

## **The Importance of Copyright Protection to Audio and Audiovisual Performers in the Digital Age**

*An Actor's Point of View of U.S. Copyright in the Digital World*

by Richard Masur\*

I have been a professional actor for forty-two years. I have worked in over a hundred theatrical and television films, been in several TV series and done scores of guest appearances on other TV shows. During those years I have also done dramatic radio works, TV and radio commercials, audio books and worked on and off Broadway.

Simultaneously, I served over twenty-five years as National President, Vice President and Board Member of Screen Actors Guild, and after our merger, as a Board Member of Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA). SAG-AFTRA is a national labor union representing more than 165,000 actors, announcers, broadcasters, recording artists, background vocalists and other media professionals.<sup>1</sup> We are the largest performers' union in the world, and we exist to protect the economic and artistic rights of media artists in motion pictures, television, sound recordings and most other forms of media.<sup>2</sup>

I was asked to participate in this Symposium as a veteran professional actor as well as a union officer with many years of service to our members. Given my experience and background, I feel I can state that when copyrighted works are infringed upon, misappropriated and downright stolen, it has a direct economic and career impact on everyone who was part of creating those works.

During the course of my career, there have been many changes in our business, the most significant of which came with the advent of digital technology. In the world of analog recordings, copies had to be struck directly from master recordings to achieve the highest possible fidelity to the original performances. Every copy of every movie shown in a theater was printed from a master negative, and every video recording that was sold, rented or broadcast was struck from a master recording. These necessities of analog copying substantially restricted the ability of copyright infringers to misappropriate and exploit unauthorized copies. Digital technology took the brakes off copyright infringement through the accessibility and high quality of the stolen material and the ease of stealing it.

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1. *See About Us*, SAG-AFTRA, <http://perma.cc/Q4AH-UNEZ> (last visited Jan. 24, 2015).

2. *See id.*

When I began working in film and television it was a purely analog world. The first television program I worked on was *All in the Family* in the early 1970s. It was recorded using the then-cutting edge of technology. It was shot with four cameras (each about the size of a Buick) that were shoved around the set by large men (no women yet). Each camera was “slaved” to its respective one-inch videotape deck through huge, fat cables, while a show recording was being edited in real time onto a fifth show deck. Each deck was the size of a large dresser, and ran so hot that the recording equipment had to be housed in a special highly air-conditioned room.

The master show tape was dubbed off these tapes. And another, slightly degraded, generation of three-quarter-inch distribution tapes was copied from the master. Eventually copies of those copies were made, creating a slightly more degraded generation of tapes that were then sold or rented to the public. Any copies made from the tapes that were rented or purchased were of progressively poorer quality.

As analog recording media became progressively more refined, the tapes got smaller, the audio and video fidelity got higher, but the generational degradation continued to be a problem. Even if someone wanted to steal copies of audiovisual works, it was hard to exploit them due to their poor audio and visual quality—until digital recording and copying became possible. That changed everything.

As with sound recordings, digital technology enabled the production of identically perfect audiovisual copies. The 1s and 0s on the original recording were identical to the 1s and 0s on the first, the fifth and the fiftieth generations. That meant that any copy, no matter how far removed from the original, could be used to make additional perfect copies.

The amount of data that could be captured and recorded grew: first on digital videotape, and then DVDs, then HD DVD and Blu-Ray systems; and the possibilities for at-home viewing expanded in direct proportion. Now the tech has gotten so small and efficient that a viewing experience that required a sophisticated home theater setup ten years ago can now be watched on a laptop, tablet, smartphone or face-mounted viewer.

The term “piracy,” meaning illegal copying, began with audio recordings. Unfortunately, the word piracy implies romance—daring and thumbing your nose at authority—whereas the act is in reality nothing more or less than the theft of another’s property, albeit intellectual. The continued use of the word as the accepted term of art for digital theft does nothing to help curtail this crime; on the contrary, it tends to minimize it. We at SAG-AFTRA have been encouraging the abandonment of this term.

