

**BEFORE THE
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.**

Study on the Right of Making Available

Docket No. 2014-2

**JOINT COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, BROADCAST MUSIC, INC., THE SONGWRITERS GUILD OF
AMERICA, SESAC, INC., AND THE NATIONAL MUSIC PUBLISHERS’
ASSOCIATION**

The American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), the Songwriters Guild of America (“SGA”), SESAC, Inc. (“SESAC”), and the National Music Publishers’ Association (“NMPA”) (collectively, the “Musical Works Organizations”) respectfully submit comments in response to the U.S. Copyright Office’s (the “Office”) Notice of Inquiry dated February 20, 2014 for written comments on issues regarding its study on the Right of Making Available (the “NOI”).¹

I. INTRODUCTION

A. The Musical Works Organizations.

ASCAP, BMI, and SESAC are the three U.S. music performing rights licensing organizations (“PROs”), collectively representing hundreds of thousands of songwriter, composer and publisher members and combined repertoires consisting of millions of copyrighted musical works. The PROs license the non-dramatic public performance rights in musical works to their respective repertoires on a non-exclusive basis to a wide range of users, including digital broadcasting entities such as radio, broadcast television, cable, satellite and the Internet, as

¹ 79 Fed. Reg. 10571 (February 25, 2014).

well as restaurants, stores, concerts, background music services, aerobics and dance studios, and many more.² The vast majority of ASCAP, BMI, and SESAC member songwriters and publishers are the consummate “small businessmen and women” who depend on their performing right royalties for a major portion of their income.

SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions, with approximately five thousand members nationwide and over eight years of advocacy experience concerning songwriters’ rights. SGA is comprised of songwriters, lyricists, composers, and the estates of deceased members. It provides a variety of services to its members, including contract analysis, copyright renewal and termination filings, and royalty collection and auditing to ensure that members receive proper compensation for their creative efforts.

NMPA, founded in 1917, is the principal trade association representing music publishers and songwriters in the United States. As such, NMPA works to protect the interests of music publishers and songwriters and has served as the leading voice of the American publishing industry in Congress and the courts. With over 3,000 members, NMPA represents both large and small music publishers throughout the United States.

ASCAP, BMI, and SESAC represent not only U.S. writers and publishers, but also hundreds of thousands of foreign writers and publishers through reciprocal license agreements with PROs in nearly every country in the world. Through these reciprocal agreements, ASCAP, BMI, and SESAC are each permitted to license in the U.S. the public performing right in many thousands of musical works by foreign songwriters and composers. ASCAP, BMI, and SESAC also receive royalties from those foreign PROs for performances of ASCAP, BMI, and SESAC

² Both ASCAP and BMI operate as non-profit-making businesses and do not retain earnings. Instead ASCAP and BMI return all license fees collected, less operating expenses, as royalties to their respective affiliated songwriters, composers, and music publishers whose works are publicly performed.

musical works occurring overseas. NMPA's members also receive royalties internationally through relationships with foreign societies and sub-publishers based in foreign territories.

B. Traditional Licensing Practices and the Impact of Digital Transmissions.

For many decades the respective roles of each of the Musical Works Organizations *vis-à-vis* the licensing of musical works remained quite clear: the PROs licensed public performing rights, and the music publishers, on their own or through agents, licensed all other rights. The communications and performances in the traditional analog world – evidenced through radiowave, cable or other early broadcasting technologies – had little or no overlap or intermingling with the physical, tangible realm of music reproduction and distribution.³ As a result, there was little overlap in the mechanical and performing rights needed by these users, and their licensing needs were mainly either within the provenance of PROs solely or were handled by program owners with publishers directly. The extent of each organization's mandates was not questioned, nor was the law upon which they were based.

The advent of the digital age blurred those lines. As digital transmissions invariably implicate multiple rights, legitimate digital services have attempted to clear all possibly affected rights from both the PROs and the music publishers separately. Piracy has been rampant on the Internet, and the availability of affordable, licensed sources of music has been viewed as a key tool to controlling the piracy scourge. However, the complexities surrounding the need to license a multiplicity of rights have presented issues. These issues propelled the Office and Congress to institute proceedings addressing the scope of the issues surrounding licensing music

³ The ephemeral rights exemption in Section 112 provided broadcasters with the ability to rely on PRO licenses for their rights. Where television and radio programs required sync rights, the program producer/owners typically obtained these licenses from publishers and the broadcast stations did not have to do so (unless they created their own programs).

in the digital age.⁴ While the Office reached certain conclusions regarding the scope of each of the rights involved – Sections 106(1), (3) reproduction and distribution rights and the Section 106(4) public performance right – those pronouncements were advisory. The practical extent of application of these rights has been consequently taken to the courts in numerous contexts, some of which directly pertain to the making available rights.

C. The WIPO Treaties and the Making Available Right.

The WIPO treaties in 1998 included provisions to incorporate the right of making works available to the public into both the communication right and the distribution right. The communication to the public right is analogous to the second prong of the U.S. public performing right. The making available right was intended to clarify that interactive, on demand transmissions were fully covered by the communication right (*i.e.*, it was not limited merely to broadcast transmissions). The making available right also confirms that the mere offering of copyrighted works for public performance and/or distribution is a violation of copyright. In other words it is necessary to demonstrate only uploading to a public source, and it is not necessary to show transmissions to individual, on-demand recipients. These two concepts are both quite important to licensing content and enforcing copyright in the global digital networked environment. We believe that U.S. exclusive performance and distribution rights have encompassed both of these criteria since 1976. Interactive, on-demand transmissions have been licensed by PROs. In addition, uploading has been found to violate copyright. Given the global

⁴ See, e.g., U.S. House of Representatives Committee on the Judiciary, Subcommittee on Intellectual Property, Competition and the Internet, Hearing on “Music Licensing Part One: Legislation in the 112th Congress,” 112th Cong., 2d Sess.,”(2012); U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property, Hearing on “Reforming Section 115 of the Copyright Act for the Digital Age,” 110th Cong., 1st Sess. (2007); U.S. Senate Subcommittee on the Judiciary Subcommittee on Intellectual Property, Hearing on “Music Licensing reform,” 109th Cong., 1st Sess. (2005); U.S. Copyright Office, Digital Millennium Copyright Act Section 104 Report to the United States Congress (Aug. 29, 2001) [hereinafter “Section 104 Report”]. On March 11, 2014, the Office announced another study focusing solely on music licensing issues. 79 Fed. Reg. 14,739 (March 17, 2014).

nature of the Internet, uploading can be done in one country while the downloading or streaming recipient can reside in another, so it is clearly important to establish that uploading alone is a violation. Moreover, the service or entity that makes content available is often the commercially relevant entity for licensing purposes. That entity must be directly liable, and not merely secondarily liable, for downloads or streams initiated by consumers who are beyond the reach for all practical purposes of enforcement.

