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April 7, 2014

**Re: Comments of Professor Jane C. Ginsburg – Study on the Right of Making Available
Docket No. 2014–2**

In response to the U.S. Copyright Office’s February 25, 2014 Federal Register Notice soliciting participation in a Roundtable on the “Right of Making Available,” I submit these comments solely on my own behalf as an intellectual property law scholar, in order to address the meaning of the “making available right” in the WIPO Copyright Treaty, its interpretation in other jurisdictions (NOI question 2) and its implementation in US law (NOI question 1).

Summary

The WCT “making available” right applies to the offering to the public of on-demand access to a work in the form of a stream or of a download. Compliance with the WCT requires a member state to cover both kinds of access (streaming and downloading), and to cover not only actual transmissions of streams and downloads, but also the offering to communicate the work as a stream or a download.

The “umbrella solution” adopted at the 1996 Diplomatic Conference that yielded the WCT allows member states to implement the art. 8 making available right through a variety of means, including, for example, an all-embracing “making available” right, or a combination of a public performance right covering streams and a digital distribution right covering downloads. Whatever the means chosen, however, the member state must ensure that its law covers the offering to the public of on-demand access to a work both as a stream and as a download.

Compliance with its WCT obligations therefore turns on whether the U.S. Copyright Act, as interpreted by the courts, confers the exclusive right to offer on demand to the public a work for streaming and for downloading. Coverage only of the actual delivery of a stream or download does not suffice, nor does coverage only of offers of streams but not of downloads (or vice versa).

The U.S. implementation of the making available right reveals the potential shortcomings of relying on multiple exclusive rights collectively to cover the full range of acts comprised within the making available right: some features of the right may end up left out. The U.S. implementation has assigned the offering and communication of digital streams to the public performance right, and downloads to the reproduction and distribution rights. Although caselaw and statutory authority clearly establish that the U.S. distribution right embraces delivery of digital copies, decisions interpreting the scope of the distribution right differ regarding the essential question of coverage of *offers* to download. A majority of courts addressing that question have so far held that the right requires actual delivery of the download: a mere offering of the work to the public for downloading does not suffice. In addition, recent caselaw has called into question the scope of the public performance right in on-demand communications based on individualized storage copies. Activities which clearly would constitute “making available” within the meaning of the WCT may not be “public performances” under the “transmit clause” as interpreted by the Second Circuit in *Cartoon Network v. CSC Holdings (Cablevision)*, 536 F.3d 121 (2nd Cir, 2008), and *WABC v Aereo*, 712 F.3d 676 (2nd Cir. 2013), *cert. granted*. As a result the U.S. has not yet consistently implemented the full scope of the making available right.

Analysis

WCT article 8 applies to the offering of access to a work both as a stream and as a download

Nature of the access covered:

The text of WCT article 8 (“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”) encompasses all forms of on-demand access, whether or not the access results in a retention copy. Thus, it does not matter whether the member of the public obtains access to the work via a real-time “stream” or via the delivery to her computer or other device of a digital copy that she subsequently “opens” in order to see or hear the work.

Article 8 is designedly “technology neutral” in order to avoid obsolescence. Even in 1996, it was understood that the line between exploitations involving the creation of copies, and exploitations involving real time (more or less) listening and/or viewing without retaining a copy was becoming increasingly indistinct. The WIPO “Internet Treaties” acknowledged and anticipated the overlapping nature of “performance” and “copy” in digital communications, and, seeking a technologically neutral solution, therefore aimed to cover both.

“Making available” encompasses offering access, it is not restricted to actual transmissions

The concept of “making available” set out in WCT article 8 necessarily encompasses not only the actual transmission of a work to members of the public, but especially the offering to the public to access the work on demand. *See, e.g.,* Sam Ricketson & Jane Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, *supra*, para. 12.58: “simply offering the work on an undiscriminating basis, so that any member of the general public may access the work, should come within the scope of the right. . . . It is not necessary that the offer be accepted: ‘making available’ embraces incipient as well as effected communications.”; WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO (2003) at CT-86 (“It had to be accepted and clarified that this concept [making available] extends not only to the acts that are carried out by the ‘communications’ themselves (that is, to the acts as a result of which a work or

object of related rights is, in fact, made available to the public and the members of the public do not have to do more than, for example, switch on equipment necessary for its reception), but also to the acts which only consist of making the work accessible to the public, and in the case of which the members of the public still have to cause the system to make it actually available to them.”)

