

*Before the*  
Library of Congress  
United States Copyright Office  
Washington, DC

*In re*

Study on the Right of Making  
Available; Comments and Public  
Roundtable

Docket No. 2014-2

**COMMENTS OF  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the notice of inquiry published by the Copyright Office in the Federal Register at 79 Fed. Reg. 10,571 (Feb. 25, 2014), the Computer & Communications Industry Association (CCIA) submits the following comments, addressing certain questions regarding the subject of the “making available” right.

**I. About CCIA**

CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue.<sup>1</sup>

**II. Existing U.S. Copyright Law Adequately Covers “Making Available”**

*1(a). How does the existing bundle of exclusive rights currently in Title 17 cover the making available and communication to the public rights in the context of digital on-demand transmissions such as peer-to-peer networks, streaming services, and downloads of copyrighted content, as well as more broadly in the digital environment?*

The “making available” right is referred to in various international instruments beginning with the 1996 World Intellectual Property Organization (WIPO) treaties.<sup>2</sup> In Article 8 of the

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<sup>1</sup> For a complete listing of CCIA members, see <http://www.ccianet.org/members>.

<sup>2</sup> See, e.g., WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65, art. 8. (1996)(“WCT”); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36

WIPO Copyright Treaty, the right is treated as a subset of the “communication to the public” right. The right supplements but does not replace various exclusive rights already required to be protected under the Berne Convention for the Protection of Literary and Artistic Works. During the negotiations for the treaty, it became clear that no one approach to recognizing a “making available” right would be possible, due to differences among legal regimes, and the unwillingness of large countries such as the United States to change their copyright acts. The solution was a so-called “umbrella” approach, allowing countries great flexibility in how to implement the treaty, and most important for the present purposes, not requiring the U.S. to change its laws. The U.S. delegate made this clear at the commencement of debate on the provision (then numbered Article 10):

Mr KUSHAN (United States of America) expressed support for Article 10 . . . concerning the rights of communication to the public and making available to the public, which were key to the ability of owners of rights to protect themselves in the digital environment. He stressed the understanding – which had never been questioned during the preparatory work and would certainly not be questioned by any Delegations participating in the Diplomatic Conference – that those rights might be implemented in national legislation through the application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, so long as the acts described in those Articles were covered by such rights.<sup>3</sup>

There is no dissent to this statement to be found in the debates on article 8(10) that then follow in the minutes of Main Committee I. Indeed, the notes to the Basic Proposal before Main Committee I stated:

It is strongly emphasized that Article 10 does not attempt to define the nature or extent of liability on a national level. This proposed international agreement determines only the scope of the exclusive rights that shall be granted to authors in respect of their works. Who is liable for the violation of these rights and what the extent of liability shall be for such violations is a matter for national legislation and case law according to the legal traditions of each Contracting Party.<sup>4</sup>

Consistent with the intent of the treaty and the U.S. position during the debates on Article 8, the U.S. Copyright Act does not provide a specific “making available” right in 17 U.S.C. § 106,

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I.L.M. 76, art. 14 (1996)(“WPPT”).

<sup>3</sup> World Intellectual Property Organization, *Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996*, Vol. II, p. 675, ¶ 301 (Geneva 1999).

<sup>4</sup> *Id.*, vol. I, p. 208, ¶ 10.21.

although it nevertheless provides authors with distribution and performance rights, combined with various doctrines of secondary liability, which are more than adequate to satisfy international obligations. Neither law nor technology has changed since this time in a manner that would warrant amending U.S. law. Findings by the Copyright Office and Congress support this conclusion. In 1997, former Register Marybeth Peters assured Congress prior to the ratification of the WIPO treaties that there was “no need to alter the nature and scope of the copyrights and exceptions, or change the substantive balance of rights embodied in the Copyright Act” in order to provide a “making available” right.<sup>5</sup>

Register Peters reaffirmed this position in correspondence with Rep. Berman five years later, writing: “As you are aware, in implementing the new WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in the Digital Millennium Copyright Act, Congress determined that it was not necessary to add any additional rights to Section 106 of the Copyright Act in order to implement the ‘making available’ right under Article 8 of the WCT.”<sup>6</sup> This is also consistent with the U.S. Government’s representations to its trading partners. The U.S. Trade Representative (USTR) has pointed out repeatedly to international trade entities like the World Trade Organization (WTO) that U.S. law complies with treaty obligations to have a “making available” right.<sup>7</sup>

Current efforts to change U.S. law appear to reflect a desire to create a new cause of action not found in any international agreement and unprecedented in U.S. law: attempted distribution. Unsuccessful efforts to expand the distribution right first occurred in the *Thomas-Rasset* case;<sup>8</sup> they now continue before this Office, Congress, and the Administration. However, no international obligation compels the creation of a new cause of action for attempted distribution or any other right, and it would be bad policy to do so. The Copyright Act has

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<sup>5</sup> See Statement of Marybeth Peters, Register of Copyrights, *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 & H.R. 2180 Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 43 (1997).