Unfortunately, over the past fifteen years, the courts have analyzed the practical application of these rights in numerous contexts with results that have seen a narrow, confused reading and application of the public performance and distribution rights, and a resulting dramatic reduction in the protection afforded to music creators in the U.S. Some of these decisions have incorrectly narrowed the scope of the public performing right by hinging this right to technical processes that can easily be circumvented. There is no basis in the definitions of the exclusive rights or in the WIPO treaties to circumscribe the reach of the performing right (or the distribution right) in a hyper-technical manner. These results have been widely criticized as both faulty on domestic statutory interpretation grounds and, more troubling, as directly in conflict with this Country's obligations under numerous international treaties and agreements.⁵ As a result, we are now left with a problematic record of case law that permits technological innovators to exploit domestic and foreign works in violation of the rights of thousands of creators.

In response to this uncertainty impacting both owners and users of copyrighted works, the Office should provide formal guidance to the courts by recognizing the "making available" right as a longstanding component of U.S. Copyright Law, taking as guidance the emerging consensus

⁵ See e.g., Carson, David, *Making the Making Available Right Available*, 33 Colum.J.L&Arts 135 (2010); Ginsburg, Jane C., *Recent Developments in US Copyright Law – Part II: Exclusive Rights on the Ebb?*, 26 (Colum. Pub. L. & Legal Theory Working Papers, No. 08158, 2008), available at http://lsr.nellco.org/columbia_pllt/08158.

of both international and U.S. Law. To further clarity in the law for all parties, and particularly if the courts cannot straighten the wobbly table, we believe Congress will need to take action by explicitly clarifying the existence of the making available right under Section 106.

II. HOW DOES THE EXISTING BUNDLE OF EXCLUSIVE RIGHTS COVER THE MAKING AVAILABLE RIGHT IN THE UNITED STATES?

As noted by the NOI, the U.S. found no need to enact a specific statutory provision that would incorporate a “making available” right. Our government concluded that the current bundle of rights in the Copyright Act would, together, suffice to meet any international obligations. Therefore, copyright owners and users must analyze and navigate a given situation based upon the rights set forth in Section 106 and the interpretations placed thereon by our courts. Unfortunately, a series of case decisions call into question whether the current exclusive rights really do encompass the full scope of the making available right, both under the right of public performance and the right of public distribution. We briefly describe these cases below in order to illustrate where the tension in the law currently exists.

A. The Distribution Cases.

The NOI focuses on the line of cases applying the distribution right of Section 106(3), and we begin with those cases. Broken down in simple terms, the issue is whether the act of providing or “uploading” a digital copyrighted work for ultimate access by a user is a public distribution of that work requiring authorization from the copyright owner pursuant to Section 106(3).⁶ The question, ironically, is born out of the 1976 revision to the Copyright Act, which enacted the distribution right of Section 106(3) – “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or

⁶ The issue of offering by upload the copyrighted work is divorced from the means by which the ultimate user chooses to obtain the work – whether through traditional streaming, permanent download or some hybrid of the two. Those actions would implicate rights apart from that implicated by uploading the file in the first place.

lending.” Prior thereto, the Act provided a right to publish that clearly extended to the mere offering of works to the public.⁷ Early (pre-Internet) cases reached opposing conclusions as to whether distribution requires actual dissemination and receipt of the work.⁸ Those early cases, extended to Internet usage in the peer-to-peer line of cases, similarly led to a bifurcated understanding of the distribution right, some holding that distribution under Section 106(3) is to be read in a literal sense of distributing through actual dissemination of copies of work⁹, and some holding that the distribution right should be read in connection with the Section 101 definition of “publication,” which extends to “[t]he *offering* to distribute copies”¹⁰ While an exegesis of the legislative history supports the broader reading of the right to apply to any offering of a work, invariably including offering by way of uploading for possible receipt, the case law remains murky.¹¹ Accordingly, in at least a number of districts, the mere uploading of a digital work for potential reception – whether through download, stream or some other form of receipt – would not violate U.S. copyright law.

However, there is little consistency and even less certainty in the case law to date. On the one hand are cases that identify one form or another of a “making available” right as extant in the current language of the statute, applying it against those who would post copyrighted works making them freely available for unauthorized copying worldwide.¹² Simultaneously, however,

⁷ See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *In re Napster, Inc.*, 377 F.Supp.2d 796 (N.D. Cal. 2005).

⁸ See *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir.), cert. denied, 510 U.S. 861 (1993)(mere offer does not amount to a distribution); *Hotaling v. Church of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997)(offer of copies amounts to distribution).

⁹ See, e.g., *Universal City Studios Productions, LLP v. Bigwood*, 441 F.Supp.2d 185 (D.Me. 2006).

¹⁰ See, e.g., *Atlantic Recording Corp. v. Brennan*, 534 F.Supp.2d 278 (D.Conn. 2008) (emphasis added); *London-Sire Records, Inc. v. Doe I*, 542 F.Supp.2d 153 (D.Mass. 2008).

¹¹ Peter S. Menell, In Search of Copyright’s Lost Ark, 59 J. of Copyright Soc’y 1 (2011)

¹² See, e.g., *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006); *Motown Records Co., LP v. DePietro*, 2007 WL 5766284 (E.D. Pa. Feb. 16, 2007); *Warner Bros. Records, Inc. v. Payne*,

other cases speak to a narrower right, frequently requiring proof of actual distribution in the form of a download recipient, even when all of the actions needed to effectuate distribution over the Internet have already been taken by the defendant.¹³ This uncertainty has, in turn, yielded cases of substantial renown, known as much for their high damage awards against defendants of modest means as for any judicial recognition of a making available right.¹⁴ While upholding high statutory damages judgments against college students and single mothers may seem to “clarify” the force and scope of the making available right, in the absence of statutory clarity the precedential effects of *Sony BMG v. Tenenbaum* and *Capital Records, Inc. v. Thomas-Rasset* are far from settled. Indeed, the scale of the damages involved in those two cases have already been cited as a basis for limiting the meaning of Title 17 so as to avoid even more modest statutory damages.¹⁵ Thus, in the absence of strong Copyright Office guidance or a bright line statutory rule, courts will remain free to apply the law in a highly discretionary fashion, leaving the door open for ambiguous and uncertain enforcement of copyright owners’ rights, and exposing users, both legitimate and illicit, to unpredictable outcomes.