The European Union has adopted the WCT art. 8 making available right verbatim, in the 2001 Information Society Directive, art. 3(1). The Court of Justice of the European Union, in *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB (Case C-466/12)* (Feb. 13, 2014), recently confirmed that the “making available” right covers potential as well as completed access to works of authorship. See para. 19: “a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity” and para. 20: “It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’,” Accord, S. Von Lewinski & M. M. Walter, “Information Society Directive” in M.M. Walter & S. Von Lewinski, *European Copyright Law*, 983, par. 11.3.30-31 (Oxford University Press, 2010).

The act that triggers the making available right is the offer to communicate the work to the public on an on-demand basis; while actual individualized communications to members of the public are of course covered as well, the innovation of the WIPO Treaties was to enable authors to license, or to seek redress from, persons or entities who hold works out to the public as available for access by streaming or download.

The U.S. experience

Full coverage of the making available right through a combination of rights has proved elusive in the U.S. Both with respect to the application of the U.S. public performance right to streaming and offering to stream, and with respect to offers to download, U.S. implementation of the making available right seems increasingly doubtful.

At the time of ratification, however, U.S. authorities did not anticipate the difficulties that have subsequently ensued. As the recent study published by the U.S. Department of Commerce (“Green Paper”) explains,

When the United States implemented the WIPO Internet Treaties in the DMCA, it did not include an explicit “making available” right, as both Congress and the Administration concluded that the relevant acts were encompassed within the existing scope of exclusive rights.¹ In addition to the existing reproduction and public performance rights, the distribution right, adopted in the 1976 Copyright Act, applied to digital transmissions as

¹ H.R. REP. NO. 105-551, pt. 1, at 9 (1998) (“The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.”); S. REP. NO. 105-190, 105th Cong., 2nd Session, at 11 (1998) (“The Committee believes that in order to adhere to the WIPO treaties, legislation is necessary in two primary areas – anticircumvention of technological protection measures and protection of the integrity of rights management information This view is shared by the Clinton administration.”); Statement of Bruce Lehman, Assistant Secretary of Commerce for Intellectual Property, Hearing on WIPO Copyright Treaties Implementation Act (H.R. 2281) and On-Line Copyright Liability Limitations Act (H.R. 2180) before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (Sept. 16, 1997).

well as the distribution of physical copies.² And the legislative history indicates that this right was intended to incorporate the prior law’s “publication” right,³ which included the mere offering of copies to the public.⁴

Since that time, a number of U.S. courts have addressed the “making available” right, primarily in the context of individuals uploading a work to a shared folder on a computer connected to a peer-to-peer network. A number of courts have concluded that the distribution right incorporates the concept of “making available” reflected in the WIPO Treaties.⁵ Some others have disagreed.⁶ All of these cases, however, have focused solely on the scope of the distribution right and predate the recent academic scholarship described above, reviewing previously unanalyzed legislative history.⁷

U.S. Department of Commerce Internet Policy Task Force, *COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY* (July 2013) [“Green Paper”] pp. 14-16.

“Making available” and the distribution right

The Green Paper’s hopeful coda (“All of these cases, however, have focused solely on the scope of the distribution right and predate the recent academic scholarship described above, reviewing previously unanalyzed legislative history”) signals the problem: U.S. courts have inconsistently interpreted the scope of the distribution right. The Green Paper’s hint to courts to heed academic commentators’ exploration of legislative history reveals the U.S. Administration’s fear that our uncertain caselaw may be putting us out of step with international norms.

The U.S. encounters the danger of insufficient international compliance even though it has long been recognized in the U.S., as a matter of statute and caselaw, that the exclusive right to distribute

² Notably the legislative history from 1965 made reference to the potential for the “transmission of works by . . . linked computers, and other new media of communication” that “may be expected to displace the demand for authors’ works by other users from whom copyright owners derive compensation.” Supplementary Register’s Report on the General Revision of the U.S. Copyright Law 14 (1965)

³ The right to “distribute” first emerged in the “Preliminary Draft for Revised U.S. Copyright Law” in late 1962, and was substituted for “publish” to avoid the confusion that had developed surrounding the term “publication” and courts’ attempts to avoid the harsh effects of “publication” without proper notice (forfeiture of federal copyright protection). See generally Peter Menell, In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. COPYRIGHT SOC’Y USA 1 (2011); Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 488-89 (1955).

