

Tulane

Tulane University School of Law
John Giffen Weinmann Hall
6329 Freret Street
New Orleans, Louisiana 70118-6231
(504) 865-5987 (office)
(504) 862-8846 (fax)
glunney@law.tulane.edu

GLYNN S. LUNNEY, JR.
McGlinchey Stafford Professor of Law

April 2, 2014

Office of Policy and International Affairs
United States Copyright Office
101 Independence Avenue S.E.
Washington, D.C. 20559

Re: Notice of Inquiry: The Right of Making Available, Docket No. 2014-2

In response to the Copyright Office's Notice of Inquiry, Docket No. 2014-2, regarding the making available right, I offer the following comments. My comments here build upon and clarify the testimony I offered to Congress at a January 14, 2014 hearing before the House Subcommittee on Courts, the Internet, and Intellectual Property. I continue to believe today, as I did when I testified at the hearing, that we should not add an express "making available" right or a "communication to the public" right to the Copyright Act. Adding either right to the Act is not necessary to satisfy our treaty obligations. It would not solve the file sharing "problem." And it would create substantial and undesirable legal uncertainty for the Internet generally, and for social networking and cloud computing specifically.

While I have covered these issues in some detail in my prior testimony, I wanted to clarify one issue and expand on another. In terms of clarification, I testified that our existing structure of rights provides protection equivalent to the "making available" and "communication to the public" rights required by the WIPO Copyright Treaty ("WCT") and the WIPO Performance and Phonograms Treaty ("WPPT"). I continue to believe that this is true. My testimony should not, however, be taken to suggest that merely offering a copyrighted work through a file sharing program violates the distribution right under existing United States law. Rather, my testimony reflected a belief that we have satisfied our treaty obligations whether we require proof of a download to establish infringement of the distribution right or not. This issue, whether proof of a download is or is not required, is precisely the sort of implementation issue that these treaties left to the discretion of the individual member states. The umbrella solution

adopted in the treaties, along with principles of international law more generally, expressly give member states leeway to implement the agreed rights through their own, admittedly varying legal structures. Given that leeway, our existing law satisfies our obligations under the WCT and the WPPT whether we require proof of a download to establish a violation of the distribution right or not.

As for whether existing United States law requires proof of a download, I agree with a majority of the district courts that have addressed the issue. To establish a violation of the distribution right in the file sharing context, a copyright owner must establish that a download has occurred. It is not enough to show that a work has been offered for distribution; the copyright owner must show that a distribution has in fact occurred. The plain language of section 106(3) unambiguously compels such a conclusion. Section 106(3) provides a copyright owner with the exclusive right:

[T]o distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership¹

By adding the phrase “by sale or other transfer of ownership” to the provision, Congress made clear that the copyright owner has the right to control only the actual distribution of copies of her work. Absent a change in possession of a copy, an offer to distribute or an attempt to distribute does not violate the exclusive right because no sale or transfer of ownership occurs.²

Given that the statutory language is unambiguous, there is no need, and indeed, it would be improper, to resort to the legislative history. Taking isolated statements from the legislative history, out of context, provides no legitimate basis for ignoring or rewriting the statute’s plain language.

Moreover, requiring proof of a download in the file-sharing context improves the fit between the legal rules and the policies they intend to serve. It is the downloading of a work, not the uploading, that most directly interferes with a copyright owner’s legitimate economic interest. Only when a consumer downloads a copyrighted work from a file-sharing program and thereby obtains his or her own unauthorized copy does file sharing have the potential to displace directly the sale of an authorized copy.³

¹ 17 U.S.C. §106(3).

² A copyright owner may prove that such a distribution was more likely than not to have occurred through circumstantial as well as direct evidence. *See, e.g.,* London-Sire Records, Inc. v. Doe I, 542 F. Supp. 2d 153, 169 (D. Mass. 2008).

³ Economic studies disagree on whether file sharing displaces authorized access. Some studies have found that file sharing displaces authorized access to some degree. *See, e.g.,* Martin Peitz and Patrick Waelbroeck, *Why the Music Industry May Gain From Free Downloading: The Role of Sampling*, 24 INT’L J. INDUSTRIAL ORG. 907 (2006) (using macro data from sixteen countries to estimate that file sharing reduced sales by 20 percent). Some

Proponents argue that adding a making available right would enable copyright owners to nip file sharing in the bud. With a making available right, copyright owners could pursue a legal remedy as soon as a work was posted to a file sharing network. There would be no need to wait for the work to be downloaded, and then pursue the ever-expanding network of downloaders. Thus, a making available right would finally put a stop to file sharing and would do so with a minimal invasion of consumer privacy, or so proponents argue.