Although some unauthorized copying was happening in the era of analog videocassettes, an explosion of audiovisual theft was triggered by digital recording because of the perfect copies made possible by the technology. All that was necessary to take that explosion nuclear was a ubiquitous, readily accessible distribution system. Enter the Internet.

Audiovisual works, stolen and legal, are available twenty-four hours a day, seven days a week to anyone that can access the ‘Net with a TV, computer, gaming

device, tablet or smartphone. And once digital audiovisual work has been downloaded, it can be passed along through a host of methods, always as a perfect copy of the original. To date, virtually every strategy that has been deployed to try to thwart unauthorized copying of digital audiovisual work has been unsuccessful or defeated by readily available applications that are developed almost as quickly as new methods of copy protection come online.

And those are the technological changes in just the consuming end of the process. On the audiovisual recording end, the advent and development of technology has also been truly incredible. We've gone from those Buick-sized cameras supplying those dresser-sized one-inch analog tape decks to video recorders that can fit in one's palm as a phone or dedicated recording device, and make recordings at much higher audio and video fidelity than the operators of those Buick/dressers could have ever imagined.

These advances in the technology of recording audiovisual works have had impacts not only on the professional film and TV production industry, but also on amateur "filmmakers" and their viewers. High quality, affordable recording hardware, coupled with low-cost editing through easily accessible computer apps has created a nation of "filmmakers."

And all of these "filmmakers" have one goal: to get their work seen by as many people as possible. "Hits" are the currency by which these "filmmakers" reckon their success, and collecting the greatest number possible creates the stars of YouTube and other video sites. And since exposure is its own reward in this universe of "filmmakers" and their viewers, they assume the same must be true of everyone who is part of the audiovisual world.

This has created the rich soil in which audiovisual theft has been planted and is flourishing. If one is a "filmmaker," or a viewer of such films, one is most likely also a consumer of professionally made audiovisual work. And if one is used to offering one's work or consuming others' work for free, then why would one think of paying for any work one wants to see? Why shouldn't the exposure of the work to the largest possible number of viewers be sufficient payment? So these consumers guiltlessly steal the work of others, considering everything to be theirs for the viewing, by right.

The direct effect these changes in technology have had on all of us who attempt to make our living in this field has been profound, because the income of every audiovisual performer is dependent on the revenues generated by the exploitation of copyrighted material. The vast majority of our earnings are directly derived from the copyright holders' revenues.

Early in my career, in 1974, the preponderance of the income that the producers of feature films realized from their work came from their initial release in movie theaters. Pictures lived or died, careers were made or destroyed at the theatrical box office. Almost no one had a videocassette recorder/player in his or her home.

The initial compensation paid to creators of feature films, in most cases, entitled the copyright holders to exploit the work in *theatrical* release "throughout the universe." So the only income most actors received from their work in films was their initial compensation, and, after 1960, occasionally some residual payments for

reuse of those films when broadcast on television. For TV programs, we might have received some residuals from reruns of our work on network TV (if we were lucky), or much smaller payments for reruns through syndication on independent TV stations.

Then half-inch videotape systems were introduced and a new way of exploiting audiovisual works began. The SONY Betamax system hit the market in 1975, and a year later, in '76, the Panasonic VHS VCR system arrived. Beta was high quality and very expensive, but had a maximum one-hour recording length and very few consumer features, while VHS was one-third the price, had up to four-hour recording times and was programmable. You could set up a VHS VCR to record your favorite show or movie, and it would turn itself on and off. Within ten years VHS had crushed Beta, and the videocassette rental and sales business was booming.

Concurrently, cable TV was spreading slowly throughout the world. And with cable, in 1975, came the first premium channel, HBO, and direct delivery of very current theatrical motion pictures, live prizefights and other sports events that could be recorded and kept by viewers, but legally only *for their personal use*.

Video and cable created huge new markets for copyright holders—producers, studios, distribution companies and networks—and subsequently for creators of film and television works. Each of the unions representing the performers, writers, directors, composers and musicians fought and won rights from our employers to receive additional compensation for the use of our work in these new markets that were supplemental to the initial markets for which the works were made.<sup>3</sup>

Early on, this new income stream was just that—supplemental. But in the past 40 years, these supplemental uses have gone from being minor, to representing 30% of total motion picture income 20 years ago, and to over 75% of the total income now.<sup>4</sup> So, the initial compensation we receive for our work is now less than one-third of the compensation for which we have negotiated.

