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# Streaming Wars and ACE: Screen and Content Competitors but Friends against Piracy and Copyright Infringement

BY [ROBERT SISTOSO](#)/ ON NOVEMBER 30, 2019



Apple TV+ launched on November 1, 2019 and features A-listers and creatives, such as Steve Carell, M. Night Shyamalan, Steven Spielberg, and J.J. Abrams. Subsequently, Disney+ launched on November 12, 2019 and boasts an impressive library of nostalgia-invoking and ubiquitous content from Disney, Pixar, Marvel, Star Wars, and National Geographic. Remarkably, Disney+ surpassed 10 million subscribers on its launch day.<sup>[1]</sup> NBCUniversal's streaming service Peacock launches on April 2020 and HBO Max launches in May 2020. Not to be made irrelevant, Netflix struck deals for NBC's *Seinfeld* and to distribute and develop Nickelodeon's library.<sup>[2]</sup>

Though the launches of highly anticipated streaming services and the release of new content have excited the Streaming Wars, there remains an underlying (and growing) problem with content fragmentation. To illustrate, NBC's *Friends*, *Seinfeld*, and *The Office* – three of the most popular sitcoms in the modern American zeitgeist – are all going their separate ways. In order to watch *Friends*, one requires an HBO Max subscription; in order to watch *Seinfeld*, one

requires a Netflix subscription; and to watch *The Office*, one requires a Peacock subscription. As the competitors in the Streaming Wars each vie to each become a mainstay on consumer screens and credit card bills, divided access to content and costs present potentially prohibitive barriers. With piracy constantly looming, such barriers often induce consumers to explore illicit alternatives to binge their shows and watch new films. And it is this threat of piracy and copyright infringement that has been an intensifying concern for producers and distributors of streaming content.<sup>[3]</sup> As streaming services are beginning to launch in full, piracy continues to impose immense losses for entertainment industries and the United States economy, with estimations of at least \$29.2 billion and as much as \$71 billion in lost revenue per year.<sup>[4]</sup> Cord-cutting consumers have increasingly moved from cable to streaming content on the Internet and this development has been hastened by technologies such as smart televisions, set-top boxes, and Internet Protocol television (IPTV).<sup>[5]</sup> Indeed, as technology has become more sophisticated in the modern digital streaming age, so too have the technical methods that facilitate piracy and infringement.

Central to television broadcast and streaming space is the United States Supreme Court's 2014 decision in *ABC, Inc. v. Aereo, Inc.*<sup>[6]</sup> In that case, several television producers and broadcasters sued Aereo, a subscription service that allowed users to stream time-shifted television broadcasts, for copyright infringement.<sup>[7]</sup> The decision proactively resolved a potential circuit split between the Second Circuit and Ninth Circuit on the issue of whether uniquely private transmissions of copyrighted broadcasts to individuals constituted unlawful performances under the Copyright Act.<sup>[8]</sup> The Supreme Court determined that Aereo effectively operated like a cable system in its broadcast retransmission operations.<sup>[9]</sup> Specifically, the Court rejected Aereo's argument that each broadcast retransmission was received by only one subscriber and thus did not constitute a public performance under the Copyright Act.<sup>[10]</sup> The Court held that notwithstanding Aereo's one broadcast to one subscriber retransmission process, Aereo's "retransmitting [of] a television program using user-specific copies is a 'process' of transmitting a performance" and that its subscribers sufficiently constituted the public.<sup>[11]</sup> Thus, Aereo's retransmission broadcasts were public performances of copyrighted works.

While start-ups and technology companies innovate in other industries, *American Broadcasting* demonstrates that television ventures such as Aereo are unlikely to circumvent copyright protections no matter how technologically and legally convincing its broadcast or streaming method may seem. For example, Rabb.it was a relatively popular online video streaming application where users could effectively host a chat room and watch content together.<sup>[12]</sup> Although the service shuttered earlier this year, it would have inevitably faced legal challenges. Rabb.it displayed copyrighted works such as films or television episodes to a subset of the public, putting its operation in the hairlines of copyright holders' exclusive right to display their works publicly.<sup>[13]</sup> However, § 101's definition of what constitutes a "public" performance may provide an exception for prospective streaming services akin to Rabb.it: "to perform or display it at a place open to the public or at any place where a substantial number

of persons outside of a normal circle of a family and its social acquaintances is gathered.”[\[14\]](#) Though there may be merit for this interpretation, it is highly unlikely to be adopted by courts given that Internet strangers are not the sort of “social acquaintances” Congress probably had in mind. Furthermore, streaming services that share digital access to content as such usually have not acquired licenses for the copyrighted works or have not attained their copies lawfully. Nevertheless, streaming and file sharing services providing similar functions as Rabb.it continue to operate. Plex provides hosting software such that users can retain their content – films, television episodes, music, and other videos – in one central depository on their computer or hard drive.[\[15\]](#) Via the Internet, they can stream their content from other devices and computers. However, they also allow users to share their depositories and the content therein with other users. Kast, Rabb.it’s successor, provides a similar functionality as it allows user to host “parties” where “you can watch your favorite movies and shows, play and share games, and spend time with friends.”[\[16\]](#)

