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Comment for the Right of Making Available

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I. INTRODUCTION

I am a lawyer in private practice in Nashville, Tennessee. Along with my law partner, Tara Aaron, I am a partner at Aaron & Sanders, PLLC, a technology and intellectual-property law firm. We represent both rights holders and licensees, and we both enforce intellectual-property rights and defend against them. As a matter of firm policy, we do not advocate for major policy changes in copyright, since most such changes would benefit only some of our clients but would hurt others. Thus, this comment will not advocate for or against the "making available" right, but will simply point out that, if Congress decides there should be such a right, it will need to create one, and it should take certain practical consequences into account in doing so.

I am also an adjunct professor at Vanderbilt University Law School, where I teach copyright. I wrote an article, *Will Professor Nimmer's Change of Heart on File Sharing Matter?*, 15 VAND. J. ENT. & TECH. L. 858 (2013), on the subject of the existence of a "making available" right. It is publicly available at <http://www.jetlaw.org/wp-content/uploads/2013/05/Sanders.pdf>. Because of this article, I have been encouraged to respond to this request for comment. Much of what follows is drawn from this article, and if further support for the points below is desired, the article may be consulted.

II. RESPONSE TO QUESTION 1(a).

How does the existing bundle of exclusive rights currently in Title 17 core the making available and communication to the public rights in the context of digital on-demand transmission such as

peer-to-peer networks, streaming services, and downloads of copyrighted content, as well as more broadly in the digital environment?

To answer this question, one first ask whether a “making available” right exists among the bundle of rights currently in Title 17 (the “Exclusive Rights”), and if not, then examine the extent to which the Exclusive Rights already cover—and fail to cover—the “making available” right. We define the “making available” right as placing a copy, phonorecord or computer file in a place or network where the public may not only access it but either take a copy or phonorecord, or make a copy of a computer file and take that copy, with the intent that the public would access and download the copy, phonorecord or computer file. This definition explicitly excludes accidental acts of making copyrighted material available, such as when one’s portable computing device is placed in an unsecured public network, such as WiFi networks available at coffee shops, airports and the like. Technically, for example, anyone using a WiFi-enabled iPhone that contains music files into a coffee shop with a public WiFi network, without taking adequate security measures, has made those music files available to everyone on the WiFi network, even though that would surely not be the user's intent. Consistent with copyright law, however, the actor need not know that he or she lacks the authority to perform these actions; copyright would remain a tort of strict liability to this extent.

A. Congress Should Not Assume a “Making Available” Right Exists Under Current U.S. Law.

Under current case law, the existence of an identifiable “making available” right is uncertain. Until 2012, however, it was safe to say that the weight of legal authority was against the existence of that right. In 2008, the United States District Court for the District of Arizona exhaustively surveyed the case law and the treatises and found that most decisions and all three major copyright treatises either rejected the existence of a “making available” right or expressed strong skepticism. *See Atl. Recording Corp., v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008). In 2012, the United States Court of Appeals for the Eight Circuit declined to rule on this issue. *See Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 902 (8th Cir. 2012). On those occasions when courts did find “making available” right, the defendants in those cases were usually pro se and, so,

may not have made very persuasive arguments against the existence of the right. See *Motown Record Co. v. DePietro*, 2007 U.S. Dist LEXIS 11626, at *12-13 (E.D. Pa. Feb. 16, 2007); *Universal City Studios Prods., LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006). But see *UMG Recordings, Inc. v. Alburger*, 2009 U.S. Dist. LEXIS 91585, at *10 (E.D. Pa. Sept. 28, 2009) (finding a “making available” right against a represented defendant, but following *DePietro* to do so).

A. Professors Nimmer and Menell Find "Copyright's Lost Ark."

In 2012, one of the major copyright treatises, *Nimmer on Copyright*, decided that there was a “making available” right and that it was contained in the distribution right. 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 8.11 (2012) (“Nimmer on Copyright”). *Nimmer on Copyright* was originally written by Melville B. Nimmer and is now maintained by his son, David. David Nimmer had been persuaded as to the existence of the “making available” right by Peter S. Menell’s 2011 article, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. Copyright Soc’y U.S.A. 1 (2011). David Nimmer invited Prof. Menell to re-write the section of *Nimmer on Copyright* on the distribution right, Section 8.11.

