



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

Before the
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Regarding
“The Scope of Copyright Protection”
January 14, 2014
Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.¹

The scope of copyright protection is an issue that regulates vast parts of the U.S. economy – industries and individuals that benefit from protection, as well as industries and individuals who depend upon copyright exceptions to engage in commerce and protected speech. The broad contours of this question are worthy of the Committee’s attention. Given the narrower focus of witness testimony at this time, this statement addresses only the specific issues of a right to ‘make available’ and the WIPO Broadcast Treaty. CCIA requests that this statement be included in the record of this hearing.

I. The Broadcast Treaty

The proposed World Intellectual Property Organization Treaty on the Protection of Broadcasting Organizations, conventionally referred to as the “WIPO Broadcast Treaty,” has been pending before the WIPO Standing Committee on Copyright and Related Rights (SCCR)

¹ A complete list of CCIA members is available at <http://www.cciagnet.org/members>.

for roughly a decade. Although some WIPO members initially favored a broad new system of neighboring rights, WIPO has more recently agreed to a signal-based approach for the instrument, acknowledging the risk of rights gridlock or licensing complexities that could result from new rights. The move away from the proposal to create a broad, 50-year long, *sui generis* intellectual property right in signals was prudent. A “neighboring right” with a long, post-fixation term inspired considerable controversy and concern regarding overlapping entitlements and exacerbated rights gridlock. While new rights confer benefits, they also impose substantial costs, and one of the last international exercises in new rights creation — the EU Database Directive — is regarded by many as a failure. Absent empirical study the net effect of new rights is unclear at best.²

CCIA has long expressed the view that it is unclear whether such a treaty is necessary. Treaty proponents have yet to articulate problems that the treaty would solve which cannot be remedied with existing copyrights — with the possible exception of real-time sporting events for which no protection is available. However, even in this case, copyright claims have successfully been made with respect to replays, logos, and on-screen graphics.

Further study of new neighboring rights should analyze whether new rights would (a) inadvertently create new liabilities for innocent third parties such as Internet service providers and intermediaries, device manufacturers, and software developers, and/or (b) empower broadcasters to control and restrict the private use of signals by lawful recipients. In any event, no instrument should extend beyond the intentional misappropriation of signals, nor should it apply to post-fixation transmissions, since such transmissions would already be regulated by the existing scheme of international copyright protection. To the extent any protection is provided, that protection should be subject to mandatory limitations and exceptions which ensure that actions lawful under copyright law are not rendered unlawful by the new broadcaster protection.

CCIA will continue participating in the ongoing stakeholder dialogue on this issue in Washington and Geneva.

² See generally Nat'l Academies of Science, *Copyright in the Digital Era: Building Evidence for Policy* (2013), at 8 (“Although copyright law’s efficacy and contours are amenable to empirical inquiry, systematically collected evidence using transparent analytical methods has not often been brought to bear”).

II. Making Available Right

The United States has long taken the position³ that U.S. copyright law is in compliance with its international obligation⁴ to have a “making available” right because of the combination of several of the existing 17 U.S.C. §106 rights: the reproduction right (106(1)) and the performance right (106(3)). Expanding the scope of U.S. copyright law by modifying § 106 is thus unnecessary. To the extent that a particular act ought to violate an author’s exclusive rights, but involves no volitional act transgressing Section 106(1) or 106(3), courts may, in appropriate cases, penalize defendants by resorting to theories of secondary liability.

While it is commonly understood that copyright is a strict liability statute, wherein even unintentional acts can give rise to liability, a *volitional act* is nevertheless necessary. A party cannot incur direct liability in circumstances wherein it took no action. In certain specific cases, a party may be held secondarily responsible for the acts of another, however. The line dividing these two cases is drawn by the requirement of a volitional act. In the online context, a system or service provider cannot be directly liable for infringement unless the service’s volitional acts caused the infringement. In cases where a service was involved, but the infringement resulted from the volitional acts of the user, the service may be liable only in cases where court-made secondary liability doctrines apply (and, under U.S. law, when the safe harbors of the Digital Millennium Copyright Act do not apply).

Accordingly, in the absence of a volitional act by the party “making available,” the “making available” right should be construed as a secondary liability violation of the author’s right, rather than as a direct violation of the distribution right or a new exclusive right encompassing “attempted distribution.”⁵ Construing the distribution right in this manner — to include not only distribution, but also “attempted distribution” — would be inconsistent with the

³ See, e.g., U.S. submission to World Trade Organization (WTO) Trade Policy Review Body in Response to Questions from Japan regarding Copyright Issues, WT/TPR/M/88/Add.1 at 121 (Jan. 8, 2002) (stating that “making available” right is provided under existing U.S. copyright law); accord U.S. submission to WTO Trade Policy Review Body in Response to Questions from Chile, WT/TPR/M/126/Add.3, Chile #4 at 140 (Nov. 22, 2004).