<sup>6</sup> See Letter from Marybeth Peters to Rep. Howard L. Berman (Sept. 25, 2002), reprinted in *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 114-15 (2002).

<sup>7</sup> See, e.g., U.S. submission to 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 the “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).

<sup>8</sup> *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 903-04 (8th Cir. 2012) (discussing objectionable jury instructions from *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008), that said that the distribution right could be violated, “regardless of whether actual distribution has been shown”).

robust enough remedies predicated on actual violations of Section 106 rights; it need not expand further for the convenience of plaintiffs unwilling to present requisite evidence of actual infringement.

*1(b). Do judicial opinions interpreting Section 106 and the making available right in the framework of tangible works provide sufficient guidance for the digital realm?*

As Prof. Glynn Lunney observed in testimony before the House Judiciary IP Subcommittee on January 14, 2014,<sup>9</sup> U.S. courts have been able to apply existing U.S. copyright law to cover activities that may also be construed as “making available.”<sup>10</sup> Thus, there is no “gap” in protection under existing law. Today’s combination of rights and causes of action that satisfy U.S. international treaty obligations appears to serve rightsholders well. Between the reproduction right, distribution right, public performance/display right, and secondary liability doctrines, there is no form of digital infringement that is without a remedy under existing law. While “making available” has arisen in certain recording industry cases against individual file-sharers, in each of those cases the plaintiffs had at least two other ways to prevail against individual file-sharers, without the need for a “making available” theory: (1) for making unauthorized reproductions and (2) for actual, completed distributions. Both claims were made in individual file-sharing cases brought by the recording industry during the campaign against end-users.<sup>11</sup>

*2(a). How have foreign laws implemented the making available right (as found in WCT Article 8 and WPPT Articles 10 and 14)? Has such implementation provided more or less legal clarity in those countries in the context of digital distribution of copyrighted works?*

Further illustrating that there is no need to implement a separate “making available” right, nations outside the United States, such as France, have not done so. A thorough EU-commissioned report in 2013 on these issues revealed a wide diversity in implementation, and no

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<sup>9</sup> See generally statement of Glynn S. Lunney, Jr., *The Scope of Copyright: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014), available at <http://docs.house.gov/meetings/JU/JU03/20140114/101642/HHRG-113-JU03-Wstate-LunneyG-20140114.pdf>.

<sup>10</sup> See, e.g., *Twentieth Century Fox Film Corp. v. iCraveTV*, 2000 WL 255989, at \*7 (W. D. Pa. 2000).

<sup>11</sup> See, e.g., *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006); *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 236 (S.D.N.Y. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 159 (D. Mass. 2008).

agreement on a number of issues,<sup>12</sup> a fact which undercuts the notion that there is international pressure for Congress to do anything. WIPO adopted the umbrella approach precisely to let countries deal with online issues in national law, and that is what they have done.

*3(a). If Congress continues to determine that the Section 106 exclusive rights provide a making available right in the digital environment, is there a need for Congress to take any additional steps to clarify the law to avoid potential conflicting outcomes in future litigation? Why or why not?*

As noted above, the existing bundle of Section 106 rights has twice been judged by the Copyright Office to be adequate to deal with these issues contemplated by the “making available” right. That there is litigation over the reach of the 106 rights says nothing about those rights’ adequacy; the limits of any right are bound to be tested by litigants. The Copyright Act’s exclusive rights and balancing limitations and exceptions were deliberately drafted to be flexible; Congress realized that technology is dynamic and that static laws cannot address dynamic situations. Legislating a new right, upon which there was and is no international consensus, is ill-advised.

Even assuming that a “making available” right would reduce the cost of proving distribution claims in court (by obviating the need to prove that distributions actually took place, making it possible to build a *prima facie* case solely by scanning the Internet to locate files that are available), this “benefit” will also aid copyright trolls who focus on high-volume, usually dubious infringement claims. This business model of litigation has been adopted chiefly in corners of the adult entertainment industry, where shell entities have initiated legal proceedings against many individual Americans based on allegations of offering pornographic materials for upload, and threats to make public the fact of litigation. One such scheme obtained at least seven figures worth of settlements due to the sensitive subject matter and the availability of statutory damages, even though the claims were, in at least some cases, without merit.<sup>13</sup> Similar cases now clog federal courts, a development that several federal judges have greeted with alarm.<sup>14</sup>

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<sup>12</sup> See De Wolf & Partners, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* (2013), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/131216\\_study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf).