But the notion that a making available right would stop file sharing is a pipe dream. Many countries have an express making available right. In those countries, file sharing is just as common as it is in the United States.⁴ Adding a making available right to our Copyright Act would not stop, or even put a serious dent, in file sharing, nor would it safeguard consumer privacy. Indeed, if we value consumer privacy, the Copyright Act should simply exempt consumers from its reach.

This brings me to the issue on which I would like to expand. Allowing copyright owners to pursue individual file sharers has led to a serious porn troll problem. Rather than help legitimate businesses control file sharing, adding a making available right would instead only exacerbate this problem. Threatening to expose someone for sharing a copyrighted porn film is essentially an extortion scheme, but it is an extortion scheme to which copyright law and federal courts have decided to lend their power and prestige. If an individual works for an Internet service provider, and in that role, is able to identify a thousand individuals who are downloading porn through file sharing programs, the individual could threaten to expose them unless they pay up. Such a threat would be straightforward extortion and illegal under existing law. Although illegal, such a threat may also prove quite effective. Given the personal and professional costs of speaking up, many will choose to remain silent and simply pay up to avoid exposure. Yet, because the threat is illegal, only one of the victims need speak up to shut the entire scheme down.

have found that file sharing neither increases nor decreases authorized access. See, e.g., Felix Oberholzer-Gee and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (finding that unauthorized downloads do not reduce authorized purchases). Some studies have found that file sharing actually increases the purchasing of authorized copies. See, e.g., Birgitte Andersen and Marion Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, University of London Working Paper (2008) (finding that file sharing increasing sales and estimating that, on average, for every twelve additional downloads, a consumer purchased an additional 0.44 CDs).

⁴ Internet traffic studies thus show consistent and steady growth of file sharing traffic in Europe, Asia, Africa, and North and South America. Compare CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2011-2016, at 9 (2012), with CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2007-2012, at 4 (2008).

Yet, if the individual at the heart of this extortion scheme is the copyright owner of the porn film being downloaded, all of a sudden this same extortion scheme somehow becomes legitimate. Not only legitimate, but the federal courts are legally required to protect and aid the extortion scheme. Existing copyright law enables the porn troll: (i) to use the subpoena power of the federal courts to compel an ISP to identify a downloader; and (ii) to file a federal lawsuit to facilitate the extortionate threats. Moreover, if someone chooses to speak up and objects to the extortion scheme, they accomplish nothing. Even though, as a factual matter, it remains at heart the same extortion scheme, legally, we must pretend that it is not. When it is the copyright owner of the porn film engaging in such extortion, we pretend that the scheme has somehow become mere enforcement of copyright. Copyright law thereby both protects the extortionate porn troll from the reach of our laws against extortion and blackmail generally, and facilitates the porn troll's extortion scheme.

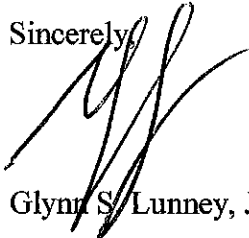
As a recent study has shown, porn troll litigation is increasingly becoming the predominant form of copyright litigation in this country.⁵ It is very difficult to see how copyright law, by enabling and facilitating these extortionate threats, is promoting "the progress of Science." Certainly, I think, no one would argue that we need copyright law to redress the unauthorized sharing of these works because there would otherwise be insufficient porn on the Internet. Moreover, as facilitating these threats becomes increasingly copyright's most visible role, playing that role will tend to de-legitimate copyright and diminish its stature more generally.

Rather than consider adding rights to the Copyright Act, Congress ought instead to be looking at ways to cut copyright back. The central problem with copyright law today is not that we have too little, but that we have too much. When measured against its constitutional purpose, copyright protects too much and too broadly, and it does so for far too long. Given its current breadth, expanding copyright law further does not represent a zero-sum game, but a net loss for our economy. Like a tax-and-redistribution scheme, broader copyright may give copyright owners an extra dollar, but it does so by taking somewhat more than a dollar from copyright consumers. It may promote creative output and employment in the copyright industries, but it does so by reducing output and employment that would have added more value elsewhere in the economy.

⁵ See Matthew Sag, *Copyright Trolling, An Empirical Study* 24 (2014) (available on [arXiv:1403.0002v1 \[LAW\]](#)) ("There were almost no John Doe pornography cases until 2010, yet by 2013 these cases made up more than half of all copyright filings in 19 federal districts in 2013.").

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For its first two hundred sixty years, from 1710 until the 1970s, copyright focused on copying and distribution by commercial entities and ignored copying and distribution by ordinary consumers. It should return to that focus. Congress should expand the scope of section 1008 of the Copyright Act to exempt noncommercial consumer copying and distribution generally.

Sincerely,

Glynn S. Lunney, Jr.