Prof. Menell’s argument was that scholars and lawyers had long overlooked a “trove” of legislative materials that definitively showed Congressional intent to include offers and attempts to distribute in the distribution right, and that offers and attempts to distribute are the non-digital equivalent of “making available.” These materials showed the thought process of the very drafters of the distribution right and that those drafters expected the distribution right to include the old exclusive rights to publish and to “vend” in the predecessor Copyright Act of 1909 (the “1909 Act”). Menell further argued that the old exclusive right to publish included offers and attempts to sell copies of the work at issue, which he saw as the functional equivalent of a “making available” right.

The new Section 8.11 caused a sensation. See, e.g., Moses Avalon, *Copyright Guru Changes Mind: Costs Lawyers Millions*, MosesAvalon.com Blog (Oct. 2012); Devlin Hartline, *Nimmer Changes his Tune: ‘Making Available’ Is Distribution*, Copyhype (Oct. 2, 2012). For years, the lawyers retained by the Recording Industry Association of America (“RIAA”) had sought to establish a “making available” right in order to ease their

campaign against individual file-sharers. See David Kravets, *RIAA 'Making Available' Argument: File Sharers 'Freeload,'* Wired (June 30, 2008). Not one had discovered Prof. Menell's "trove" of legislative materials, and not one had made Prof. Menell's argument. With David Nimmer's imprimatur, however, it seemed the puzzle—"copyright's lost ark," as Prof. Menell called it—had finally been solved.

B. Professor Menell Fails to Establish the Existence of a "Making Available" Right Under Current Law.

As much as practitioners might welcome clarity on this matter, Prof. Menell's arguments do not withstand scrutiny, unfortunately. Prof. Menell is either incorrect about or overstates four points crucial to his argument. First, it is probably not appropriate even to look at any legislative materials to help explicate the scope of the distribution right. Second, even if it were, it was surely not correct to look at these particular materials because they do not show *Congressional* intent. The drafters' intent is not necessarily to be ascribed to Congress. Third, even if it could, the intent would be ascribed to the *wrong Congress*. It is the intent of the Congress that enacted the statute that matters, not that of previous Congresses, and these materials were generated more than ten years before Congress passed the Copyright Act of 1976 (the "1976 Act"). Fourth, although the drafters of the new distribution right clearly meant to encompass the old exclusive rights to publish and to vend in the new right to distribute, there is no indication whether they understood those old exclusive rights to include the offers and attempts to sell copies.

The touchstone of statutory construction is to ascertain the intent of the legislative body that enacted the statute. *United States v. Flores*, 135 F.3d 1000, 1003 (5th Cir. 1998). While Congress leaves behind committee reports and other materials that shed light on its intent, it is not always appropriate to resort to these "legislative materials." Indeed, it is appropriate to do so only where the statutory provision in question is inherently ambiguous based on its plain meaning and statutory context. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)); see also *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The

ambiguity cannot be the result of the the legislative materials; it must be inherent to the statute. See *Comm'r v. Ewing*, 439 F.3d 1009, 1013 (9th Cir. 2006); *United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997) (citing *United States v. Gonzales*, 520 U.S. 1, 4-6 (1997)).

Here, the use of the term “distribute” in the 1976 Act is not sufficiently ambiguous in context. It is not specially defined, so one must resort to its plain meaning. The vast majority of meanings given to “distribute” involve the physical movement of objects. *Distribute*, Merriam-Webster Dictionary (online) (2013); Webster’s Third New International Dictionary 660 (1961)). The exceptions are meanings special to a particular industry.

Then, there is the unusual nature of the legislative materials themselves. They were not generated by Congress. They were generated by the U.S. Copyright Office and describe (among other things) a 1963 meeting among “sixty-two government officials, industry representatives, and copyright scholars,” but no members of Congress or their representatives. See 2 *Nimmer on Copyright* § 8.11[B][1]. Most important, the meeting was attended by the General Counsel of the U.S. Copyright Office, who was tasked with drafting the new distribution right. The report showed that the General Counsel explicitly intended for the new distribution right to encompass, at a minimum, the old exclusive rights to publish and to vend: “I think the draft covers virtually all forms of distribution.” *Id.* (quoting *Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft* (1964)).

