

Entertainment Law

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Film

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As connoisseurs of jazz know all too well, the surest way to turn the American public against something enjoyable is to declare it an art form, but there can be no denying that the Hollywood movie, at its best, is the most visible American contribution to the world's body of art. With its characteristic optimism and its ability to aim for the middle without sliding too far into sentimentality, the Hollywood film has helped create a positive international perception of the United States, directly or indirectly helped with both American exports and tourism to the United States, and nearly all the while managed to deliver robust profits.

In 2009, American movie revenues from all sources totaled nearly \$10.6 billion.¹ Although the trend has been generally upward, there have been fluctuations: slightly down the year before, up the year before that. The American movie industry, however, has been famously recession (and Great Depression) proof: when times are bad and you need a little cheering up, the movies have provided a relatively cheap form of the kind of immersive fun that takes you out of yourself.

Born of technological change (electric lighting and dry emulsion on celluloid film), the movies have found themselves challenged by further advances. The addition of sound in 1927 and the increasing use of color helped fortify the movies against the coming assault by television; later, and for much the same purpose, came wide screens and stereophonic sound, along with more esoteric modifications such as 3D and IMAX. Television has in turn given the movies something of a boost, with its shift from scripted dramas and comedies to subtly scripted reality programming that showcases the improvisational talents of nominal amateurs.

As with nearly every other form of expression (now termed by intellectual property lawyers the mere "provision of content"), the movies are facing their most formidable challenge

since their invention: their adoring fans. The weapon employed by fans that could potentially hobble or even bring to ground the beast they love is the personal digital device. Personal computers, laptops, notebooks, and iWhatever provide the biggest threat to the high numbers spent by, and generated by, the movie industry—and they do it with nothing more than the numbers zero and one, as formed into binary code.

The law has struggled to come to the assistance not only of Hollywood but other "providers of content." The Digital Millennium Copyright Act,² passed in 1998 and known by lawyers as the DMCA, has given aggrieved parties a method to stop piracy by presenting a Hobson's choice to Internet service providers and Internet hosts: either take down pirated content or be subject to litigation. The statute works, but in a counterintuitive way: the best defense is the ignorance associated with passive transmission; Internet service providers and hosts are generally wise to make sure that they remain largely unaware (up to a point) about the content of those using their facilities until receiving formal DMCA takedown notices.

Another method of protection has been the use of technology—the digital version of fighting fire with fire. One key tool has been digital rights management (DRM) software—basically an encryption code that wraps around content code and monitors its usage, blocking more copying than the owner allows.³ DRM appears to have fallen a bit out of favor, in no small part because it hasn't worked all that well. Several self-styled unbreakable codes have been broken within the space of a few days by professors, graduate students, and others.

Just to make the game more interesting, BitTorrent technology arrived in 2001.⁴ BitTorrent is a peer-to-peer file sharing protocol for uploading and downloading files that allows users to distribute large amounts of data while at the same time reducing demands on their computers. By logging onto a BitTorrent site, your computer pulls pieces of a movie or other content from the hard drives of many computers owned by other users and assembles the complete film from those scattered parts. Using BitTorrent technology, a movie may be broken into multiple pieces and reassembled elsewhere—as if you, thrown into the film *Terminator 2*, were to blast the evil machine to pieces, only to see those parts reassembled right before your eyes. The division and scattering of the infringed content into chunks of code stored in multiple locations turns attempts to stop determined piracy into technical and legal scavenger hunts.

The technological changes of recent decades have sometimes been misconstrued as evolutionary. They were not; they were revolutionary. Never before in the course of human experience has it been possible for the average person, using materials available to the typical household, to produce a perfect copy of expensive and sophisticated audio-visual content. Even the VCR, that earlier-perceived nemesis of Hollywood (later understood more correctly as a source of new revenue), could only produce a next-generation copy: VCR

tapes looked like what they were—degraded copies. A consumer-made copy of a movie on a disk, however, suffers no loss of quality for the effort.

Another problem is that the law is, in the end, only as good as the moral underpinnings that promulgate and enforce it. You can draft all the legislation you want. You can take the course of the Recording Industry Association of America (RIAA) and others have taken and sue and thereby make examples of some of the more egregious consumer malefactors; but if you don't have the hearts and minds of consumers on your side, you are going to experience the mutiny that popular music has experienced: consumers will ignore you and, secure in their belief that they are right, steal what you have offered to sell them at even modest prices.

With relatively few (but important) exceptions, you indeed violate the copyright law when you make a perceivable copy of legally protected expression owned by another. The public has been told by lawyers and copyright owners that copying a favorite song, video game or movie is just like walking into Wal-Mart and shoplifting a bottle of shampoo. They don't believe it, and they are right. It is actually like walking into Wal-Mart, picking up the shampoo bottle, using a little black magic to conjure up a perfect copy, putting the original back down and walking out with the copy. True, Wal-Mart keeps the original bottle, but it just lost the sale. You've used its facility to get around the purchase, thereby injuring Wal-Mart and its vendor. Should that new black magic, still not possible with shampoo but easy to achieve with films, be seen as morally correct? Apparently so, to judge by the indifference with which the public increasingly greets owners' pleas that it pay for the pleasures it so readily duplicates and shares.