Under SAG-AFTRA collective bargaining agreements, the vast majority of payments for supplemental market use of our work are determined through revenue-based formulae, based on various percentages of producer's or distributor's gross, and are therefore dependent on the revenues that have flowed to our employers.<sup>5</sup> So, in a nutshell, *we* get paid if and when *they* get paid.

Every dollar that is lost to copyright infringement, misappropriation and outright theft of audiovisual works in which we have participated means a proportionate loss of income to me and every other performer who worked on that job, as well as the writer, director, cinematographer, composer and musicians.

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3. See generally Archie Kleingartner & Alan Paul, *Labor Relations and Residual Compensation in the Movie and Television Industry*, 10–11, 25 (UCLA Inst. of Indust. Relations, Working Paper No. 224, Mar. 1992), available at <http://perma.cc/5U8N-96LK>.

4. See Brief for American Federation of Television and Radio Artists et al. as Amici Curiae Supporting Plaintiffs, *Viacom v. YouTube LLC*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 07 Civ. 2103(LLS)), 2010 WL 2333941.

5. See, e.g., *Principal Performers: Residuals (Use Fees)*, SAG-AFTRA, <http://perma.cc/K6XN-P8UY> (last visited Jan. 24, 2015).

The making of a film or a television show is a tremendously collaborative undertaking. Scores, if not hundreds, of people contribute their talents to every film and TV show. And we all depend on the U.S. copyright system and international treaties to protect our work and our livelihood. Our income is under extreme threat from digital theft, directly and indirectly. U.S. audiovisual copyright holders lose billions of dollars each year as a direct result of digital theft.<sup>6</sup> And a percentage of every one of those dollars is lost to the actors who appear in those supposedly protected works.

Just one example: *The Hurt Locker*, a tremendously successful, critically acclaimed, Academy Award winning film, made almost no money at the box office. Why? Because a digital version of the film was stolen and posted on websites all around the world . . . before the film ever opened.<sup>7</sup> That experience and similar digital thefts of other big films changed the way films are now released.

The film industry has shifted its business model in large part to huge blockbuster action, science fiction and fantasy films, much of which incorporate formats such as IMAX and 3D in their initial release. The thinking is that if you can give the people an experience they cannot possibly get at home, they will come to the theater and pay, even if there are stolen versions available on the web. And if you have a smaller, more intimate film—like *The Hurt Locker*—the strategy now is to open it in thousands of theaters simultaneously, so hopefully you can get a solid week or two of release and take in as much money as possible before the stolen copies flood the online space and kill your box office.

In addition, this change in business practice in reaction to the massive amounts of digital theft in recent years has had a substantial effect on which and how many films are produced. Fewer films are made for initial distribution in theaters because the costs of producing huge spectacles filled with computer-generated effects is very high. As a result, not only are fewer theatrical motion pictures being made, but also the percentage of films that are large budget films is much higher than it had been in the past. The greater average costs per film have increased the stakes and the resulting pressure to produce films that will result in blockbuster box office receipts. Therefore, the diversity of content in the U.S. film industry has been reduced in proportion to the growth of digital theft and distribution of copyrighted feature films. And the fewer theatrical motion pictures that get made, the fewer jobs available for U.S. actors.

And that is illustrative only of copyright infringement's financial impact and its effect on employment opportunities. There is another manner in which digital recording of audiovisual works and the theft of those works has negatively impacted actors: the theft of our performances, likenesses and voices to make new unauthorized works.

In order to enforce a copyright and halt infringement, one must actually hold the

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6. STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY (2007), available at <http://perma.cc/UT6L-ZFTF>.

7. *How Internet Pirates Stole The Hurt Locker's Bounty*, HOLLYWOOD.COM, <http://perma.cc/FJX3-PE94> (last visited Jan. 24, 2015).

copyright in question. That fact is leaving actors unprotected in the digital world. An actor's work may be stolen and repurposed as an unauthorized clip that is separately distributed. Or her work might be "mashed-up" into an entirely new work, which mixes her performance in with other material, or reedited in such a way so as to create comedic, prurient or other distortions of the original intent of the filmmakers and the actors.