It is, however, a mistake to ascribe the intentions of the drafter of legislation to the legislative body that enacts it. The goal here is to ascertain *Congressional* intent, not the drafter’s. The drafter is not elected and is not empowered to enact legislation. Further, the members of Congress may not share the drafter’s subjective intent. Here, the General Counsel assuredly knew a great deal about the history of copyright law and the 1909 Act, but unless the General Counsel shared such knowledge with Congress—and there is indication he did—we cannot ascribe this background knowledge to Congress. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 618 (1976) (Stewart, J., dissenting).

Further, even if the General Counsel shared his intent and expertise with Congress in 1963, Congress did not pass the copyright reform legislation in 1963 or 1964. In fact, Congress did not pass the legislation until 1976. When examining legislative materials, one must content oneself with those generated by the Congress

that actually passed the statute in question. See *Lyons v. Ga.-Pac. Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1247 (11th Cir. 2000); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007) (tracing the history of an oft-amended act, but limiting its discussion of legislative materials to those Congresses that enacted the amendments in question). One Congress may have different reasons for passing legislation and may have a different understanding of that legislation, than a predecessor Congress considering substantially the same bill.

Finally, there is no evidence that the General Counsel even understood the old exclusive rights to publish and to vend as including offers and attempts to sell copies. The fact is that the issue never directly came up in the courts. Neither Prof. Menell nor I can find a single decision under the 1909 Act in which the defendant was accused of infringing copyright by offering for sale or attempting to sell a copy. Indeed, we are able to locate only a single decision in which the court had to decide whether the exclusive rights to publish and to vend included offers to sell. See *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957). In that case, the court had to determine whether an offer to sell unauthorized copies of a book infringed copyright, not to determine liability for copyright infringement (which was admitted because there had been actual sales), but to determine which state's statute of limitations should apply. The court held, based on dodgy authority, that offers for sale did **not** constitute an exercise of the exclusive rights to publish or to vend. *Id.* at 49, 62-64. This legal authority is not much, but it is all we have.

To be sure, there are decisions regarding the scope of the 1909 Act's use of the terms "publish" and "publication," but none of these involved the exclusive right to publish a work. Under the 1909 Act, the term "publish" did double-duty. It not only defined one of the exclusive right, but it was also a condition for obtaining federal copyright protection in the first place. In stark contrast to the 1976 Act, under the 1909 Act, works started life under state copyright law until such time as they were "published." If they were published with "notice" (i.e., an appropriate copyright notice and date), they were protected by federal copyright law. If they were published without notice, they entered the public domain—a harsh result. It was a common defense under the 1909 Act to argue that the copyright holder had published the work without notice and, therefore, had no copyright to enforce. Thus, courts had several opportunities to pass on the question of whether offers to sell constituted a publication without notice,

and the law governing this sort of "publication" became notoriously difficult and confused.

It is submitted that these decisions are not germane to the question of a "making available" right. There is a presumption that a term appearing in several places in a cohesive statute, such as the 1909 Act, has the same meaning throughout. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (5-4 decision); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). This presumption is not absolute, however, and will yield where context demands. *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Gustafson*, 513 U.S. at 588 (Thomas, J., dissenting in 5-4 decision). This presumption should not apply to the two uses of "publish" in the 1909 Act. The two uses serve very different functions. One use describes the scope of an exclusive right. The other describes a condition for federal copyright protection. The purpose of the publication requirement was to give notice to the world of the author's claim over work. See *Data Cash Sys., Inc. v. J S & A Group, Inc.*, 628 F.2d 1038, 1043 (7th Cir. 1980). By making the work publicly available, the author was informing the public whether they could or could not freely use the work. By contrast, an exclusive right describes what the public may not do with the work, assuming federal copyright protection.

Therefore, Congress should not assume that a "making available" right exists. It will have to create one. If it chooses to, it should do so with care.¹

III. QUESTION 3b.

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?

It has been argued that the addition of a "making available" right will have little or no practical effect on current U.S. law. That argument is overstated somewhat. A "making available" right will have several practical consequences for copyright law, which Congress should account for in crafting such a right (should it choose to do so).