<sup>13</sup> *Ingenuity 13 LLC v. John Doe*, Dkt. No. 12-8333, 2013 WL 1898633, at \*1 (C.D. Cal. May 6, 2013) (lawyers’ elaborate scheme “outmaneuvered the legal system”, leading to sanctions); see also Joe Mullin, *Prenda hammered: Judge sends porn-trolling lawyers to criminal investigators*, *Ars Technica*, May 6, 2013, at <http://arstechnica.com/tech-policy/2013/05/prenda-hammered-judge-sends-porn-trolling-lawyers-to-criminal->

3(c). *Would adding an explicit “making available” right significantly broaden the scope of copyright protection beyond what it is today? Why or why not? Would existing rights in Section 106 also have to be recalibrated?*

“Making available” would create an unprecedented form of civil attempt liability for copyright. As conceived by a small minority of scholars and certain recording industry plaintiffs, this theory would in effect expand the distribution right to create civil attempt liability for copyright infringement. Such a result is without precedent. No other provision of copyright law imposes civil liability on those who have attempted to infringe, but failed to succeed in infringing, the exclusive rights of the copyright holder. 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).

Where actual copies are distributed, there is no need for an expansive “making available” right, as the current distribution right already covers those situations. An unsuccessful attempt to distribute copies, in contrast, inflicts no harm on rightsholders, just as a failed attempt to make copies or transmit copies also fails to inflict any harm on rightsholders. If a bar owner tries to publicly perform the Super Bowl without a license in his establishment, but fails to get the satellite TV reception to work, distribution liability is inappropriate. There is no reason the result should be different if the same person offers up downloads of the game the next day, but no one takes him up on his offer. Similarly, one who makes an unauthorized reprinting of the latest best-selling novel and attempts to sell copies, but finds no buyers, would violate the reproduction right, but not the distribution right. No case has been made that different outcomes should result if the unauthorized copy is instead a digital file, uploaded to a server.

The chosen means of implementing “making available” rights in Europe has created additional complexity and rights-clearance cost.<sup>15</sup> The result in the EU in music, for example, is that additional clearance is required for “making available” as well as other rights, and often additional rents are sought for the same act, making the rights licensing and clearance landscape

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investigators/; *see generally*, Ars Technica series, *Who’s Behind Prenda Law?*, available at <http://arstechnica.com/series/whos-behind-prenda-law/>.

<sup>14</sup> *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, IOWA L. REV. (2014 forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404950](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950).

<sup>15</sup> *See* Computer & Communications Industry Association, *Public Consultation on the review of the EU copyright rules* (March 2014), at 11-12, available at [http://www.cciainet.org/wp-content/uploads/2014/03/CCIA-Contribution-to-the-EU-Copyright-Consultation-2014\\_FINAL.pdf](http://www.cciainet.org/wp-content/uploads/2014/03/CCIA-Contribution-to-the-EU-Copyright-Consultation-2014_FINAL.pdf).

more complex and expensive, rather than less so. This interpretation invites rightsholders to demand multiple payments for what is ultimately a single exploitation of the work at issue.

This has also been a problem in U.S. law even under existing Section 106 rights, such as litigation over whether ringtones implicate reproduction rights (which are often owned by record labels) or public performance rights (which are often owned by Performance Rights Organizations like ASCAP).<sup>16</sup> Adding another exclusive right of “making available” would further exacerbate problems with overlapping rights, and create another gatekeeper attempting to extract royalties.

*3(d). Would any amendment to the “making available” right in Title 17 raise any First Amendment concerns? If so, how can any potential issues in this area be avoided?*

Notwithstanding the argument that “there is no First Amendment right to infringe,” the Office is no doubt aware that *Eldred* and *Golan* make clear that changing the “traditional contours” of copyright triggers First Amendment scrutiny.<sup>17</sup> If adding a new right does not change copyright’s “traditional contours,” nothing does. The most obvious course of action to avoid this issue is to avoiding tinkering with Section 106.

*3(e). If an explicit right is added, what, if any, corresponding exceptions or limitations should be considered for addition to the copyright law? If there are any pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments.*

Creating or redefining exclusive rights also causes problems for existing contracts under which rights were properly licensed yet newer technologies weren’t anticipated.<sup>18</sup> Many contracts have taken into account clear expectations regarding rights and obligations based on unambiguous statutory language regarding the various existing rights of a copyright holder. There is no guarantee that a newly created right would vest in the hands of the existing holder of the distribution rights, an outcome which could cause gridlock for licensing of existing works for the term of the work. Thus, the “making available” right is inadvisable, but retroactive application is manifestly so. Indeed, retroactive application could so severely gridlock existing business arrangements as to constitute a regulatory taking.

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<sup>16</sup> *United States v. Am. Soc’y of Composers, Authors & Publishers (Application of Cellco P’Ship)*, 663 F. Supp. 2d 363, 371-74 (S.D.N.Y. 2009).

<sup>17</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 220-21 (2003); *Golan v. Holder*, 132 S. Ct. 873, 890-91 (2012).

<sup>18</sup> *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

### **III. Conclusion**

In conclusion, CCIA advises against modifying U.S. copyright law in any manner pertaining to “making available,” because existing U.S. copyright law already satisfies the obligation to have a “making available” right.

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