Just as moral standards have slid, a simultaneous business-related shift has moved revenue from content providers to the providers of the hardware and connectivity by which digital access and piracy both occur. Year after year, the average American consumer can spend thousands of dollars on electronic devices, software, wired and wireless linkage, and maintenance, support, and servicing. The sellers of those products and services, from the sources of raw materials to retail vendors, are making good money. Once you've paid for all that, it is perhaps only human to believe that, whatever the equipment that you bought and paid for can deliver is yours to be had for nothing—just like what you get on your television and radio. The Internet, originally built to satisfy military and academic needs⁵ and only later taking on its now-famous .com commercial attitude, obliges piracy through the way it is configured: it makes unauthorized data access and duplication free and easy. Because the public has been given to understand that whatever comes through the Internet and other digital instrumentalities is theirs for free, good luck to the lawyers and marketers who hope to convince them otherwise. Just ask any copyright attorney: he will probably admit he can't even stop his own children from doing it.

The major hurdle that most consumers have faced in downloading films with near impunity has not been anything imposed by the industry or the operation of law. It arises from the inherent weakness of small digital devices: because they are small, and because they use standard consumer technology for connectivity, it can take a bit of time to find, download, and assemble large digital files such as a Hollywood feature film. But technology is about improvement: just a few years ago, using a dial-up modem, it would have taken me about half a day to download a complete movie. At the 18.30 megabytes per second transfer speed at which Time Warner Cable clocked my connection this month, it shouldn't take me much longer than the time needed to brew a pot of tea.

Because of what happened to record labels and the proprietors of shorter video content such as news clips and television shows, Hollywood has been given the dubious honor of seeing its future in what befell those who came before—that is, those whose revenues were derived from content distributed on smaller files. The feeling, when you talk to movie executives, is a bit like standing on a sinking ship and watching those who are already in the water being diced by sharks into bite-sized snacks. The people off the ship first in this case were record executives. When your livelihood depends on a three-minute pop song (average file size, about three megabytes, as compressed into the readily downloadable MP3 format), you will indeed feel it earlier. The RIAA has put the global loss to music piracy at \$12.5 billion per year,⁶ with over seventy-one thousand jobs lost in the U.S. alone, although that is presumably measured to a fair extent against the record-package-and-sell business model that consumer-controlled copying has largely obsoleted.

Fortunately for the musicians, record labels, and indeed, the history of music, music does not need to be recorded to be appreciated. Music started as a live medium: from live it came, and to live it is now returning. With the possible exception of work by The Beatles and a few others in rock's second and greater golden age (the late nineteen sixties), no recording ever replaced the excitement and delight of a live concert in any genre. Once artists and executives became almost, if squeamishly, comfortable with the idea of making little or nothing on records, and once the record labels learned to dig into their artists' pockets for a chunk of revenue from live performances and from merchandise and other ancillary products and services, the record industry found a way to survive, if a bit humbled. (When was the last time you heard the term *rock star* used as a synonym for "revered artist of unrivaled personal excess"?)

Except for parts of New York City and a few other spots, film effectively trumped live dramatic performance in America a good while ago. Moviemakers since D.W. Griffith have understood that the screen-projected replacement is a different dramatic medium than the live stage—in the way it is acted, in the method of storytelling, and in who is perceived as having given the greatest creative imprint (the playwright on one hand and the movie director on the other).

The current U.S. Copyright Act was enacted in 1976,⁷ the year that Apple released the first practicable home computer, the Apple I.⁸ Like Grandma after being told by her doctor she needs to supplement her bridge game with a gym membership, the law has been wheezing under its new obligations ever since. Despite the criminal conviction of its founders, the Swedish BitTorrent site www.thepiratebay.com continues to thumb its nose at the movie industry and others, posting the DMCA takedown notices it receives along with snide interlineated comments, and offering pirate-ship T-shirts for sale to its devoted international following. In the old days of a few years ago, you had to go to Sweden to bring something back from Sweden; now, you just give it a good swift left click.⁹ As the BitTorrent brigands like to remind their correspondents, copyright law is territorial, and the DMCA doesn't apply to Sweden. That's not a correct application of law concerning content that reaches and infringes in the United States, but the whole point about piracy is that it doesn't care about the application of law.

In light of the comparative helplessness of business, the law, and morality, what, if anything, can save the big-budget, profit-making feature film? The answer may lie in something else that is uniquely American: suburban sprawl.

American culture is about what is big, and Hollywood budgets and production values are very big. A new generation, however, has taught itself to see big movies on small screens (something purists of a certain age still abominate). The greater the reliance on digital distribution, the greater the percentage of piracy; big budgets still need theatrical exhibition to justify themselves, and that will likely continue into the near and perhaps distant future. But Americans, with their capacity for exaggeration, grabbed hold of the dream of their British forebears for a country house on land of one's own and twisted it into its affordable manifestation: the suburb. Except for rare holdouts like New York and San Francisco, where the charms of urban living entice the middle-plus classes to stay, most American cities fell into everything from torpor to downright blight as taxpayers vacated for their own tufts of green. Few hastily fabricated suburbs had an opportunity for, and apparently had little interest in, developing an indigenous culture; if you were to be dropped blindfolded into a shopping mall anywhere, you would undoubtedly have difficulty, from the familiarity and uniformity of the stores and restaurants, in figuring out where you were.