2006 WL 2844415 (W.D. Tex. July 17, 2006); *Interscope Records v. Duty*, 2006 WL 988086 (D. Ariz. Apr. 14, 2006).

¹³ See, e.g., *Atlantic Records Corp. v. Brennan*, 5347 F. Supp. 2d 278 (D. Conn. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Atlantic Records Corp. v. Monell*, 554 F. Supp. 2d 976 (D. Ariz. 2008).

¹⁴ See *Sony BMG v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013) (upholding a finding based in part on the “making available” right against a Boston University undergraduate resulting in a \$675,000 judgment against the student); *Capital Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012) (reviewing multiple decisions of the lower court and upholding an award against a single mother of \$222,000 that had been reduced from prior jury awards of \$1.92 million and \$1.5 million).

¹⁵ See *W. Coast Prods., Inc. v. Garrett*, 2014 WL 752670, at *2 (E.D. Mo. Feb. 25, 2014) (reducing a damages award from a requested \$9,250 damages to \$3,250 in part by characterizing the defendant’s conduct as unwillful and therefore distinguishing it from the conduct in *Thomas-Rasset* on the basis of judicial, rather than statutory, guidance).

B. The Download Public Performing Right Case.

Concomitantly with the peer-to-peer cases which focused on the act of uploading a file for receipt, the Second Circuit was faced with the issue of which rights may be affected by the ultimate corollary activity – that of actually downloading a file. ASCAP, on behalf of composers, songwriters and publishers, argued to its Rate Court that the plain reading of the Transmit Clause to the definition of the term “publicly” as applied to the Section 106(4) right of public performance, would hold a transmitting entity liable as it was transmitting or otherwise communicating a performance of the work “to the public, by means of any device or process, whether the members of the public capable of receiving the performance receive it in the same place or in separate places and at the same time or at different times.” The court held that a pure downloading activity did not amount to a public performance because the Section 101 definition of “perform” required a contemporaneous perception with the act of transmission.¹⁶ The court found that the perception of the work upon a pure download occurs after the transmission.¹⁷ While the reproduction right may be implicated by the download transmission, the court reasoned, the public performance right was not.¹⁸ The court did recognize, however, the dynamic and hybrid nature of music services, finding that some services may blend their offerings such that a transmission could trigger both a performance and another right.¹⁹

The Second Circuit affirmed the District Court’s reading of the Section 101 definitions.²⁰ It likewise found that a download, unlike a stream, does not produce sound; “only after a file is

¹⁶ *U.S. v. ASCAP, In the Matter of the Application of America Online, Inc.*, 485 F.Supp.2d 438 (S.D.N.Y. 2007) [hereinafter “*ASCAP-AOL*”].

¹⁷ *Id.* The court rejected arguments that services and technology then existed that permitted simultaneous perception of downloaded music files at the time of transmission. By today such technologies are commonplace.

¹⁸ *Id.* at 445.

¹⁹ *Id.* at 466 fn.5; *Id.* at 447.

²⁰ 627 F.3d 64 (2d Cir. 2010).

downloaded on a user's hard drive can he perceive a performance by playing the downloaded song.”²¹ The performance, the Second Circuit concluded, must be contemporaneously perceived with the transmission.²² Accordingly, based on this case, it is commonly accepted that the transmission by download to a recipient that is not perceived automatically upon the transmission, and only afterwards, does not invoke the public performance right.²³ As discussed, *infra*, this result has tremendous implications for creators of musical works, in particular composers of music in audiovisual works.

C. The Cablevision-Aereo Cases.

The Second Circuit, in reaching its conclusion in the *ASCAP-AOL* case, relied in part on the reasoning of its earlier decision in the case *Cartoon Network LP v. CSC Holdings, Inc.*²⁴ That case involved the use of a remote DVR by the cable operator which, upon request of a subscriber, created and stored a unique copy for such subscriber of a copyrighted program upon transmission and then retransmitted such copy to the subscriber upon demand at the time of the subscriber's choosing. The Court held that each transmission to each subscriber of his unique copy of the broadcasted program constituted separate private performances and did not implicate Section 106(4). The Court reasoned that the Transmit Clause of the Section 101 definition of “perform” should be read narrowly to focus on the potential recipients of the specific

²¹ *Id.* at 74. The court likewise recognized that a transmission could constitute both a stream and a download. *Id.* at fn10.

²² *Id.* at 73-74. The court further based its analysis on the prior case of *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.2d 121 (2d Cir. 2008), which, in our opinion, misread the transmit clause, as discussed *infra*.

²³ This result has particularly adverse implications for composers of audiovisual works who often do not receive mechanical royalties.

²⁴ 536 F.3d 121 (2d Cir. 2008) [hereinafter “*Cablevision*”].

transmission.²⁵ As each transmission could only be received by a single subscriber, each such transmission – and all transmission in the aggregate – were private performances.

Based on this decision, the Second Circuit, in *American Broadcasting Companies v. Aereo*, held that a system pairing a remote DVR with a multiplicity of antennae was likewise not a public performance.²⁶ The Aereo system has been described many times, but in short, it allocated a unique antenna to each subscriber, made separate unique copies of each over-the-air broadcast signal received by each subscriber’s designated antenna, stored the copies of such broadcasts in separate cloud storage areas allocated to each subscriber, and transmitted such unique copies of the copyrighted program (and music contained therein) to each subscriber separately upon each subscriber’s request. Affirming the lower court decision, and following its reasoning in *Cablevision*, the Court opined that the Copyright Act first required an analysis of who is capable of receiving a specific individual transmission.²⁷ If the specific transmission can only be received by an individual, as was the case in *Aereo*, such transmissions are considered at the first instance to be private.²⁸

The Second Circuit’s decision has been followed by one district court.²⁹ However, district courts in other circuits found an identical broadcast retransmission service to be in violation of the broadcaster copyright owner plaintiffs’ public performance right, disagreeing

²⁵ *Cablevision* at 134 (“[i]n determining whether a transmission is ‘to the public,’ it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times. The implication from this same language, however, is that it is relevant, in determining whether a transmission is made to the public, to discern who is ‘capable of receiving’ the performance being transmitted. The fact that the statute says ‘capable of receiving the performance,’ instead of ‘capable of receiving the transmission,’ underscores the fact that a transmission of a performance is itself a performance.”)

²⁶ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d. Cir. 2013).

²⁷ *Id.* at 687-688.

²⁸ *Id.* The Court fashioned an inexplicable exception in the case that the unique copy was made from a single master copy.

²⁹ *Hearst Stations Inc. D/B/A WCVB-TV v. Aereo, Inc.*, Civ. Action No. 13-11649-NMG (D.Mass. Oct 8, 2013)

with the notion that an analysis of the public nature of transmissions must be made at the individual transmission level. Accordingly, until the Supreme Court rules on the matter, services are able in certain districts to engineer their services to fit into the flawed performance right loophole created by the *Cablevision* and *Aereo* decisions.