⁴ The “making available” right is derived from the WIPO Copyright Treaty, Art. 8 (1996) and the WIPO Performances and Phonograms Treaty, Art. 14 (1996). It is also found in Free Trade Agreements, such as the U.S.-Australia FTA, Art. 17.5 (2004).

⁵ When Congress has previously intended *offers* to constitute direct violations of a right in the Copyright Act, it has done so explicitly. See, e.g., 17 U.S.C. § 901(a)(4) (defining “distribute” to include “to sell” and “to offer to sell” or otherwise transfer).

statute and would impose substantial risks on online services, in a manner inconsistent with the DMCA liability limitations enacted by Congress in 1998.

Because passive “making available” does not involve a volitional act, imposing such liability would conflict with precedent on direct liability in several circuits. The volitional act requirement has been highlighted on numerous occasions, first in *Religious Tech. Center v. Netcom On-line Comm.*, 907 F. Supp. 1361 (N.D. Cal. 1995), and later adopted by in cases including *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), and *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). In *Netcom*, a case Congress explicitly endorsed when enacted the DMCA, the court explained that “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” *Netcom* at 1370. *CoStar* endorsed this, “conclud[ing] that *Netcom* made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct — specifically, the act constituting infringement — to become a direct infringer.” *CoStar* at 551. *Cablevision* similarly endorsed this requirement. “In determining who actually ‘makes’ a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct.” *Cablevision* at 131-32. To the extent courts have held otherwise, *see, e.g., Hotaling v. Church of Latter-Day Saints*, 118 F. 3d 199 (4th Cir. 1997), those cases should be understood as limited to their facts, or overturned by subsequent holdings such as *CoStar* and *Cablevision*.

There are sound policy reasons to construe making available in a narrow manner. The potential for abusive litigation on the basis of a “making available” right is far greater than under the existing contours of Section 106. Copyright trolls already bring extortion-like suits against individuals on the basis of infringement allegations — in one case manufacturing an elaborate scheme which, in the words of one federal judge, “outmaneuvered the legal system.” *Ingenuity 13 LLC v. John Doe*, Dkt. No. 12-8333, 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013). In a number of cases identified with a firm known as Prenda, several attorneys formed Ingenuity 13 and several other offshore entities, which held the copyrights to several pornographic movies and no other assets. These shell entities brought suit against individuals, threatened to make public the fact of litigation, and obtained millions in copyright infringement settlements due to the

sensitive subject matter and the availability of statutory damages, even though their claims were, in at least some cases, without merit.⁶

While incidents such as the Prenda matter demonstrate worrisome misuse of the copyright entitlement, their capacity for mischief is inherently limited by the fact that it is necessary to demonstrate, or at least allege, that some form of unauthorized access has occurred. A “making available” right would sweep away this hurdle, inviting litigation against individuals in cases where no one gained unauthorized access to a work. In fact, the potential for mischief could even extend to victims of cloud security breaches, who may unintentionally make lawfully acquired works available through no fault of their own.⁷

In sum, whatever conveniences might result from the capacity to state a claim on the mere basis of attempted distribution would be outweighed by the risk of mischief and litigation uncertainty. Because plaintiffs can adequately enforce their rights in “making available” contexts by employing existing theories of secondary liability, no reinterpretation or expansion of Section 106 is necessary.

⁶ Disciplinary proceedings resulted from various misdeeds by the principals of this scheme, including the underlying vexatious litigation, misrepresentations by counsel, failure to pay taxes on settlement income, and identity fraud related to the litigation. This trolling scheme ultimately led to multiple awards of attorneys’ fees and sanctions. Joe Mullin, *Prenda hammered: Judge sends porn-trolling lawyers to criminal investigators*, ArsTechnica, May 6, 2013, at <http://arstechnica.com/tech-policy/2013/05/prenda-hammered-judge-sends-porn-trolling-lawyers-to-criminal-investigators/>; *see generally*, Ars Technica series, *Who’s Behind Prenda Law?*, available at <http://arstechnica.com/series/whos-behind-prenda-law/>.

⁷ *See, e.g.*, Ted Sampson, *Dropbox fiasco serves as reminder of cloud-storage insecurity*, InfoWorld, Aug. 2, 2012, at <http://www.infoworld.com/t/cloud-security/dropbox-fiasco-serves-reminder-of-cloud-storage-insecurity-199197>.