That created a problem for that other great American institution: date night. Those rock and pop acts that can't make any real money from their records may have to tour more often, but with tickets selling for hundreds or even the thousands from the scalper sources that end up the typical default distributor, your average guy on a date has to be pretty lonely or pretty much in love to put down money for a concert by a top performer. The movies, however, remain the readily available and relatively inexpensive source of date-night pleasure. Consider it from the home entertainment point of view: why else would so many people with so many electronic devices continue to go out of their way to have someone

else project software for them without even a bathroom break? Even if technology arrives that allows the average person to download an entire film within a relatively short period of time, and even if public perceptions make no shift toward a sense of guilt in doing so, there will always be the need for something for young couples and friends to do when they go out on a weekend night. And as long as nothing more interesting invades suburban life, if exhibition profits and whatever else can be generated by digital distribution continue to keep enough films in the black, good American movies will continue to be made. It may be a gamble to continue to bet on that, but the American film, long before it became an art form, was always a gambler's medium.

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¹ See Box Office Mojo, Yearly Box Office, available at <http://boxofficemojo.com/yearly/>.

² Digital Millennium Copyright Act, [Pub. L. 105-304](#), [112 Stat. 2877](#) (1998) (codified as amended at [17 U.S.C. §§ 512](#), [1201-1205](#)).

³ See, e.g., Screen Actors Guild, New Media Glossary, available at <http://www.sag.org/content/new-media-glossary> ("Digital Rights Management (DRM) – is a collection of systems that attempts to control how content is used. In its most basic form, think of DRM as a lock and key. Content that is protected by DRM is put in to a lock box and only authorized users have the key to open the box."). See also Electronic Frontier Foundation, Digital Rights Management, available at <http://www.eff.org/issues/drm> ("DRM can prevent you from making back ups of your DVDs and music downloaded from online stores, recording your favorite TV programs, using the portable media player of your choice, remixing clips of movies into your own home movies, and much more.").

⁴ See, e.g., BitTorrent, BitTorrent Secures \$20 Million in Venture Capital, available at <http://www.bittorrent.com/pressreleases/2006/11/30/bittorrent-secures-20-million-in-venture-capital> ("When I created BitTorrent in 2001, my mission was to solve the problem every website has when distributing large, popular files," said Bram Cohen, CEO and Co-Founder of BitTorrent.). See also, BitTorrent/Users, What is BitTorrent, available at <http://www.bittorrent.com/btusers/what-is-bittorrent> ("BitTorrent is a protocol (a set of rules and description of how to do things) allowing you to download files quickly by allowing people downloading the file to upload (distribute) parts of it at the same time.").

⁵ See, e.g., Internet Society, A Brief History of the Internet, available at <http://www.isoc.org/internet/history/brief.shtml#darpa>, stating:

The first recorded description of the social interactions that could be enabled through networking was a series of memos written by J.C.R. Licklider of MIT in August 1962 discussing his "Galactic Network" concept. He envisioned a globally interconnected set of computers through which everyone could quickly access data and programs from any site. In spirit, the concept was very much like the Internet of today. Licklider was the first head of the computer research program at DARPA [Defense Advanced Research Projects Agency], starting in October 1962.

⁶ See Recording Industry Association of America, Frequently Asked Questions, available at

<http://www.riaa.com/faq.php>:

One credible analysis by the Institute for Policy Innovation concludes that global music piracy causes \$12.5 billion of economic losses every year, 71,060 U.S. jobs lost, a loss of \$2.7 billion in workers' earnings, and a loss of \$422 million in tax revenues, \$291 million in personal income tax and \$131 million in lost corporate income and production taxes.

⁷ U.S. Copyright Act, [Pub. L. 94-553, 90 Stat. 2541](#) (1976) (codified as amended at [17 U.S.C. §§ 101 et seq.](#)).

⁸ See [The Scream Online, Apple History](#), *available at* <http://thescreamonline.com/technology/applehistory/applehistory.html>:

On April 1, 1976, the Apple computer was born. Steven Wozniak, a high school drop-out who worked for Hewlett-Packard, dabbled in computer-design and created what would become the Apple I. His high school buddy Steven Jobs, also a drop-out, worked for Atari and convinced him that the two should form a company to market the new computer, which eventually took off in 1977 with the Apple II. By 1980, the Apple III was released and their company employed several thousand workers.

⁹ Kultur & Nöje, [The Pirate Bay Sentenced to One Year in Prison](#), April 17, 2009, *available at* <http://www.dn.se/kultur-noje/musik/the-pirate-bay-sentenced-to-one-year-in-prison-1.846915>.