¹ It is a separate question, beyond the scope of this Comment, whether current U.S. Law complies with Article 8 of the WIPO Copyright Treaty, despite the lack of a "making available" right as defined in this Comment.

A. A "Making Available" Right Is Largely Redundant.

Let us assume for the sake of argument there is no “making available” right. If a host knowingly made certain computer files available for download over the internet, the host’s operator could still be liable for infringing the distribution right.² As is the case in other areas of the law, it is rare to have direct evidence of the misdeed. The fact that files were made available to the public for download for a certain period of time might be enough to convince a jury that actual distributions had taken place. *See London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (holding that no "making available" right exists but denying the motion to dismiss because a jury could plausibly find actual distributions based on the fact that the files were publicly available). If the host destroyed or deliberately failed to keep an access log or other traffic data, it might be difficult to prove how many of those files were downloaded—a crucial question for damages, especially statutory damages—but that is a risk assumed by the host.

Furthermore, a preliminary injunction removing the files from public access should be readily available. It is well-established that a rights owner need not wait for infringement before obtaining injunctive relief, so long as the infringement is “imminent.” If, for example, an unwitting retailer was known to have received a shipment of unlicensed books, the copyright owner could surely enjoin the distribution of those books even before the retailer could set them out for sale. *See 5 Nimmer on Copyright* 14.06 n.32 (hypothetical: preliminarily enjoining the public performance of a play that has been advertised and privately rehearsed but not yet publicly performed); *accord Dallas Cowboy Cheerleaders v. Scoreboard Posters*, 600 F. 2d 1184, 1187-88 (5th Cir. 1979); *see also Pennsylvania v. West Virginia*, 262 U.S. 533, 593 (1923) (A plaintiff “does not have to await the consummation of threatened injury to obtain preventative relief.”);

² This analysis assumes that digital distributions actually constitute distributions, as defined by statute. *See* 17 U.S.C. § 106(3). Courts generally hold that they do. *See London-Sire*, 542 F. Supp. 2d at 170-74. However, under plain reading of the statute, digital distributions are not "distributions" because the right is limited to distributions of "copies or phonorecords." With respect to computer files, the copy or phonorecord in question would be the hard-drive (or other storage medium) on which the computer file is written, not the file. When a file is digitally distributed, what actually happens is the host computer communicates data to the recipient computer, which then writes the data as a computer file on a hard-drive (or other storage media), thus implicating the reproduction right but not the distribution right.

United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (“The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs.”). Knowingly making computer files publicly available for download is almost certainly the kind of “imminent” harm that preliminary injunctions may prevent.

B. However, a "Making Available" Right Would Have at Least Three Practical Consequences that Congress Should Take into Account.

Despite this, a “making available” right would have three practical effects on copyright law, which Congress should take into account and balance if it chooses to implement such a right: (1) it would make enforcement of copyright in the digital context much more efficient than under current law; (2) it would greatly increase the number of works at issue in a particular enforcement action, which would probably also greatly affect the amount of damages; and (3) it would effectively create an exception to the three-year statute of limitations contained in the Copyright Act.

First, even though proof that computer files were made publicly available for download **can** be sufficient for a jury finding of copyright infringement, it is no guarantee. More important, a “making available” right would almost certainly allow copyright owners to avoid the vagaries of jury trials completely. Proving a violation of a hypothetical “making available” right would be almost elementary: one need prove only that the files existed on the host’s computer system in a “folder” (or similarly situated location) designed to be publicly accessible. Most peer-to-peer file-sharing systems are explicit about designating such file folders, so all a copyright owner would need to do is obtain an accurate “image” of the host’s computer hard drive (or other storage) and look in the public folders, a fairly easy task for a competent computer forensics specialist. At that point, the copyright owner will have proven all the elements of an infringement of a hypothetical “making available” right and should prevail at summary judgment, obviating uncertain and expensive jury trials.

