



April 1, 2014

Maria Pallante
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

RE: Request for Comments for the “Study on the Right of Making Available”

Dear Ms. Pallante:

In response to the Study on the Right of Making Available; Comments and Public Roundtable, 79 FR 10571 (25 February 2014), the Society of American Archivists (SAA) submits these comments on behalf of all U.S. archivists. SAA is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,100 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

SAA offers the following responses to questions posed in the Notice of Inquiry:

1. Existing Exclusive Rights Under Title 17

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 suite of exclusive rights currently provided for by Title 17 entirely incorporates, and in some cases exceeds, the provisions of the WIPO Treaties,¹ through the application of

¹ The WIPO Treaties include only two actual Rights of Making Available: the Right of Making Available of Fixed Performances (WPPT Article 10) and the Right of Making Available of Phonograms (WPPT Article 14). In all other cases, the WIPO Treaties include "making available" under the Right of Distribution (WCT Article 6, WPPT Article 8) and the Right of Communication to the Public (WCT Article 8).

either the right of distribution in Section 106(3), or the public performance and display rights in Section 106(4)–(6). As the Copyright Office notes in the NOI (footnote 8), the distribution right in Section 106(3) is already "far broader than the new distribution right afforded under the WIPO Treaties." Where the "making available" provisions are not covered by the Title 17 distribution right, the rights of public performance and display fully accommodate any remaining aspects of the "making available" rights in the WIPO Treaties. There is thus no need for any additional "making available" right in U.S. law. As the Office notes, this has been the position held by the U.S. since the enactment of the Digital Millennium Copyright Act in 1998.

Although technology has changed, the effectiveness of the Section 106 bundle of rights has not. The peer-to-peer file-sharing disputes that immediately followed passage of the DMCA provide solid evidence that the exclusive rights have worked as intended. The content owners had ample room within the reproduction right alone to show the infringement needed to collect damages, but also successfully pursued infringement of both the distribution and the performance rights. In *A&M Records*, for example, the court had overwhelming direct evidence of both uploads and downloads of files, which was more than sufficient to prove infringement of both the reproduction and the distribution rights.² Either or both of the distribution and public performance rights govern streaming services, and bad actors that illegally make copyrighted content available for download are fully liable for infringing the reproduction right immediately, and for distribution as soon as (and each time that) a download occurs.

SAA knows of no problem that would be solved by recognizing a separate "making available" right, nor of any ways in which clarification is needed over the extent of the rights granted by Section 106. Any copyright owner who would seek protection under such a "making available" right is already able to bring legal actions for infringement of one of the existing rights.

If anything, in the digital environment, the existing bundle of exclusive rights covers the reproduction, distribution, and public display of copyrighted works too broadly. One of the most important activities in which archivists are currently engaged is utilizing digital distribution networks to increase public access to archival records. Through both widespread programs for the digitization of analog material and the acquisition and management of "born digital" records, the work of archivists is increasingly becoming digital. Online archival materials provide surrogates for human memory, both individually and collectively, and serve as evidence against which individual and social memory can be tested. For example, initiatives such as the Library of Congress's American Memory program bring the recorded past to students, citizens, and other researchers. The number of visitors to the online collection sites of all repositories has been growing exponentially.

² *A&M Records v. Napster*, 239 F.3d 1004, 1013 (9th Cir., 2001). "...the evidence establishes that a majority of Napster users use the service to download and upload copyrighted music...[and those uses] constitute direct infringement of plaintiffs' musical compositions, recordings." (internal citations omitted).

SAA is concerned that creating a new explicit exclusive right for copyright owners could have chilling effects on archival practice, with no complementary benefit to copyright owners. A new explicit right would only lead to further confusion and litigation as to the scope of that right and would reinforce the sometimes overly cautious approach of archivists but with no commensurate benefit to copyright owners.

3. Possible Changes to U.S. Law

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?

SAA is not convinced that Congressional action is necessary. If Congress were to act, we would urge the following clarifications:

- It should be made clear that the "making available right" under U.S. law is limited to the exclusive rights of distribution and public display and performance, and that the exclusive right to distribute is limited to distributions by "sale or other transfer of ownership, or by rental, lease, or lending."
- It should be made clear that actual distribution must be shown in order to establish an infringement of the distribution right.

SAA is concerned that some of the recent court cases have had the effect of thwarting Congressional intent regarding the nature and scope of the distribution right.

With respect to the scope of the distribution right, SAA believes that the court in *Hotaling* erred when it equated listing a work in a library's catalogue (making the work available) with actual distribution of the work. Though listing in a library catalogue, or archival finding aid, could constitute an offer to distribute the work, in many cases (and in nearly all cases involving archival materials) listing the availability of a work demonstrates nothing more than the opportunity to consult the work under supervision. As the dissent noted, distribution requires at least a temporary transfer of custody, such as lending; since showing an item to a patron in a reading room does not constitute lending, it is not a distribution pursuant to the statutory language.³ This interpretation is fully consistent both with the constitutional goals of providing incentives to authors and with our international obligations.

