



# Temporary Copies

## *Introduction*

As a decentralized web of networks, the Internet has delivered new distribution models for media content. Powerful content publishers feel threatened by these new models, because they claim a loss of control and profits from their copyrighted material. In order to regulate and reassert their control over reproductions of audio and visual media, the content industry is lobbying for provisions that would expand the definition of what a “copy” constitutes. In their view, this includes even temporary copies of copyrighted work, like copies in random access memory (“RAM”) memory. These proposed policies reveal a profound disconnect with the reality of the modern computer, and such transitory copies should not be covered by copyright at all.

Temporary copies are files that are automatically copied by computers (into RAM, onto a video hardware buffer, etc.) during the course of routine operations. “Temporary copying” of data is fundamental to how computing works in general, especially on the Internet. For example, online videos are buffered in memory in order to play smoothly, browser cache files are stored on servers to speed up the loading of websites, and copies of visited pages are stored in a temporary Internet files folder on your hard drive, speeding up the loading process for those websites the next time you visit them. Since it’s technically necessary to copy a temporary version of everything we see on our devices, under the content industry’s theory anyone who ever views content on their device could potentially be found liable of infringement. In short, bringing temporary copies under copyright is very harmful policy.

## *Policy Background*

The United States has grappled with this problem for years through the judicial system.<sup>1</sup> US courts have considered whether the literal copy made by ordinary operation of a computer is sufficiently fixed in place to be subject to copyright, and—if it is—whether other exceptions and limitations apply. Recognizing that a strict interpretation of this rule would lead to unintended consequences, many US courts have correctly applied other exceptions and limitations, like the fair use doctrine or implied licenses, which greatly helped prevent unjust results, and allow ordinary operation without giving veto power to the copyright holder.

Language in proposed international IP agreements, like the Trans-Pacific Partnership (TPP), seek to undo these years of positive development, and impose the most extreme version of the controversial rule without requiring the accompanying exceptions and

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<sup>1</sup> For more details on the history of case law in the US see <https://www.eff.org/deeplinks/2012/07/temporary-copies-another-way-tpp-profoundly-disconnected>

limitation that are necessary to balance the law. In the US, the judicial system is working to refine and balance the problems with temporary copies, there is no reason an unbalanced policy should be pushed forward into international law as if it is settled policy.

### ***Negative Impacts***

A definitive and unbalanced international standard on temporary copies would not only create a new intricate layer of copyrights, it would impact the cost of accessing licensed content, as well as raise concerns about how this provision could affect privacy. Without further clarity, such language on temporary copies could require licenses for every single copyrighted file that passes through a device.

In practice, safe harbors must also be provided for Internet intermediaries like Internet service providers, in order to shield them from crippling liability of their users' copyright infringement. Such protections are vital for companies hosting and storing user-generated content, such as a website like Wikipedia. Without a safe harbor provision, such language on "temporary copies" gives the content industry a right to shut down the innovation of others.

Worse yet, it is hard to say that other nations subject to such a provision would have the same ability to carve out such exceptions and limitations. In the TPP, for example, neither the content, the footnotes, nor any other part of the agreement, requires any balancing doctrines. Balancing doctrines have provided the US with the flexibility that has allowed the ordinary operation of computers, websites, and video streaming. Alone, the TPP temporary copies provision creates chilling effects not just on how we behave online, but also on the basic ability of people and companies to use and create on the Web.

### ***Examples of Impact***

- *Shutting Down Innovation:* a company could use this provision to shut down new businesses on the ground that the product relies on an infringing reproduction of content.
  - In the US, many innovative companies with new streaming video technologies have been sued out of existence.
- *Privacy Implications:* new technologies must be developed in order to track all transient copies of files, which would have profound negative effects on user privacy.

### ***EFF's Position***

Transitory/temporary copies should not be covered by copyright at all. Given how crucial the storage of "temporary copies" of digital files is to the functioning of our devices, the inclusion of unfettered provisions to regulate it is purely backward, especially given the supporters' failure to justify a legitimate purpose for imposing a

burden without a balance. Such provisions expand copyright restriction in a way that would unnecessarily expose a user to infringement liability. The content industry is losing the debate in the US courts, as more cases are finding applicable exceptions and limitations, such as fair use. But if the proposed strict temporary copies provision were to be adopted by another country that does not have similar fair use safeguards, it could play out much worse.

**Additional resources:**

- A New Perspective on Temporary Copies: The Fourth Circuit's Opinion in *Costar v. LoopNet* By Jonathan Band and Jeny Marcinko (2005): <http://stlr.stanford.edu/2005/04/a-new-perspective-on-temporary-copies/>
- [ArsTechnica](http://arstechnica.com/gaming/2009/01/judges-ruling-that-wow-bot-violates-dmca-is-troubling) on *MDY Industries v. Blizzard* and how the decision upheld that RAM copies of the software constitute infringement (under section 2): <http://arstechnica.com/gaming/2009/01/judges-ruling-that-wow-bot-violates-dmca-is-troubling>
- Temporary Copies: A TPP Provision Disconnected from the Reality of the Modern Computer: <https://www.eff.org/deeplinks/2012/07/temporary-copies-another-way-tpp-profoundly-disconnected>

**Case Law in the US**

Twenty years ago, in *MAI Systems Corp. v. Peak Computer, Inc.* a US appeals court held that temporary copies in RAM were infringing when a third-party computer repair technician loaded a computer program into memory. The US Congress quickly reacted, creating a new exception for copies necessary to run a computer program (17 U.S.C. § 117). However, over the following years, several courts relied upon this precedent to find that other temporary copies, like local caches of webpages, were subject to the Copyright Act.

Recognizing that a strict interpretation of this rule would lead to unintended consequences, many courts correctly applied other exceptions and limitations, like the fair use doctrine or implied licenses, which greatly helped prevent unjust results.

More recently, a line of cases has clarified the law for temporary copies. In *CoStar v. LoopNet*, another appeals court found that temporary copies that were qualitatively transitory were not subject to the Copyright Act. Subsequently, in the Cablevision remote DVR case, a different appeals court applied this reasoning to permit video buffering copies.

Thus, through the judiciary, the US legal system has provided the space for users and innovators despite the notion that a RAM copy would be subject to the Copyright Act.