Thus, a “making available” right would be a great practical advantage for rights holders, but not so much because their rights are expanded but because their rights are more efficiently enforced. The risk is that this advantage could be abused by those looking to exploit statutory damages as an arbitrage through mass litigation. An

unscrupulous rights holder could, for example, argue that insufficiently secured home computers make their files available to the public, particularly through home Wi-Fi systems. Even though most courts would reject this argument, individual consumers would neither have the resources nor the knowledge of copyright law to challenge that argument in court. Over the last few years, some rights holders—usually, but not always, owners of copyrights in pornography—have sued hundreds of consumers and offered to settle for less than the cost of defense. *See K-Beech, Inc. v. Does 1–85*, No. 3:11cv469–JAG, 2011 WL 9879174, at *3 (E.D. Va. Oct. 5, 2011); *see also Malibu Media, LLC v. Does 1–10*, No. 2:12–cv–3623–ODW, 2012 U.S. Dist. LEXIS 89286, at *8–9 (C.D. Cal. June 27, 2012) (“The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial.”).

Second, there is the issue of damages, which will be explored in greater detail below.

Third, a “making available” right would be a “continuing tort,” which has consequences for the applicability of the Copyright Act’s three-year statute of limitations. Continuing torts are not unknown in copyright law, particularly in the digital context. But, like the infringement found in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), a “making available” right creates an usually passive one. One might upload a file “somewhere on the internet” and forget about it—not an unusual occurrence—yet that person will be, in effect, constantly infringing copyright for purposes of the statute of limitations. The rights holder will have much longer than the three-years from discovery intended by Congress to bring suit.

If Congress creates a “making available” right, it should consider whether such a departure from the three-year statute of limitations is an acceptable side effect of such a right, or whether special measures should be taken to mitigate the departure. For example, Congress could specify that the three-year statute of limitations accrues once and once only upon discovery that the work is publicly available.

C. A “Making Available” Right Would Alter the Calculus Behind Statutory Damages.

A “making available” right would interact strangely with copyright damages. Assuming a copyrighted work has been timely registered, a victorious copyright owner

may choose between compensatory damages (wrongful profits plus actual damages) and statutory damages. Statutory damages are determined by a jury and must be between \$750 and \$30,000 **per work infringed**.³

1. Thomas-Rasset: A Case Study

A “making available” right would almost certainly increase the damages in a typical case of peer-to-peer file sharing. In the *Capitol Records v. Thomas-Rasset* case, the defendant was found liable for actually distributing 24 music files through a peer-to-peer file-sharing system, and successive juries found her liable for \$222,000 (or \$9250 per file), \$1.92 million (or \$80,000 per file) and \$1.5 million (or \$62,500 per file).⁴ See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 (8th Cir. 2012). The trial court explicitly refused to find a “making available” right, so the rights holders made a strategic decision to limit their case to 24 files for which they had direct evidence of actual downloading. *Id.* at 902. However, the defendant actually had about 1000 such files available for download. *Id.* at 910.

One might conclude that, if the rights holders had been successful in establishing a “making available” right, the defendant would have been liable for \$9.25 million, \$80 million or \$62.5 million. This assumes, however, that a jury would have regarded an actual download as just as culpable as merely making the same file available to the public. *Cf. id.* at 910 (“If [the plaintiffs] had sued over 1,000 recordings, then a finder of fact may well have considered the number of recordings and the proportionality of the total award as factors in determining where within the range to assess the statutory damages.”). Common sense suggests that actual distributions are more damaging than attempted distributions and that a jury would award statutory damages accordingly. Even so, at the minimum statutorily permissible amount, the defendant would have been liable for an additional \$750,000.

Statutory damages are intended both to compensate the rights holder, especially when calculation of actual damages is difficult, and to discourage similar acts of

³ The floor of this range may be reduced to \$250 upon a jury finding of “innocent infringement” and the ceiling may be raised to \$150,000 up on a jury finding of willfulness.

⁴ For strategic reasons, the rights holders appealed the first (and lowest) judgment in an attempt to establish a “making available” right. The Eighth Circuit Court of Appeals refused to consider the question on justiciability grounds. *Id.* at 910.

infringement in the future. In light of the difficulty of catching and proving most acts of copyright infringement—i.e., most infringers are likely to “get away with it”—compensatory damages alone are insufficient to deter infringement. At the same time, punishment should be proportional to the wrong. Ideally, the punishment is the minimum necessary to both fully compensate the victim and deter future conduct.