In such cases the damage to the underlying work might be considered by the copyright holder to be insignificant, such that while there may be a clear case for infringement the copyright holder has no interest in pursuing the violator. The actor, however, may consider the infringement to be highly damaging to her reputation and wish to take action to halt distribution of the infringing work, have it taken down from any websites on which it may be accessible, and possibly seek monetary damages. But, under current law, while the actor has an economic and personal interest in enforcing against this unauthorized use, she lacks legal standing.<sup>8</sup> And the entity that has legal standing has no such interest.

Of course such infringements could have theoretically existed in the analog world, but the time and skill necessary to create such unauthorized works and the complete lack of a system through which to "publish" and distribute them rendered such works virtually nonexistent. In the digital world, anyone with access to the Internet and a computer or other device could produce and distribute such an infringing "work" in a matter of hours, or even minutes.

Of course, if there is a use of her persona, name, likeness or voice for *commercial* purposes then the actor might find some relief through a right of publicity action.<sup>9</sup> But much of the time these misappropriations of actors' work do not involve commerce but rather are distributed for free through the Internet, and it is generally much more difficult for plaintiffs to successfully sue such noncommercial speakers under the right of publicity.<sup>10</sup>

Once again, the issues raised here flow primarily from an evolution of

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8. This is the general view among U.S. courts. However, one recent Ninth Circuit panel found likely a protectable joint authorship in an acting performance. *Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir. 2014). The Ninth Circuit granted an en banc rehearing on November 12, 2014, and the decision was pending at the time this Article went to print. *See Garcia v. Google, Inc.*, 771 F.3d 647 (9th Cir. 2014); *Status of En Banc Cases*, U.S. COURTS FOR THE NINTH CIRCUIT (Mar. 27, 2015), <http://perma.cc/5J8R-LNB6>. Note that the fact pattern in *Garcia* is quite specific and varies from the scenario being discussed in this Article.

9. *See, e.g.*, CAL. CIV. CODE § 3344(a) (West 2014) (statutory right of publicity protecting "name, voice, signature, photograph, or likeness" against uses "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services"); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2014) (providing a cause of action when a person's "name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade" without the person's written consent). *But see Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348–49 (S.D.N.Y. 2002) (explaining that art, even for-profit art, is not within the scope of the New York right).

10. *See generally* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995) ("The right of publicity protects the commercial value of a person's identity."); Jennifer E. Rothman, *Commercial Speech, Commercial Use and the Intellectual Property Quagmire* (Oct. 10, 2014) (unpublished manuscript) (on file with Columbia Journal of Law & the Arts).

technology and a failure of the copyright law to adequately address these new—or greatly intensified—issues and protect those who may be harmed by the growing amounts of infringement made possible by digital technology.

What may be needed in this case is a new concept: a strictly limited, *shared* copyright status. This would require a method by which the copyright holder would be able to *share* a limited copyright status with the actor so even when the copyright holder has no interest in enforcing the right, if the actor does, she could use this limited, *shared* status to do so.

All of these technological changes that require the strengthening and reexamination of our copyright regime have happened within the span of at least one actor's career—mine. And, unfortunately, though the technology for producing, distributing and consuming audiovisual work has changed enormously over the past forty years I have been doing this work, the law and the systems to protect those who rely on copyright have lagged well behind. Unless any changes that are made to the Copyright Act and the legislation that is needed to comply with the Beijing Treaty<sup>11</sup> take into account these advances in technology and changes that are just over the horizon, our copyright system for audiovisual works will be ineffective, and eventually beside the point.

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11. See Beijing Treaty on Audiovisual Performances art. 4–16, June 4, 2012, 51 I.L.M. 1214 (2012); see also Aaron X. Fellmeth, *Beijing Treaty on Audiovisual Performances, Introductory Note*, 51 I.L.M. 1211 (2012) (giving an overview of the relevant terms of the Beijing Treaty).