legitimate services will protect a vulnerable sector of the entertainment world.

Action Items:

1 IP Protection:

Confirm that your creative clients have obtained copyright protection for their compositions, sounds, and other creative works.

2 Monitoring Intellectual Property:

Ensure that copyrighted material is registered or deposited with a music industry registry such as The American Society of Composers, Authors and Publishers (ASCAP) to monitor public performances, whether via broadcast or live, and that they are compensated accordingly.

3 Stay Up To Date:

Stay informed of the promoted as well as proposed legislation that affects both your creative clients and your streaming business clients.

4 Advising Streaming Operators:

Advise your streaming platform clients about their licensing and other operations obligations to avoid running afoul of the PLSA and other pertinent legislation.

Further Readings

1. <https://abounaja.com/blogs/music-streaming-copyright>
2. <http://www.mjilonline.org/the-expansion-of-spotify-and-international-copyright-law-impact-on-artists/>
3. <https://journals.library.columbia.edu/index.php/lawandarts/article/view/8953>
4. <https://www.taylorwessing.com/en/interface/2021/predictions-2022/dl-the-economics-of-music-streaming>
5. https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_3.pdf
6. <https://copyrightalliance.org/protecting-lawful-streaming-act-signed/>
7. <https://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=403035>



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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions. Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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