⁴ See Menell *supra* note 3 at 57; see also 2-8 NIMMER ON COPYRIGHT § 8.11[B][4][d]. At the time, the right to “publish” was understood to encompass the offering of copyright works to the public, and there was no requirement to prove actual distribution of copies. *Id.* See David O. Carson, *Making the “Making Available Right” Available: 22nd Annual Horace S Manges Lecture, February 3, 2009*, 33 COLUM. J.L. & ARTS 135, 160-61 (2010); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1986) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

⁵ *A&M Records v Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“*Napster*”); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 191 (D. Me. 2006); *Motown Records Co. v. DiPietro*, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); *UMG Recordings, Inc. v. Alburger*, Civil No. 07-3705, 2009 WL 3152153, at *3 (E.D. Pa. Sept. 29, 2009).

⁶ These cases have not, however, required direct evidence of the dissemination of copies, but have allowed proof based on circumstantial evidence or inference. See *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210, 1225 (D. Minn. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 169 (D. Mass. 2008); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-84 (D. Ariz. 2008).

⁷ Menell *supra* note 3; 2-8 NIMMER ON COPYRIGHT § 8.11[B][4][d].

the work in copies or phonorecords (17 U.S.C. sec. 106(3)) applies to digital as well as to material copies. *See, e.g.*, in addition to the sources cited in the “Green Paper,” 17 U.S.C. sec 115(a) (“digital phonorecord delivery”); 115(c)(3)(A) (“compulsory licensee to *distribute* or authorize the distribution of a phonorecord of a nondramatic musical work *by means of a digital transmission* which constitutes a digital phonorecord delivery” – emphasis supplied).

But, as the “Green Paper” acknowledges, the authorities are inconsistent as to whether the distribution right extends both to offers as well as to actual deliveries of digital copies. For the moment, only federal district courts have ruled on the question, but their rulings have ranged from assimilating making available to “publication” (whose statutory definition encompasses offers to distribute) to requiring actual downloads.⁸ The latter group of decisions thus leaves a gap in U.S. coverage of the full range of the making available right.

So confident, however, was one district court that the mere offer of downloads could not violate the distribution right, that the court declined to follow the rule of statutory interpretation (the *Charming Betsy* doctrine) that calls upon courts to interpret statutes consistently with U.S. international obligations. (*See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).) That court held instead that the *Charming Betsy* doctrine applies only when a statute is ambiguous, and that the scope of the distribution right, as interpreted in the Eighth Circuit, unambiguously foreclosed its application to offers to distribute. *See Capitol Records v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn., 2008).

As a result, at least so long as *Capitol Records v. Thomas* remains good law, and notwithstanding judicial acknowledgement that a shortfall in U.S. compliance with its international obligations may result from an interpretation of the distribution right that does not extend to offers to deliver, the positive law of U.S. copyright does not fully and uniformly implement the international norm of “making available.”

The Uncertain Scope of the Public Performance Right

Further doubt regarding the U.S.’ compliance with its international obligations arises from some federal courts’, particularly the Second Circuit’s, removal of certain on-demand transmissions from the scope of the public performance right. While it should be clear that the “making available right” was designed to reach the full range of on-demand transmissions, the Second Circuit in *Cablevision* and *Aereo* have amputated from the scope of the right on-demand transmissions made from “personalized” copies initially delivered by the service to its customers’ individualized cloud storage boxes, on the ground that the subsequent one-to-one transmissions were not “to the public” because they derived from the customer’s own copy. The Second Circuit’s interpretation is inconsistent with the great majority of foreign jurisdictions which have interpreted the scope of the “making available right.” Courts in Europe,⁹ Australia¹⁰ and Japan¹¹ have all overturned various

⁸ See *supra*, note 5.

⁹ *Wizzgo v. Metropole Television et autres*, Paris Court of Appeals, decision of 14 December 2011, http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3297 (automated “remote video recorder” service qualifies neither for transient copying nor for private copying exceptions because service, not the end-user, is the maker of the user’s individual copy); *Shift TV* (BGH 11 April 2013) (violation of copyright owners’ retransmission right).

¹⁰ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (service “makes” the personalized storage copy).

elements of the *Cablevision/Aereo* edifice, from the designation of the user as the sole “maker” of the source copy of the transmission, to the non-public nature of the “personalized” transmission.¹² These courts saw through the “Rube Goldberg-like contrivance,”¹³ correctly perceiving the defendants’ services as over-engineered secondary transmissions or offers of video on demand

Individualized making available in the E.U.