In a few weeks, the U.S. Supreme Court will hear oral arguments in the *Aereo* case. The Supreme Court's decision in that case will provide clarification regarding a specific application of the public performance right to certain digital transmission services. It will hopefully, however, do more than that and overturn a mangled interpretation of what constitutes a "public" performance by transmission, rightfully placing U.S. law within the bounds of its treaty obligations. It will also end a disturbing pattern of case law that has myopically analyzed and interpreted the copyright law against the intentions of Congress and has left open the door for infringers to exploit the rights of copyright owners and stifle creativity through blatant infringement.

III. HOW HAVE FOREIGN LAWS INTERPRETED THE MAKING AVAILABLE RIGHT?

A. The Treaties.

As observed in the NOI, the U.S. implemented the WIPO Copyright Treaty ("WCT") and WIPO Performances and Phonograms Treaty ("WPPT") (collectively, the "WIPO Internet Treaties") through the Digital Millennium Copyright Act ("DMCA") in 1998 without any amendment to the basic rights provided by Section 106. Congress concluded that the provisions of the WIPO Internet Treaties regarding substantive exclusive rights – as relevant here Article 8 of the WCT and Articles 10 and 14 of the WPPT – were adequately covered by the existing bundle of rights.³⁰

³⁰ See H.R. Rep. No. 105-551 at 9 (1988).

The WCT was drafted to ensure that copyrighted works would be protected at a time when global borderless means of dissemination was becoming (and has since become) commonplace.³¹ It was concluded at that time that the protections set out in the Berne Convention were not adequate to protect rightsholders given the realities of the new information age.³² Article 8 of the WCT was drafted to provide broad protection in the digital age regardless of the work and the means by which it was disseminated. Article 8 states as follows:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(ii), 14(i)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.³³

The rights set forth in Article 8 should be contrasted with the right of distribution set forth in Article 6 of the WCT, which is intended to cover exclusively “fixed copies that can be put into circulation as tangible objects.”³⁴ The legislative history behind Article 8 has been recorded at length by those intimately involved in the entire process of drafting and finalization of the text.³⁵ That history clearly shows the Article was intended to provide a broad, technology-neutral and exclusive right encompassing all manner and form of providing and disseminating copyrighted works to the public. The right created was to apply regardless of the manner in which dissemination occurred, for instance regardless of whether

³¹ *Id.*

³² Berne Convention for the Protection of Literary and Artistic Works (ParisText,1971).

³³ http://www.wipo.int/treaties/en/text.jsp?file_id=295166 - P80 10269. Articles 10 and 14 of the WPPT contain similar language regarding the making available right, but the focus of these comments is regarding the WCT.

³⁴ *See* Agreed Statement to Articles 6 and 7 of the WCT.

³⁵ *See* M. Ficsor, *The Law of Copyright and the Internet – the 1996 Treaties, their Interpretation and Implementation*, Oxford University Press (2002)

the work was offered through on-demand or “push” technologies such as streaming or downloading. The right was also enforceable anytime copyrighted works were offered to the public and did not rely on proof of a subsequent receipt.³⁶

The broad nature of the right was drafted to ensure: (1) all on-demand transmissions are covered (“in such a way that members of the public may access these works *from a place and at a time individually chosen by them*”); (2) that the focus is on access to *works*, not performances or transmissions, thereby eliminating any difference between streams or downloads and placing the analysis of who may access the work, not the specific transmission (“in such a way that members of the public may access these *works* from a place and at a time individually chosen by them”); and (3) that the action is formulated in the permissive such that mere offering of works – whether or not actually received by the public – triggers the right (“in such a way that members of the public *may* access these works from a place and at a time individually chosen by them.”)³⁷

It should be noted and underscored that the formulation was intended to “apply existing norms to this new phenomenon (since on the basis of such norms, established practices had emerged, long-term contractual relations had been based, and so on).”³⁸ In other words, the intent was not to upset the apple-cart.

While various country delegates favored the broad approach, there was some disagreement as to whether the “making available” right itself need be adopted by party countries

³⁶ See Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* ¶12.58 (2006); Ginsberg, *Recent Developments*. See *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO* (“WIPO Guide”).

³⁷ See *Id.*

³⁸ *WIPO Guide* at 207, CT-8.1.

in order to meet the minimal requirements of the Article.³⁹ It was ultimately agreed that in respect of the actual choice of the right or rights to be applied, sufficient freedom should be left to national legislation – the so-called “umbrella approach.”⁴⁰

While the NOI focuses on the WIPO Treaties, it should be emphasized that the U.S. has entered into numerous bi-lateral and regional agreements, which in large part track the provisions of Article 8 of the WCT, and specifically require the implementation of “making available” rights. As with the WCT, Congress implemented the agreements through legislation with a confirmation that no changes to the existing rights afforded to copyright owners under the Copyright Act need be made.⁴¹

B. International Implementation.

The umbrella approach was created in large part to accede to the U.S. desire to implement the Article 8 rights through existing rights in force in the Copyright Act. The U.S., however, appears to be unique in that regard – most countries have implemented the “making available” right by either adopting the text of the Treaty, providing a specific making available right or relying on broad protections that clearly reflect the broad reach of Article 8.⁴² The umbrella concept is definitely not intended to permit countries to incorporate the making available right into only their communication or distribution right, in any event.

³⁹ See *WIPO Guide* at 209, CT-8.5-8.9.

⁴⁰ *Id.*

⁴¹ See, e.g., Free Trade Agreement, U.S.-Australia, Art 17.5, May 18, 2004. Other free trade agreements with similar provisions requiring “making available” rights have been entered into with Bahrain, Chile, Jordan, Morocco, Panama, Singapore and South Korea.

⁴² For example, Germany specifically included WCT making available language into its Article 19a of the German Copyright Law. France, on the other hand, followed a minimalist approach to implementing the WCT by keeping its very broad representation right to include such other rights.

1. European Union.

The European Union in 2001 enacted a directive for member states to implement the provisions of the WCT.⁴³ Article 3 of the Directive provides:

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

* * *

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

The Directive ensures the broad approach taken by Article 8 of the WCT is adopted by EU-member states.⁴⁴

The Recitals to the Directive underscore the intention of a “high level of protection”⁴⁵ and, following the construct of the WCT, ensure that the right of communication is broadly construed to cover “all communication to the public not present at the place where the communication originates . . . [and] any such transmission or retransmission of a work to the public by wire or wireless means”⁴⁶ Further, the Recitals provide that rightsholders should

⁴³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. The preamble to the Directive sets out the purpose – that of ensuring that the laws of member states enacted in response to technological changes do not “result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency . . . [t]he impact [of which] will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property.” Directive Recital (6). Considering that such technological development of the information society extends beyond the EU, to a global marketplace, the need for harmonization on a global scale – as intended by the WCT – is obvious.