As entertainment and telecommunications industries face more and more consumer cord-cutting and as the Streaming Wars kick off, many entrepreneurial efforts are attempting to capture the cable or satellite subscribers converting to digital steaming and IPTV in lawful and unlawful ways. In order to combat infringers and preserve intellectual property rights on this front of piracy, a group of entertainment, media, and telecommunication companies formed the Alliance for Creativity and Entertainment (ACE) in 2017.[\[17\]](#) ACE is a cooperative composed of major entertainment companies including NBC, ABC, Fox, Amazon, the BBC, Disney, Hulu, Lionsgate, MGM, Netflix, Sony, and WarnerMedia, several of whom were plaintiffs in the *American Broadcasting* case against Aereo.[\[18\]](#) The number of members continues to grow as Viacom and Comcast have recently joined ACE.[\[19\]](#) ACE have filed lawsuits against numerous entities engaged in online piracy and copyright infringement. In February 2019, ACE filed a copyright infringement complaint against content streaming provider Omniverse One World Television, Inc. claiming that Omniverse “transmits streams of unauthorized movies and television programs... to numerous downstream services” and seeking damages and injunctive relief to shut down Omnia’s infringing operations.[\[20\]](#) Omniverse had falsely represented that it had licenses with the respective copyright holders of the works it streamed, and falsely claimed that it had license to sublicense its rights to other TV streaming services such as SkyStream, MiloTV, and ExchangeVue through set-top boxes and other network appliance devices.[\[21\]](#) On November 14, 2019, ACE prevailed on its claim, receiving \$50 million in damages and its requested permanent injunction against Omnia.[\[22\]](#)

Similarly, ACE has pursued lawsuits against several “downstream services” in the form of IPTV providers and hardware distributors. ACE has won permanent injunctions to shut down unlawful IPTV businesses SetTVNow and TickBox that streamed unlicensed copyrighted content through set-top devices.[\[23\]](#) ACE also filed suit against IPTV distributor Dragon Box for mass producing and selling network appliance devices that enabled “mass theft and illegal distribution of copyrighted” content, but reached a settlement agreement.[\[24\]](#) ACE has also

filed lawsuits against more general file hosting and sharing services, which host unlawful copies of movies and films on their servers. Such hosting services subsequently allow playback and download by embedding or inline linking on pirated streaming sites, like FMovies or PrimeWire. File-hosting services OpenLoad and StreamMango accounted for a remarkable amount of pirated content, as OpenLoad itself operated one thousand servers in Europe and provided infringing works to “72% of the top 50 illegal video streaming and linking sites in the world.”<sup>[25]</sup> Although ACE had ongoing litigation in Germany against OpenLoad, ACE recently announced its settlement with both OpenLoad and StreamMango to cease all operations.<sup>[26]</sup> Lastly, users of infringing works have also been targeted by copyright holders. While this is not a new development in piracy and intellectual property infringement,<sup>[27]</sup> a different issue in the Streaming Wars has surfaced – password-sharing. ACE intends to address “improper password sharing” although it is unknown exactly how ACE and other copyright owners will tackle the issue.<sup>[28]</sup>

While digital streaming and the Streaming Wars is an exciting time for consumers, it exacerbates piracy and intellectual property infringement issues. Technology and content fragmentation – different services and platforms, software, hosting and streaming methods, hardware, and licensing concerns – complicate intellectual property determinations of whether or not a business may be infringing. Does showing a movie in the park via an individual’s Plex account constitute an unlicensed and unlawful public performance of a copyrighted work? The answer would certainly be yes if I used a Dragon Box leased set-top box instead. Could an individual rip his Disney+ and HBO Max streams onto Kast and subsequently watch content with their subscription-less friends? Most likely not, but individuals can always fall back on sharing passwords. With IPTV businesses like TickBox, hosting sites such as OpenLoad, and pirated streaming sites like FMovies, the issue is that piracy and infringement are hydra-headed. When ACE or another copyright owner shuts down an infringing service, another one can – and will – pop up to replace it.

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<sup>[1]</sup> Julia Alexander, *Disney+ surpasses 10 million subscribers on first day*, The Verge (Nov. 13, 2019) <https://www.theverge.com/2019/11/13/20963172/disney-plus-subscribers-10-million-star-wars-marvel-pixar-launch>.

<sup>[2]</sup> Julia Alexander, *Seinfeld is heading to Netflix in 2021*, The Verge (Sep. 16, 2019) <https://www.theverge.com/2019/9/16/20868736/seinfeld-netflix-2021-hulu-friends-streaming-wars-launch>; Netflix, *NETFLIX AND NICKELODEON FORM MULTI-YEAR OUTPUT DEAL TO PRODUCE ORIGINAL ANIMATED FILMS AND SERIES FOR KIDS & FAMILIES AROUND THE WORLD*, Netflix (Nov. 13, 2019); <https://media.netflix.com/en/press-releases/netflix-and->

nickelodeon-form-multi-year-output-deal-to-produce-original-animated-films-and-series-for-kids-families-around-the-world.

