

# Online video streaming and the reproduction right

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## Introduction

It is uncontroversial that downloading a copyrighted video from the internet onto a computer hard drive is an infringement of the copyright holder's reproduction right. Less clear though, is whether a person who streams a copyrighted video is infringing the reproduction right. The question seems academic; it is highly unlikely copyright holders would seek out these individuals to hold them responsible. However, establishing the 'primary' infringement by these individuals may be significant in determining whether or not another, more prosperous, party can be held accountable for authorising the infringement. Despite the popularity of video streaming websites, there has been little authority on the legality of watching a video on the internet by streaming.

A plethora of websites now offer endless hours of video content to be streamed at no cost. YouTube, one of the largest streaming video websites, serves 800 million unique users a collective total of over four billion hours of video each month.<sup>1</sup> With the proliferation of video streaming websites, another type of site has arisen: the video bookmarking website. Instead of hosting the video files on their own server, a video bookmarking website allows users to 'bookmark' videos by posting links to videos hosted on video streaming websites like YouTube. Video links are then "embedded" into the video bookmarking website, creating a frame around the video and making the video bookmarking website appear as the originator. Other users are then permitted to watch the bookmarked video. However, when users watch the video, no data passes through the video bookmarking website's server; the connection is directly between the host of the video and the user.

'myVidster' is an example of a video bookmarking website. In August this year, the United States Court of Appeal for the Seventh Circuit held that the website did not infringe copyright when a user 'bookmarks' a video which is later viewed by other users.<sup>2</sup> While the Court considered a number of issues, a key finding was that myVidster was not indirectly liable because the user who streamed the

video was not actually infringing copyright as the user does not make a copy of the video.<sup>3</sup> Instead, a user who streamed copyrighted video content was likened to a person who steals and then reads a copyrighted book from a bookstore; a 'bad thing to do' but not an infringement of copyright.<sup>4</sup>

## How streaming works

Most video streaming websites will use a substantially similar technical process for transmitting content to users. After a user clicks on the play button, the video starts to be transmitted from the host server to the user. Generally, a 'buffer' will be employed to store video ahead of what is currently being played to minimize the video stopping and starting as the internet connection speed fluctuates. The storage of the video in the buffer will occur locally on the user's computer.

Intermediate websites, like myVidster, can "embed" these videos if the hosting video site supports it. This is not a novel feature and websites such as YouTube allow, and even encourage embedding; the relevant code to embed a video on an external website is provided underneath each YouTube video. It is significant that the intermediate websites that use this embedding functionality do not transmit any of the video content; they provide a frame for the external video to be loaded into.

It is submitted, however, that the detail of the streaming method may be critical to determining liability. The buffering function means that users can lose their internet connection and still watch the video already loaded into the buffer. In addition, some websites, like YouTube, may also store the entirety of the video on the user's local machine after one play-through to allow for instantaneous, offline playback and minimization of bandwidth usage ('Replay Functionality'). This would be much like downloading a video by making a copy on a disk drive. The applicability of this function may vary, however, since it does not appear to be triggered each time a video is played. If a user does not watch the entirety of the video or if they jump around to different positions in the video, it may not be activated and no complete copy of the video would be made. The idea of 'streaming', while largely

similar between video hosting websites, may differ in critical ways depending on each website's implementation and the users' habits.

### The reproduction right

The copyright holder of a cinematograph film has exclusive rights to make copies of that film.<sup>5</sup> The definition of a copy is quite broad, simply requiring an 'article or thing' in which the visual or audio components of the film are embodied.<sup>6</sup> It is clear that the portion of the video which is buffered and remains playable on the user's computer (even while offline) will be a copy. It may not be easily accessible outside of the browser like a traditional file, but the temporary file that holds this information still resides on the user's computer and is viewable through the video player until the browser is closed or a new page is loaded.

Of course, for a copy to be infringing, it must consist of at least a 'substantial' part of the film.<sup>7</sup> This requirement of substantiality is easily satisfied if the Replay Functionality is activated since the entirety of the video will have been stored on the user's computer. Far more uncertain though, is whether or not there is a substantial reproduction if, at any given point in time, the user only makes a copy of the portion of the video contained in the buffer. Substantiality of visual images and sounds is both a quantitative and qualitative assessment.<sup>8</sup>

The major hurdle will be evidentiary. Perhaps it may be possible to draw some inferences based on reasonable assumptions. If it is assumed that the size of the buffer is a fixed time and at least one user watches the entirety of the video, the question could be simplified to whether or not there exists a block of video (spanning the time of the buffer) throughout the entire video which could represent a substantial part. This seems like an easier question to answer but is still far from certain and may depend on other factors like the connection speed with the hosting server; slower internet connections may mean the buffer was not completely filled.

At present, there is little consideration of whether a user who streams a video over the internet will be making a copyright infringing copy. While the issue was not directly considered in *Optus v National Rugby League*,<sup>9</sup> Rares J found that users who streamed video did not store a copy in a 'permanent form' and that users' devices displayed data immediately as it was received and then discarded it.<sup>10</sup> The Full Federal Court, on appeal, highlighted this fact in support of their finding that it was Optus

(or Optus and the user jointly), rather than the user, who had made copies of the broadcasts.<sup>11</sup> Interestingly, QuickTime Streaming in Optus' infrastructure may have shed some light on this issue, but it was ultimately undecided.<sup>12</sup> The simplicity of the analysis in this case may reflect

the fact that it was not a critical issue; it may also reflect a belief, like in the *myVidster* case, that it is unnecessary to give more than a cursory consideration to the intricacies of streaming.

### Conclusion

The case law in Australia and in the United States reflects the need for a more detailed consideration of the different approaches to streaming. While the concept of video streaming may seem obvious and well established, the various implementations of it have come closer to traditional downloading than streaming. It would be inappropriate to dismiss the possibility of users being liable for viewing streaming video content without delving further into the technical details and carefully considering the evidentiary issues that arise.

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<sup>1</sup> YouTube, YouTube <[http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics)>.

<sup>2</sup> *Flava Works, Inc v. Marques Rondale Gunter, et al* (2012).

<sup>3</sup> *Ibid* 7-9.

<sup>4</sup> *Ibid* 7.

<sup>5</sup> Copyright Act 1968 (Cth), s 86(a).

<sup>6</sup> Copyright Act 1968 (Cth), s 10 (definition of 'copy').

<sup>7</sup> *Ibid* s 14(1)(b).

<sup>8</sup> *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, 293; *Roadshow Films Pty Ltd v iiNet Ltd*

(2011) 194 FCR 285, 439.

<sup>9</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300.

<sup>10</sup> *Ibid*, 314-5.

<sup>11</sup> *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147, 162.

<sup>12</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300, 334-5.