



LIVE VIDEO-STREAMING APPS POSE LEGAL CHALLENGES FOR CONTENT OWNERS

by James L. Johnston

Although people have been using smartphones to shoot videos they share on social-media platforms for some time, live video-streaming apps are bringing sports, entertainment, and media events to mass audiences like never before.

Since Meerkat emerged on the scene as the darling of the 2015 South by Southwest Interactive conference, the media and marketing communities have been buzzing over the potential and pitfalls of live video-streaming apps. That buzz reached a fever pitch in May when the highly anticipated boxing match between Floyd Mayweather Jr. and Manny Pacquiao became the first high-profile live sporting event to suffer a blow from rampant piracy on Meerkat and its competitor, Periscope.

To date, the reaction of copyright holders has been somewhat muted. In the case of professional sports leagues, reaction seem to be divided: The National Hockey League has sought to limit the apps' use, but Major League Baseball has indicated that it will not prohibit fans from using them. Journalist Stephanie Wei reported that her media credentials were revoked by the PGA Tour for the remainder of the season after she used Periscope during a practice round at the WGC-Cadillac Match Play Championship, while the National Football League allowed journalists to live stream the annual amateur draft.

CURRENT TOOLS

The takedown procedures of the Digital Millennium Copyright Act (DMCA) are intended to provide tools to copyright owners to remove unauthorized exhibition of copyrighted content. But these tools may not be enough.

The DMCA requires service providers to respond "expeditiously" to remove or disable access to allegedly infringing material. It is already a challenge for owners of substantial libraries to ask YouTube to remove a video of a prerecorded concert, movie, or television program that is tagged with YouTube's Content ID system. However, it is a challenge of a completely different magnitude for a rights holder to ask Periscope or Meerkat to remove a streaming video of an event that is occurring at that very moment, which may have ended by the time the rights holder discovers the infringement or the app provider is able to comply. Periscope confirmed that it received 66 complaints of unauthorized streaming of the Mayweather-Pacquiao fight and removed 30 of them. The remaining streams had finished before Periscope was able to deal with them.

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Some believe that the video-streaming experience is not compelling enough to lure audiences away from an entire sporting event in significant numbers. But it is important to remember that Periscope and Meerkat are still in their infancy, and it is not difficult to imagine that the user experience will dramatically improve over time. With improved cameras and higher resolution streaming, Periscope and Meerkat could easily find themselves right next to Netflix on connected flat-screen televisions.

Even if audiences are not ready to watch an entire live event via Periscope or Meerkat, there is still substantial harm from the loss of surge viewership. Casual fans may tune in to a broadcast only when something momentous is likely to happen—such as a pitcher going into the ninth inning with a perfect game or a quarterback driving his team in the last two minutes of the fourth quarter. This surge of viewership can have a significant impact on overall audience levels for high-profile events. Periscope and Meerkat, though, provide convenient opportunities for those casual fans to view an unauthorized stream of that momentous event, depriving the rights holder of that surge in viewership.

CONTENT OWNERS' RESPONSE

If Napster and its progeny have demonstrated anything, it is that an intellectual property protection strategy focused principally on enforcement is a losing proposition. The current legal tools for enforcing intellectual property rights provide only limited remedies. It will be critical for rights holders to work closely with Meerkat and Periscope to develop technological tools to manage these risks. Even more importantly, rights holders must create a superior live-streaming experience for audiences to enjoy. With more and better angles and closer access to the action, rights holders can give audiences a reason to seek them out, instead of the stream from the fan in the upper deck.

DO NEW RULES APPLY? NOT REALLY

Every time a new technology or marketing technique arises, it raises questions as to whether new rules for clearances, disclosures, and regulatory compliance apply. In most cases, the answer is no. A new technology may require a different application of existing rules. But in almost all cases, those rules will continue to apply.

Live video-streaming apps present unique challenges in this regard. A marketer's Periscope stream is still a channel of marketing communications, so marketers should obtain consent from individuals appearing in these broadcasts. Because of their live nature, obtaining clearance from individuals appearing in the streams can seem daunting. But with some advance planning, these challenges are manageable. For example, designers and models can be precleared for fashion shows, and audiences appearing incidentally can be alerted to the stream in advance. Similar tactics can be used for award shows. As one example, for CoverGirl's BET Awards stream on Periscope last month, the company had existing relationships with the celebrities and artists that they featured.

Another key clearance challenge is music rights. The ability to live stream from an event does not necessarily convey the right to transmit the music from that event. For events organized by marketers, such as Target's fashion preview of the Lilly Pulitzer collection via Periscope, marketers should ensure that they have cleared any music they wish to use at the event for live streaming in addition to the event itself. For those events managed by others, such as the BET Awards, marketers should work closely with partners in advance, detailing any live-streaming needs and obtaining assurances that all music at the event will be cleared for use. Alternatively, the live stream should focus on activities at the event that do not feature music.

Each new technology also poses regulatory and disclosure challenges. While regulators may not announce specific guidelines for each new technology as it is introduced, they pay close attention to developing practices. The Federal Trade Commission and other regulators have turned their focus to social-media disclosures and will be looking at platforms such as Periscope and Meerkat closely. It is precisely the ability of these platforms to function as “content” rather than “marketing” that poses the risk of deception and draws the attention of regulators. So while a “clear and conspicuous” disclosure on Meerkat may look different than a similar disclosure on Twitter or Instagram, marketers must keep the underlying principles behind these disclosure requirements in mind and look to adapt their disclosure practices for live video-streaming platforms.

BOTTOM LINE

Live video-streaming apps offer opportunities and challenges for rights holders and marketers. Existing legal tools provide only limited protection for rights holders, such as professional sports leagues, broadcasters, and award-show producers, against the threats posed by the likes of Periscope and Meerkat. As these apps continue to develop, rights holders will need to look to technological tools and develop more engaging video-streaming content themselves to ensure their audiences’ loyalty.

For marketers, live-streaming tools offer exciting opportunities to connect with audiences around the world in new and immediate ways. But rushing into these platforms without contemplating the challenges they pose can place a marketer at risk of claims and sink a campaign.

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