⁴⁴ Specifically, the extension of Article 3 of the Directive to both streaming and downloads is underscored by the addition of Article 3(3) regarding exhaustion. The concept of exhaustion (*i.e.*, first sale) does not exist with common communications such as online streaming; accordingly download offerings must have been presumed included in the broad right.

⁴⁵ See Directive Recital (4), (9)

⁴⁶ Directive Recital (23).

have the exclusive right “to make available to the public copyrighted works or any other subject-matter by way of interactive on-demand transmissions.”⁴⁷

Article 3 of the Directive has been considered by the Court of Justice of the European Union (“CJ”) in a number of decisions.⁴⁸ In that case law, the CJ developed a number of criteria, derived in part from the interpretation of international agreements including the WCT, for ascertaining whether a communication to the public under Article 3 of the Directive has occurred. As set out by the CJ in a decision issued last month:

First, the expression must be interpreted broadly, in such a way as to ensure a high level of protection for rightsholders.

Second, the specific means of communication is not decisive; what matters is that the public is placed in a position to access the works at issue

Third, the concept of ‘public’ involves an indeterminate but fairly large number of potential recipients, considered both collectively and successively.

Fourth, the public in question must be a ‘new’ public in the sense that it is different from that contemplated when the original broadcast was authorized * *

Finally, if the communication involves a profit-making element (for example, if it attracts customers), that is a relevant indication that it falls within the scope . . . of the right of communication to the public under Article 3.⁴⁹

Following the technologically neutral approach of the WCT, the Directive applies to all types of transmissions, so the *means of transmission* is irrelevant. The focus is on *access to the works*. Accordingly, the CJ found in a case involving the linking by a website to copyright materials served by another website that “for there to be ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that

⁴⁷ Directive, Recital (25).

⁴⁸ The Court of Justice of the European Union hears copyright cases referred from member states and offers interpretations of the Directive applicable to such member states.

⁴⁹ Ochranny svaz autorsky pro prava k dilum hudebnim, o.s. v. lecebne lazne Marianske Lazne a.s.[2014] ECR I-___ Case C-351/12 at 27.

public may access it, irrespective of whether they avail themselves of that opportunity.”⁵⁰ In short, merely uploading a work for potential receipt is an act of communication falling within the copyright owner’s exclusive right.

Likewise, the public is not viewed in isolation; rather a communication may be to the public when the communications of the work are made separately to individuals separated by time and space. For example, the CJ held that transmission by a hotel of cable programming to separate guests in individual hotel rooms is considered to “the public” as the “cumulative effects of all communications of the same type must be taken into consideration.”⁵¹

The broad concept of the communication right was recently emphasized in the recent case of *ITV Broadcasting Ltd. V. TVCatchup Ltd.*, which involved a service similar to the Aereo service now before the U.S. Supreme Court, which converted over-the-air broadcast signals to a digital data feed that was transmitted to a server from which individual access by subscribers could be made through “one-to-one” connections. The CJ held that such a service violated the right of communication. The CJ found that the Directive required that “each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.”⁵² Therefore, the CJ held that the use of a new medium – the Internet – to make available the works was indeed a separate communication. The CJ also ruled irrelevant the fact that the recipients of the transmissions were individual subscribers. The CJ observed that it should look at the “cumulative effect of making the works available to potential recipients” and it is “irrelevant whether the recipients access the

⁵⁰ *Svensson v. Retriever Sverige AB*, [2014] ECR I-___ Case C-466/12 at 19.

⁵¹ *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA*, [2006] ECR I-11519 case C-306/05 at 55.

⁵² *ITV Broadcasting Ltd. v. TVCatchup Ltd.*, [2013] ECR I-___ Case C-607/11 at 23.

communicated works through a one-to-one connection.”⁵³ Because the works were made available to the public at large, the author’s right of communication to the public was violated.

In sum, the CJ decisions make clear that the right of communication to the public in the Directive, as based upon the WCT, was intended to be read broadly, in a technology-neutral manner and without regard to the nature of the work, the nature of the transmission, whether the works were simply offered for receipt (*e.g.*, uploaded), or whether the public accessed the works on-demand in an individual manner at a time and place chosen by them.

It should be noted, of course, that rightsholders do not enjoy a single protection in the EU. Instead, they are protected on the basis of a bundle of national rights in each member state. While those rights have been largely harmonized by the Directive (the provisions of which have been generally adopted by member states), differences remain and the geographical scope of the rights is limited to the territory of the country granting them. Copyright is thus territorial in the sense that rights are acquired and enforced on a country-by-country basis under national law. The EU is currently undergoing a larger process to review the EU copyright laws.⁵⁴ In its review, the EU is focusing, in part, on whether further clarification of the communication to the public and making available right is necessary, specifically in the context of cross-border activities, for example where the upload occurs in one country and the download to a user in a separate

⁵³ *Id.* at 33-34.

⁵⁴ See Public Consultation on the Review of the EU Copyright Rules, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm. This is the most recent activity in the EU’s parallel review of its copyright laws. Past activity included a communication on Content in the Digital Single Market, COM (2012) 789 final, 18/12/2012, which reviewed the UE copyright legislative and licensing frameworks, as well as numerous Green Papers related to these issues. See COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm#maincontentSec2, COM(2011) 427 final, http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm, http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf as well as <http://ec.europa.eu/licences-for-europe-dialogue>.

country.⁵⁵ Considering the nuances of the laws of each EU state, and the lack of cases interpreting the rights relative to these questions, results may differ.

2. United Kingdom.

The U.K implemented the Directive in 2003 by amending its Copyright, Designs and Patents Act of 1988 to include a making available right. Section 20 provides a right for “the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.” The High Court applied Section 20 of the Act in connection with peer-to-peer file-sharing activities.⁵⁶ The Court found that connecting a computer to the Internet using P2P software in which music is placed in a shared directory capable of download falls within the Act, finding that “the mere fact that the files were present and were made available is sufficient for the infringement under s.20 to have been committed.”⁵⁷ The Court followed this line of reasoning in a host of well-reported cases involving piracy of films and sound recordings, including the Newzbin cases and a case involving the P2P site The Pirate Bay.⁵⁸

3. Australia.

The Australian Copyright Act was amended in 1999 to implement the WCT. With regard to literary, dramatic or musical works, Section 31(1)(a)(iii) of the Act provides an exclusive right “to perform the work in public” and Section 31(1)(a)(iv) provides an exclusive right “to communicate the work to the public.” In the case of artistic works, Section 31(b)(iii) provides an exclusive right to “communicate the work to the public.” Section 10 of the Act defines

⁵⁵ See Public Consultation at 10.