[3] See *Global Entertainment Companies Join Forces to Launch the Alliance for Creativity and Entertainment to Reduce Online Piracy*, PR Newswire (June 13, 2017), <https://www.prnewswire.com/news-releases/global-entertainment-companies-join-forces-to-launch-the-alliance-for-creativity-and-entertainment-to-reduce-online-piracy-300472720.html>.

[4] David Blackburn, Jeffrey A. Eisenach, & David Harrison Jr., *Impacts of Digital Piracy on the U.S. Economy*, U.S. Chamber of Commerce Glob. Innovation Policy Ctr. (June 2019), <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.

[5] Brett Tingley, *14,000 Americans Are Cutting Cable Each Day*, Streaming Observer (May 7, 2019), <https://bgr.com/2019/05/09/cord-cutting-statistics-2019/>; Margaret Rouse, *Definition IPTV (Internet Protocol television)*, TechTarget (last updated March 2017), <https://searchnetworking.techtarget.com/definition/IPTV-Internet-Protocol-television> (IPTV is a method of broadcasting television over the Internet rather than through cable or satellite signals.); Bradley Mitchell, *What Is IPTV?*, Lifewire (May 19, 2019), <https://www.lifewire.com/what-is-iptv-817752>.

[6] *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 134 S. Ct. 2498 (2014).

[7] *Id.*

[8] Sam Hudson, *Private or Public? The Developing Circuit Split on Internet TV Retransmission*, Trademark & Copyright Law Blog (Sept. 17, 2013), <https://www.trademarkandcopyrightlawblog.com/2013/09/private-or-public-the-developing-circuit-split-on-internet-tv-retransmission/>.

[9] *Aereo, Inc.*, 573 U.S. at 442-444.

[10] *Aereo, Inc.*, 573 U.S. at 448-450; See 17 U.S.C. §§ 101, 106(4).

[11] *Aereo, Inc.*, 573 U.S. at 448-450.

[12] See Kris Wouk, *Rabbit TV promises a lot of TV for a little cash, but is it the real deal?*, Digital Trends (Feb. 16, 2018), <https://www.digitaltrends.com/home-theater/rabbit-tv-real-deal-or-swift-swindle/>.

[13] 17 U.S.C. § 106(4).

[14] 17 U.S.C. § 101.

[15] Eric Ravenscraft, *What is Plex?*, PC Magazine (Oct. 14, 2019), <https://www.pcmag.com/news/371278/what-is-plex>.

[16] *Kast Loves Rabbit, So We're Bringing the Best of Rabbit Into Kast*, Kast, <https://kast.gg/message-to-rabbit-community.html> (last accessed Nov. 19, 2019).

[17] *Global Entertainment Companies Join Forces*, supra note 3.

[18] *Ace Members*, Alliance for Creativity and Entertainment, <https://www.alliance4creativity.com/#Board-Member> (last accessed Nov. 19, 2019).

[19] George Bevir, *Comcast and Viacom join anti-piracy initiative*, IBC (Oct. 22, 2019), <https://www.ibt.org/consume/comcast-and-viacom-join-anti-piracy-initiative/5114.article>.

[20] Complaint, *Paramount Pictures Corp. v. Omniverse One World Television, Inc.*, No. 2:19-cv-01156 (C.D. Cal. Feb. 14, 2019).

[21] *Id.* at 8.

[22] Permanent Injunction, *Paramount Pictures Corp. v. Omniverse One World Television, Inc.*, No. 2:19-cv-01156 (C.D. Cal. Nov. 14, 2019).

[23] *Statement from ACE on Major Anti-Piracy Victory Over SetTVNow*, Alliance for Creativity and Entertainment (Aug. 1, 2019), <https://www.alliance4creativity.com/news/statement-from-ace-on-major-anti-piracy-victory-over-settvnow/>; *Court Orders Piracy Device Seller Tickbox to Stop Facilitating Access to Unauthorized Movies and Television Shows*, Alliance for Creativity and Entertainment (Feb. 14, 2018), <https://www.alliance4creativity.com/news/court-orders-piracy-device-seller-tickbox-stop-facilitating-access-unauthorized-movies-television-shows/>.

[24] *Ace Continues to Successfully Challenge Online Piracy with Dragon Box Settlement*, Alliance for Creativity and Entertainment (Jan. 28, 2018), <https://www.alliance4creativity.com/news/ace-continues-to-successfully-challenge-online-piracy-with-dragon-box-settlement/>.

[25] *ACE Action Prompts Pirate Giants, Openload and Streamango, to Cease All Operations*, Alliance for Creativity and Entertainment (Oct. 31, 2019), <https://www.alliance4creativity.com/news/ace-action-prompts-pirate-giants-openload-and-streamango-to-cease-all-operations/>.

[26] *Id.*

[27] Eriq Gardner, *Piracy Crackdown May Be Next Front in Streaming Wars*, The Hollywood Reporter (Nov. 5, 2019), <https://www.hollywoodreporter.com/thr-esq/piracy-crackdown-may-be-next-front-streaming-wars-1252309>.

[28] *Id.*