If the defendant in *Thomas-Rasset* was at all typical (and she probably was), a making available right will increase liability by hundreds of thousands of dollars, probably more. Congress might consider whether the making-available right should have a much lower floor for statutory damages, particularly in light of the ways mass copyright litigation can and has already been abused.

2. How Patent Law Handles Damages for Offers to Sell.

A comparison to patent law may be instructive here. Patent law, unlike copyright law, is explicit in forbidding offers for sale, as well as sales. *See* 35 U.S.C. § 271(a). It may be asked how patent law calculates damages where the only infringing acts are offers for sales. Patent law has no statutory damages, so patentees must content themselves with compensatory damages, which under patent law can be no less than a reasonable royalty, defined as what a willing licensor and willing licensee would have agreed to in a hypothetical negotiation. *See* 35 U.S.C. § 284; *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1561 (Fed. Cir. 1983). A reasonable royalty is not a good fit for offers to sell, however, because it is unlikely that a patentee would license only the right to offer to sell patented products, but not also the right to sell, even in a hypothetical negotiation.

Damages for violating the patentee’s exclusive right to offer to sell are very rare, but not impossible. *See Rotec Indus. v. Mitsubishi Corp.*, 215 F.3d 1246, 1260 (Fed. Cir. 2000) (Newman, J., concurring) (dicta as to damages); *Transocean Offshore Deepwater Drilling, Inc. v. Stena Drilling Ltd.*, 659 F. Supp. 2d 790, 796 (S.D. Tex. 2009) (dicta as to damages). In *Vulcan Engineering Co. v. Fata Aluminium, Inc.*, the Federal Circuit disagreed about how to measure such damages, but it accepted that they were at least theoretically recoverable. *Compare* 278 F.3d 1366, 1377 (Fed. Cir. 2002) (considering but rejecting as insufficiently proven a theory of “price erosion” caused by infringing bids) *with id.* at 1382 (Michel, J., dissenting in part) (arguing that a “but for” model should be used). That case had an unusual fact pattern in that the infringer and the patentee were

the only two competitors in the market and had both made bids for the same construction project.

3. Congress Should Consider Lowering the "Floor" of Statutory Damages Where Only the "Making Available" Right Has Been Violated.

Damages for offers for sale in patent law are, as can be seen, rare because they almost never result in actual harm to the owner. Applying this observation to copyright statutory damages, we see that the need for compensation is minimal but the need for deterrence remains. While juries will presumably take this into account in awarding statutory damages, the \$750 "floor" limits juries' flexibility. Congress set this floor with the expectation that it will both compensate and deter, but if the "making available" right implicates only deterrence, the \$750 "floor" is too high for infringing acts of making files publicly available. In addition, because a "making available" right will encompass vastly more works, juries will find themselves forced to make very large awards for acts they might otherwise regard as innocuous (but not "innocent" in the legal sense). Congress might consider substantially lowering the "floor" where a work's copyright is infringed solely by a violation of the "making available." Nothing, of course, would prevent a jury from awarding more for egregious acts of making files publicly available.

Consider the following two actors. The first makes a popular motion picture available to the public, with a clear intent to profit. The second makes her collection of 1000 music files available to her friends via a public network. In neither case are actual downloads proven. A jury could award at most \$150,000 for willful infringement as to the first actor, but it would be forced to award at least \$750,000 as to the second actor, even though first actor is the greater menace to copyright and is in greater need of deterrence. The jury should have the option of reducing the judgment against the second actor to the minimal amount necessary to deter similar bad conduct.

Congress could accomplish this in a couple of ways. First, it could eliminate or substantially reduce the "floor" of statutory damages in cases of infringement of the "making available" right. Second, it could require that violations of the "making available" right be aggregated, i.e., treated as a single act of infringement.

IV. CONCLUSION

Congress should not assume that a "making available" right exists, despite what Professors Nimmer and Menell say. If there is to be a "making available" right, Congress will need to create one. If Congress so chooses, it should take into account the practical consequences such a right will have on (1) the ease of proof, (2) damages and (3) the statute of limitations.