⁵⁶ *Polydor Ltd & Others v. Brown & Others*, [2005] EWHC 3191 (Ch).

⁵⁷ *Id.* at par. 6-8.

⁵⁸ *Dramatico Entertainment Ltd & Others v. British Sky Broadcasting Ltd & Others* [2012] EWHC (Ch.); *Twentieth Century Fox Film Corporation and Others v. British Telecommunication PLC*, [2011] EWHC 1981 (Ch.); *Twentieth Century Fox Film Corporation and Others v. Newzbin Ltd*, [2010] EWHC 608 (Ch.)

“communicate” as to “make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter, including a performance or live performance” The Copyright Law Review Committee recommending the new law to Parliament made clear that the right of communication was broadly drafted and intended to include all means of making available and transmitting works to the public. The explanatory language accompanying the 1999 legislation made clear that the right to communicate includes both the making available of works by offering the works to the public (*e.g.*, uploading) as well as the separate act of transmitting those works:

13. Item 6 amends s.10(1) of the Act to insert a definition of “communicate”. The definition provides that “communicate” means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter. The definition is central to the new right to communicate to the public (see Item 35). The term “communicate” is limited to the availability of material online or through electronic transmissions. It is not intended to cover the physical distribution of copyright material in a tangible form, which is adequately covered by existing provisions of the Act. The definition makes clear that an electronic transmission may occur as a result of a combination of paths or delivery mechanisms. For example, a communication over the Internet may involve a transmission that travels across copper wire, optic fibre cables and microwaves.

49. Item 35 amends s.31(1)(a) to repeal ss.31(1)(a)(iv) and (v) and substitutes a new s.31(1)(a)(iv). The amendment introduces the new technology-neutral right to communicate literary, dramatic and musical works to the public. The new right will provide copyright owners with greater protection for their material in the new digital environment and is the keystone to the reforms provided by this Bill. . . .

50. The new right of communication to the public encompasses the making available of copyright material on-line, so as to provide protection to copyright material made available through on-demand, interactive transmissions. An example of the exercise of this right would be the uploading of copyright material onto a server which was connected to the Internet.⁵⁹

⁵⁹ See Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 available at http://www.austlii.edu.au/au/legis/cth/bill_em/caab1999304/memo1.html

4. Japan.

Unlike countries that adopted the making available language of the WCT, the Japanese Copyright Act specifically provides an exclusive right to both transmit a work as well as separately to make a work transmittable.⁶⁰ Article 23(1) of the Act provides:

(1) The author shall have the exclusive right to effect a public transmission of his work (including, in the case of automatic public transmission, making his work transmittable).

(2) The author shall have the exclusive right to communicate publicly any work of his which has been publicly transmitted, by means of a receiving apparatus receiving such public transmission.

Article 2 defines the relevant terms as follows:

“public transmission” means the transmission, by wireless communications or wire-telecommunications, intended for direct reception by the public;

“automatic public transmission” means the form of public transmission which occurs automatically in response to a request from the public, excluding, however, public transmissions falling within the term “broadcast” or “wire-broadcast”;

“to make transmittable” means making an automatic public transmission possible by any of the acts set out below [including uploading a copy to an Internet-connected server].

Accordingly, Japanese law clearly provides that both offering a work for ultimate receipt (*e.g.*, uploading) as well as separately transmitting the work to the recipient by any means are exclusive rights of the author. This broad drafting was recognized by the Japanese Supreme Court in the *Maneki TV* case, where it ruled that the streaming of one-to-one transmission of audiovisual programming to individual subscribers were public transmission in violation of the rightsholder’s exclusive right.⁶¹

⁶⁰ Copyright Act, Law number: Act No. 48 of 1970, Amendment: Act No. 121 of 2006.

⁶¹ *NHK (Japan Broadcasting Corporation), et al v. Nagano Shoten Co. Ltd*, 65-1 Minshu 121, case 653, January 18, 2011.

5. Canada.

The Canadian approach to the communication and making available rights is interesting, specifically in the manner by which the timing of its legislature to include a new making available right coincided with a number of copyright decisions handed down by the Canadian Supreme Court (the five decisions are often referred to as the “pentalogy”). The approach taken by the Court underscored that a specific making available right broadens the exclusive rights afforded to rightsholders.

Prior to the Copyright Modernization Act in 2012, Canada, which had not implemented the WCT, provided in Section 3(1)(f) its Copyright Act a right of communication to the public which did not reference the making available right:

3.(1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication.

The Act, however, did not define what was included in the right of communication. In 2012, the Canadian Supreme Court was tasked to apply this (yet unrevised) statute in the pentalogy cases. First, in *Rogers Communications, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, the Court analyzed the application of the communication to the public right to a service that provided on-demand streams and downloads.⁶² As to the streams, the Court ruled that individualized one-to-one on-demand streams of copyrighted works were communications to the public, rejecting the argument that the recipients of each transmission should be analyzed separately.⁶³ Veering from the approach taken by U.S. courts in applying the U.S. Copyright Act in *Cablevision* and *Aereo*, the Court found that “[f]ocusing on each individual transmission loses

⁶² 2012 SCC 35 [2012] 2 SCR 283.

⁶³ *Id.*

sight of the true character of the communication activity in question and makes copyright protection dependent on technicalities of the alleged infringer's chosen method of operation.”⁶⁴

However, the Court did not rule on the issue of the service's provision of on-demand downloads, having addressed that issue separately in the case of *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*. In *Entertainment Software*, the Court ruled that a download of a copyrighted work did not implicate the right of communication to the public.⁶⁵ The Court reasoned that the legislative history demonstrated that the right of communication has been “historically linked” to the right to perform the work and not the right to reproduce permanent copies of the work.⁶⁶

However, this analysis was made in the context of the communication right as it then existed, without any specific making available right. The Canadian legislature amended the Canadian Copyright Act in 2012 to provide a new definition for its existing right of communication to the public to include a making available right. Section 2.4(1.1) currently provides:

For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

The Canadian government explained that the amendment was intended to implement the rights and protection in the WIPO Internet treaties, and explained the making available right as the exclusive right to “authorize the communication of their work or other related subject matter in a

⁶⁴ *Id.* at par. 30.

⁶⁵ 2012 SCC 34 [2012] 2 SCR 231. This decision reversed a lower Federal Court of Appeal affirming of a decision by the Copyright Board of Canada that a download did implicate the communication to the public right which permitted the Board to set a tariff for the downloads of copyrighted musical works represented by SOCAN.