At the end of 2007, the Italian legislature modified the copyright law’s compulsory license regime for private copying to add “remote videorecorder” services.¹⁴ The EU Commission, Internal Market and Services Directorate General, demanded that Italy rescind the measure.¹⁵ The Commission’s letter condemned the Italian law as a violation of the reproduction and making available rights in the 2001 EU Information Society Directive. The Commission rejected Italy’s characterization of the service as merely enabling its customers to make private copies. The Commission also stated that no other permissible copyright exception could shelter Italy’s weakening of the reproduction and making available rights because the remote time-shifting service competed with copyright owners’ exclusive rights to license video on demand.¹⁶ As a result of the Commission’s rebuke,¹⁷¹⁶ the government never implemented the amendment, and an Italian administrative court rejected a service provider’s attempt to compel implementation, observing that the characterization of the remote videorecorder service as engaging in a “making available” of content to end users was consistent with a textual analysis of the Directive.¹⁸

Another personalized transmission service fell afoul of EU norms when the Court of Justice for the European Union ruled that TV Catchup, a service that offered streaming over the air broadcasts to U.K. users whose households possessed a television-viewing license was engaging in unlawful communications to the public.¹⁹ TV Catchup captured broadcast signals through an aerial and sent the signals to servers, which extracted individual video streams from the received signals. Upon the user’s request, the streams then were sent to another server which created a separate stream for each user who requested a channel through it. An individual packet of data leaving the server was thus addressed to an individual user, not to a class of users (CJEU opinion, paras 13-14). Unlike Aereo, TV Catchup did not assign each subscriber to a separate antenna, but, like Cablevision, it divided the source transmission into separate streams corresponding to each subscriber. Pursued by British broadcasters, TV Catchup urged that its service was not communicating the television programming to the public, because each subscriber was receiving individualized transmissions.

¹¹ ManekiTV (Supreme Court 2011) (personalized transmissions by service held public transmissions); Rokuraku II (Supreme Court 2011) (copies for individualized storage at subscriber request held to be “made” by the service). Both decisions are discussed in Takashi B. Yamamoto, ‘Legal Liability for Indirect Infringement of Copyright in Japan’ <http://www.itlaw.jp/yearbook35.pdf>.

¹² The outlier is *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830, where the appellate court appears to have followed each step of the *Cablevision* reasoning.

¹³ *American Broadcasting Companies, Inc v. Aereo, Inc.*, 712 F.3d 676, 697 (2nd Cir. 2013) (Chin, J., dissenting).

¹⁴ See Decreto-Legge of Dec. 31, 2007, n. 248. Art. 5(2-ter), converted 28 February 2008 to law n. 31 of 31 December 2007.

¹⁵ Letter n. 29900 DG Markt/D1/DB/D (2009).

¹⁶ Letter n. 29900, supra at 4-5: (“It is difficult to conceive how an exception for remote videorecording services could not in the last analysis conflict with and reduce the opportunities for commercial exploitation of licensed on demand services.”)

¹⁷¹⁶ The letter also warned that Italy’s failure to modify the law could lead the Commission to initiate an action against Italy for non-compliance with its obligations under the EU Treaty, id. p. 5.

¹⁸ Tribunale Amministrativo Regionale, Lazio Roma, sez. II, 02.3.2012, n. 2157, pp. 41-44.

¹⁹ Case C-607/11 TVCatchup Ltd, 7 March 2013.

The CJEU rejected the defense:

31 In . . . order to be categorised as a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a ‘public’.

32 In that connection, it follows from the case-law of the Court that the term ‘public’ in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons

33 As regards that last criterion specifically, the cumulative effect of making the works available to potential recipients should be taken into account. In that connection, it is in particular relevant to ascertain the number of persons who have access to the same work at the same time and successively

34 In that context, it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.

...

The “communication to the public” right set out in the EU Information Society Directive art. 3(1) implements, and contains language identical to, art. 8 of the WIPO Copyright Treaty (WCT), which obliges member States to protect the right of communication to the public, “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.” In these texts, the public’s access is to “works” rather than to “performances of works” (or per *Cablevision*, to particular “transmissions of performances”). As a result, the text affords no basis for a reading that deems the provision of access to a work non-“public” simply because no two members of the public receive the same *transmission*. Instead, the question is whether the defendant has made the work available to a “large number of persons”.

Individualized on-demand performances in the U.S.