In addition to over-construing the scope of the distribution right, both the *Hotaling* and the *Diversey* courts took a worrisome step by construing the listing of a work in a repository's

³ See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 205 (4th Cir., 1997), Hall, J. dissenting: "The owner of a copyright does not possess an exclusive right to 'distribute' the work in any conceivable manner... Because they are for research, the libraries do not permit materials to be checked out and used by a member of the public off-premises. Do the libraries nonetheless 'lend' a work each time a patron consults it? I think not. The patron might report that he 'used' or 'looked at' the work, but he would not likely say that it had been 'lent' to him."

holdings as constituting sufficient evidence to show that a distribution occurred. The mere communication that an item exists in a repository should not itself be sufficient to prove an infringement of the distribution right, for two reasons. First, though archives do under some circumstances furnish analog or digital copies to patrons, a listing in an archival finding aid does not constitute an offer to provide copies, but only an offer to allow patrons to consult the item.⁴ Second, patron copies might well have been made based on a fair use defense, and as such would rely heavily on the facts of the specific distribution (the patron's purpose for requesting the item, the nature of the item involved, etc.). Those facts cannot be supplied when the cause of action is for an imaginary, hypothetical, or statistically probable distribution. Allowing a plaintiff the presumption that an infringing distribution occurred, without allowing the archives the opportunity to avail itself of the full range of defenses, would be a gross injustice to the public, and would have the effect of censoring the public's right to know what material is held in its archives and libraries.

b. If Congress concludes that Section 106 requires further clarification of the scope of the making available right in the digital environment, how should the law be amended to incorporate this right more explicitly?

As we have argued above, SAA opposes any amendments to the law to clarify the "making available" right because that right already fully exists within the current bundle of rights. However, we are concerned with recent interpretations of the statute of limitations in copyright cases. The *Hotaling* and *Diversey* courts found that reproduction occurred more than three years ago and hence was not actionable under Section 507(b). Nor was there any evidence that distribution of the allegedly infringing works had occurred within the previous three years. Nevertheless, the courts found that the offer to distribute the work was itself infringing and, importantly, that the infringement was not time-barred. The result is that in their desire to find a cause of action, the *Hotaling* and *Diversey* courts effectively eliminated the statute of limitations that Congress has imposed.

If Congress were to introduce new legislation, a more productive route would be to impose a statute of limitations on damages associated with communications to the public (such as distributions or public displays). The possibility that a copyright owner might demand statutory damages twenty years after a work was distributed would place an unnecessary and unfair burden on archives. Repositories must be able to digitize and offer to the public items whose copyright status is unknown, and the notion that a copyright owner could demand statutory damages twenty years after the work was made available hinders that practice. A notice and takedown system combined with a provision for the payment of actual damages would be one way to offer some compensation to the copyright holder while mitigating the potentially horrendous impact of statutory damages on the archives and the public who depend on archives for access to heritage.

⁴ A library's listing of an item as "available for checkout" may constitute an offer to lend the item. Our position is that such offers should still not be sufficient to prove infringement of the distribution right, though for lawfully acquired copies, most such loans would be sanctioned elsewhere under Section 109(a)

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?

Any new right added to Section 106 would by definition broaden the scope of copyright protection today. The new right would have to be crafted such that it applies to activity not already covered by copyright, or the overlap would cripple the precedential value of case law surrounding the existing distribution, performance, and display rights, the understanding of which has been bought over many years of expensive litigation. Any new right would therefore have to identify activities that are both desirable to regulate and not already covered by the existing law. SAA does not believe such an activity exists, and so opposes any expansion of the coverage of Section 106 exclusive rights. As stated above, we believe that the existing suite of rights already provides more than enough coverage to satisfy the Constitutional goals of copyright, while being fully compliant with treaty obligations. Expansion of the suite of rights could severely harm archives ability to make available our shared cultural heritage.

A new "making available" right could theoretically be added without expanding the scope of protection by further limiting the scope of existing rights, and then applying the new right to the gaps created by doing so. However, any recalibration of the existing rights would inevitably create more questions than answers, as the courts would have to recreate the entire body of case law surrounding the scope of Section 106(3)–(6). Further, any recalibration of existing rights would almost certain result in an expansion of scope of rights in 106 and further upset the balance of copyright and its role in encouraging learning.

In short, SAA believes that existing law can address any ills that an explicit “making available” right might address. Introducing a new distinct right would unsettle the law and lead to years of litigation to establish what additional rights the inclusion of a “making available” right may have given to copyright owners.

e. If an explicit right is added, what, if any, corresponding exceptions or limitations should be considered for addition to the copyright law?

If an explicit “making available” right were added to existing law, it would be necessary to amend all of the exceptions to, and limitations of, the distribution and public performance/display rights such that those exceptions would also apply to the new right. For example, the exceptions to the distribution and display rights in Section 109(a) and (c) would have to be modified so as to extend to the new right as well. Otherwise, an archives that had legally acquired an item or a digital file might be found liable for making that material available simply by listing it in its finding aid or catalog. Similarly, the law would need to make clear that digital copies made legally accessible under Section 108 or 110 are not subject to the “making available” right. Without extreme care, a new right could eviscerate almost all existing exceptions and limitations, with disastrous

consequences for the already tenuous balance between the interests of the right holders and the interest of the public.

In conclusion, SAA opposes giving copyright owners a new exclusive right to make their works available to the public. The right is unnecessary, as the existing exclusive rights for reproduction, distribution, public performance, and public display address any infringements that the WIPO treaties seek to address, and provide more than sufficient incentive and redress for copyright holders. The right may also have unintended consequences for existing exceptions and limitations as copyright owners explore the extent of the new right. Finally, any new right would have a chilling effect on the distribution and use of archival materials. Society as a whole would suffer, with no concomitant benefit to copyright owners.

Sincerely,

A handwritten signature in black ink that reads "Kathleen D. Roe". The signature is written in a cursive, flowing style.

Kathleen D. Roe
SAA Vice President, 2013-2014