⁶⁶ *Id.* at par. 39.

manner in which the time and place of receiving the communication can be individually chosen by the members of the public (e.g., iTunes).”⁶⁷

It would appear that the Canadian legislature’s specific addition of the making available right to meet the minimum requirements of the WCT would be interpreted broadly in future cases brought before the courts. Currently, the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”), the Canadian performing rights society, has requested the Canadian Copyright Board to determine the extent of the new making available right as it applies to downloads (and whether the Supreme Court’s decision in *Entertainment Software* is effectively overruled by the 2012 legislation). That proceeding is currently ongoing.

IV. SHOULD CHANGES BE MADE TO U.S. LAW TO CONFORM TO INTERNATIONAL TREATY OBLIGATIONS?

The majority of countries that have implemented the WIPO Internet Treaties have specifically included within their national laws a specific making available right, often in connection with the communication to the public right. The U.S., however, asserted its desire to allow for an “umbrella approach” in implementing the Treaties that would permit the minimal Treaty requirements to be met through existing rights in the law. Unfortunately, the U.S. law, as interpreted by numerous lines of decisions – from the *ASCAP-AOL* download case, to the peer-to-peer cases, to the *Cablevision-Aereo* transmit cases – may not meet those minimal requirements. Moreover, the Treaties were intended to apply to existing norms, as established business practices had emerged and long-term contractual relations have been solidified. Consideration of that principle with the idea that the Treaties recognized a need for the global community to be placed on even footing as the information age inherently transcends national

⁶⁷ Available at http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01190.html

borders, the U.S. law must recognize how other countries have implemented the Treaties in law and in business practice.

A. International Compliance.

As discussed above, the WCT was drafted with the intention of providing to rightsholders a very broad, technology-neutral exclusive communication right that:

- (1) applies to all forms of transmission; whether by streaming, download or some other form.
- (2) applies whether a recipient actually receives the transmission, or whether the file is merely offered for transmission (i.e. upload or hosting for transmission).
- (3) applies whether the transmission is made on-demand (“pull”) or via non-interactive means (“push”).
- (4) applies whether the recipients of each transmission are individualized or not.

The U.S. rights system of Section 106 could in theory meet these requirements, as the umbrella approach contemplated. However, interpretation by the U.S. Judiciary of the Section 106 rights demonstrates the downside of such a solution. Consider the situation of an operator of a website that obtains digital copies of copyrighted content, either legitimately or in circumstances in which the statute of limitations has run against claims for the unauthorized reproduction of those works, and provides those copies for on-demand download to the public. The operator also connects a third party slingbox or other audiovisual transmission device to its website, and through advanced engineering is able to provide individual streams of audiovisual cable programming (through the transmission feed from the slingbox) via individual copies of such program in the manner of *Cablevision* and *Aereo*. Subscribers can access such content on-demand individually. It is clear that exclusive rights afforded to rightsholders under the WCT, the EU Directive and the laws of most countries that implemented the WCT would be infringed. Those provisions have been drafted to be technology, right and transmission neutral. However, U.S. law may provide a copyright owner with no relief. Arguably, no actionable reproductions

have been made pursuant to the conclusion of the *Cablevision* court.⁶⁸ Additionally, the mere offering of content, without proof of actual receipt, is not an actionable distribution in many districts, and could not in any event be a violation of a performance in the case of downloads. Finally, even if streams were received by individual visitors, arguably they would be seen as private under the holdings of *Cablevision* and *Aereo*. Clearly, Congress could not have envisioned that the U.S. adherence to the WCT (and its bilateral and regional Trade Agreements) would lead to such a result.

B. Global Harmonization.

As mentioned, the WIPO Internet Treaties were intended to ensure that business continued as per usual in the digital age. The unique situation of the musical works industry, demonstrates, however, why continued adherence to the umbrella approach potentially places the U.S. on uneven footing with the rest of the world.

The U.S. musical works licensing structure has been described by the Office many times in the past.⁶⁹ Simply put, ASCAP and BMI license only the public performance right on behalf of their members and affiliates.⁷⁰ The PROs also license in the U.S. the public performance right of foreign works contained in the repertoires of foreign performance right societies through reciprocal agreements with such societies. Those reciprocal agreements, in turn, permit such foreign societies to license the repertoires of the PROs in the foreign territories. On the other hand, the music publisher members and affiliates of ASCAP and BMI license all other rights other than the public performance rights either on their own, or through an agent such as the

⁶⁸ The *Cablevision* Court found that the buffer copies made in the course of such transmissions were not actionable, and held to be lawful copies made upon request of the subscriber because they were made at the volition of the subscriber, not the transmitting service.

⁶⁹ See Copyright Office Section 104 Report

⁷⁰ ASCAP is actually prohibited from licensing other rights pursuant to its Consent Decree.

Harry Fox Agency. ASCAP and BMI in the U.S. act independently of each other in licensing matters, and act independently of its members in matters involving the licensing of other rights. In other words, a digital music user, which needs multiple rights, must clear the performance right from ASCAP or BMI (or by licensing their music directly without using a PRO) and then separately clear the other rights (*e.g.*, reproduction and distribution) from the copyright owner music publisher.

Contrast this situation with that found in most other countries, including all those that have implemented the WCT. In such countries performing rights societies either license all rights on their own or jointly in tandem with a mechanical licensing organization. Only one license will be issued. As those countries have interpreted the WCT as agnostic with regards to the means of transmission, recognizing that downloads implicate the right of communication to the public (as per the discussion *supra*), the society will simply allocate a percentage of the license fees under the license towards the performance/communication right and a percentage toward the reproduction right; such percentages to change depending on the type of service and transmissions involved.

The issues of music rights licensing are complex and challenging, and not at direct issue here.⁷¹ However, it is important to recognize that the international approach memorialized in the WIPO Internet Treaties was intended to ensure continued protection for rightsholders. It has become clear that current U.S. law – as interpreted by the judiciary -- has not met that intention.

V. HOW SHOULD U.S. LAW BE AMENDED?

A. Does Congress Need to Take Additional Steps to Clarify the Rights Under Section 106 and How Should the Law be Amended?

⁷¹ The topic of global rights licensing is even more broad and complex, and we do not in any manner attempt to address the many challenging issues and concepts inherent to that topic. As noted *supra* the EU is involved in its own review of copyright and cross-border licensing as effected in that territory.

The NOI asks for specific suggestions about how the U.S. law should be amended to clarify the inclusion of the making available right. The Musical Works Organizations reaffirm that the current exclusive rights already and implicitly comprise the characteristics of the making available right. That said, and while the Supreme Court's *Aereo* decision will shed further light, given the welter of confused and inaccurate court decisions, clarification may be needed. For the liability of offering works, the fix can potentially be as simple as incorporating the words "including by making available the works to the public" in the exclusive rights sections. For correcting the inappropriate focus on the type of copy used for transmissions and the wholly-inapt focus on whether only one person received the transmission (which is of course presumed in interactive transmissions), and while Copyright Office guidance is a critical first step, further legislatively enacted clarification could be helpful.

B. Adding an Explicit “Making Available” Right Does Not Broaden Section 106 Because the Right is Already Implicit in the Law, but Rather Establishes a Bright Line Rule Which Brings Certainty to an Unclear Doctrine.

As can be seen by the range and dissonance of judicial opinion, the “umbrella approach” to implementing WIPO’s terms has failed to reliably bring U.S. copyright law into compliance with international obligations and norms. Instead, the status quo has wrought grave uncertainty to the detriment of both rightsholders and providers and purveyors of copyright. Rather than protecting rightsholders and providing certainty to users and litigants, the status quo has merely encouraged a panoply of disjunctive, unclear litigation. That, in turn, has stripped copyright owners of Congressionally intended property protections while doing significant financial harm to litigants exploited by legal opportunists who profit from Title 17’s lack of clarity or seek to propound policy agendas in court at the risk and expense of their clients. For the sake of all parties and judicial economy, and because doing so merely clarifies Congressional intent and the

consensus understanding of international law, it is critical that the Office provide guidance to all stakeholders as to the implicit existence of a making available right, and that Congress be encouraged to speak through legislative revision that clearly, plainly, and explicitly states the “making available” right under Section 106. In the latter case, Congress would not be expanding Section 106, but rather providing clarity to the law’s current meaning and establishing a bright line rule that protects both owners and users of copyright.

1. The Existence of a “Making Available” Right Has Been Recognized in the Courts.

The weight of opinion is shifting in favor of recognizing the making available right as having been both intended and implicitly nested within Section 106 by Congress. As such, making that which is implicit merely explicit will not broaden the rights under Section 106, but rather will simply make the right’s presence plain, obvious, and clear for all.

Turning first to the courts, both the *Tenenbaum* and *Thomas-Rasset* courts explicitly noted the latent existence of a making available right. The *Thomas-Rasset* Court noted specifically that the district court’s error of law was that “. . .once Thomas-Rasset makes copyrighted works available on an online media distribution system, she has completed all the steps necessary for her to engage in [infringing distribution].”⁷² Similarly, the *Tenenbaum* Court noted that the defendant’s conduct “easily” constituted infringement when he “made thousands of songs available” online, noting that this was “exactly what Congress was trying to deter when it amended the Copyright Act.”⁷³ These conclusions further comport with the earliest holding in favor of a making available right as being nested within Title 17, *Hotaling v. Church of Jesus*

⁷² *Thomas-Rasset*, 692 F.3d at 906-07.

⁷³ *Tenenbaum*, 719 F.3d at 71.

Christ of Latter-Day Saints.⁷⁴ Just as in *Hotaling*, where the work at issue was a printed work made available through a library, the Tenth Circuit has recently confirmed that the risks of making a work available in the Internet age reach beyond one or two industries, and touch all owners of copyright in creative works whose interests are intended to be protected under the current copyright law.⁷⁵

2. Explicitly Stating a “Making Available” Right Establishes a Bright Line Rule Offering Clarity and Certainty to All Parties.

Recognizing and stating the existence of the making available right has also found significant and recent support among scholars. In addition to Professor Peter Menell’s recognition of Congressional intent discussed above,⁷⁶ Professor David Nimmer has revised his renowned treatise, stating that under current law “[n]o consummated act of actual distribution need be demonstrated . . . to implicate the copyright owner’s distribution right.”⁷⁷ To make this implicit meaning explicitly clear, Professor Nimmer recently testified before Congress that “the better course of Congressional action is to *reaffirm* the existence of a ‘making available’ right.”⁷⁸ Comparing the current world of distribution via Internet postings to the distribution in a pre-digital bookstore world, Professor Nimmer emphasized that just because the “making available aspect” of copyright was once protected by technological limitations does not mean that in the

⁷⁴ 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library . . . makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public. . . . Were this not to be considered distribution within the meaning of § 106(3), a copyright holder would be prejudiced . . . and the library would unjustly profit by its own omission.”).

⁷⁵ See *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013) (finding a “making available” right applicable to the context of library listings of graduate dissertations against the wishes and without the permission of the author).

⁷⁶ See Menell, *supra* note 11 and accompanying text.

⁷⁷ 2 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11(B)(4)(d) at 8-154.10 (2013)

⁷⁸ *The Scope of Copyright Protection: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong., 2d Sess. (Jan. 14, 2014) (statement of Professor David Nimmer), available at <http://judiciary.house.gov/index.cfm/hearings?ID=111BC62C-5069-400A-92D2-6D8B8F3976DA> (emphasis added). Professor Nimmer further noting that a the absence of an explicit “making available” right has “clogged” the courts. *Id.*

digital age there should be heightened evidentiary obligations imposed to secure rights that have always been understood as existing.⁷⁹ In his testimony, Professor Nimmer concluded that the entire exercise of imposing such obligations “can and should be avoided” through greater clarity in the law itself.⁸⁰

C. The “Making Available” Right Will Not Impact the First Amendment. Rather, It Will Impact Copyright Infringers to the Benefit of Rightsholders and in Support of Progress.

Courts, scholars, and policymakers have long and consistently recognized the degree to which clear and certain copyright secures Progress by ensuring rewards for those who labor in the creation of original works, and how strong copyrights further enhance the public good by promoting distribution through rightsholders’ ability to be compensated for the efforts required to effectively disseminate those expressions.⁸¹ Because the “making available” right simply clarifies longstanding protections available to copyright owners under U.S. copyright law, the mere explicit inclusion of that right does not impact to the First Amendment. On the contrary, an explicit “making available” right will benefit the public good by impacting and discouraging copyright infringers. An explicit right will do so by clarifying the law for the merely uninformed infringer, and by closing judicial loopholes currently available to those who seek to unjustly enrich themselves on the backs of writers, musicians, composers, artists, and other creators of expressive work.

Similarly, the First Amendment has long been provided with protection through the fair use doctrine, a well-established provision unique to American copyright law. As such, merely

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ U.S. CONST. art. I, §8, cl. 8; *see also* THE FEDERALIST NO. 43, at 288 (James Madison) (“The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right at common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.”)

providing explicitly for that which has always been present in U.S. copyright law should not be employed as a pretense for expansions in fair use or other erosions of copyright protections.

VI. CONCLUSION

The Musical Works Organizations applaud the Office's efforts and initiative in this challenging area of law. While music businesses have been built upon a rights model largely unchanged in 100 years, the drastic changes in the means by which copyrighted content is used and transmitted on a global scale points towards expanded thinking about protecting rightsholders in the future.

Respectfully submitted,

Dated: April 4, 2014

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