Like the E.U., the U.S. ratified the WIPO treaties. Unlike the E.U., the U.S. did not enact legislation to implement the “making available right” set out in those treaties; the U.S. claimed already to have the domestic equivalent of a making available right through a combination of the statutory public performance by transmission right and the distribution right. Moreover, as then-Copyright Office General Counsel David Carson has observed, the U.S. has even imposed the “making available” right on our trading partners through bilateral Free Trade Agreements.²⁰ It would be awkward, to say the least, were crabbed judicial interpretations of the scope of the right of public performance (or of distribution) to result in incomplete compliance with the international norms the U.S. purports not only to respect but even to demand that other nations enforce. U.S. courts should be following the longstanding²¹ and generally applicable approach of interpreting the statutory rights in the light of, and where possible consistently with, the U.S.’ international obligations.²²

²⁰ David O. Carson, *Making the “Making Available” Right Available*, the 22d Manges Lecture, 33 Colum. J. L. & the Arts 135, 148-50 (2010).

²¹ See *Murray v. The Charming Betsy*, 6 U.S. 64 (1804).

²² See, e.g. Section 114 *Restatement of the Law, The Foreign Relation of the United States*: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”

Arguably, two differences in text between the U.S. “transmit clause” and WIPO treaty compel a more limiting construction of the latter, but neither proves persuasive. First, the WCT addresses “access to works” while the U.S. “transmit clause,” covers only capacity to receive a *performance or display* of the work. But the broader expression of the WIPO norm (“works”) may be ascribed to its broader coverage, which clearly reaches downloads as well as streams.²³ Were the WIPO text phrased only in terms of “performances,” it would exclude downloads. “Access to works” encompasses both access to performances of works and access to copies of works. The U.S. purports to cover downloads through the distribution right.²⁴ The U.S. public performance right should therefore be read commensurately with making performances of works available for individualized access.

Second, the WCT includes *potential* communication of the work, while the “to transmit or communicate” language of the U.S. Copyright Act may assume that the transmission will in fact have taken place. But the U.S. public performance right does encompass potential communications, because the “transmit clause” looks to “members of the public capable of receiving the performance or display.” Clarifying that the public performance right encompasses *capacity* to receive the performance “by means of any device or process”²⁵ was essential to ensuring that copyright owners’ rights covered on-demand markets.²⁶ The commercially significant act is the public offer of content on demand, at least as much as the subsequent piecemeal provision of that content. This understanding is also consistent with the general scope of exclusive rights under section 106, which covers “to do or to authorize” – language echoed in WCT art. 8, which states that “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 . . .” (emphasis supplied).

Unfortunately, the Second Circuit in *Aereo* and *Cablevision* misconstrued the “capable of receiving” language. Rather than understanding that the phrase was meant to ensure that individualized transmissions would be covered,²⁷ the court distorted it into a *narrowing* of the scope of the public performance right.²⁸

Unless the Supreme Court reverses *Aereo* (and depending on what terms it reverses), the U.S. will not be in compliance with its obligation to implement the “making available right” with respect to offering streaming access to protected content.

Distinguishing downloads (distribution) from streaming (public performance)

Finally, beyond the question of the scope of the U.S. digital distribution right or of the public performance right, there is a further problem with the U.S.’ piecemeal approach to the “making

²³ *Records* of the 1996 conference (vol. I., p. 204, para. 204); Ricketson and Ginsburg, *supra* para 12.59.

²⁴ The *Records* of the 1996 diplomatic conference indicate that member States may comply with the making available right either through local communication rights, or through a combination of rights, including the right to distribute copies, as the United States urged during the drafting period. (1996 *Records* at 675, para 301.)

²⁵ 17 U.S.C. sec. 101 (definition of “to perform a work ‘publicly’”).

²⁶ See H.R. Rep. No. 94-1476, 94th Cong., 2d sess. at 64-65 (1976). See also H.R. Rep. 90-83, 90th. Cong., 1st. sess. at 29 (1967): “[A] performance made available by transmission to the public at large is ‘public’ . . . where the transmission is capable of reaching *different recipients at different times*, as in the case of sounds or images stored in an information system and capable of being performed or displayed *at the initiative of individual members of the public*.” (Emphasis added).

²⁷ See H.R. Rep. No. 94-1476, at 64-65.

²⁸ See, for this critique, *KUTV v. Aereo*, 2:13-cv-00910-DAK (D. Utah, Feb. 19, 2014).

available” right. The current approach distinguishes streams from downloads and assigns each mode of delivery to different exclusive rights. But that approach assumes that it is possible today, and more importantly, will remain possible tomorrow, to ascertain what is a stream and what is a download. In fact, caselaw has already illustrated the difficulty of maintaining the distinction.

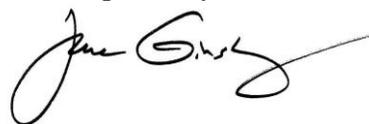
In *U.S. v. American Society of Composers, Authors and Publishers (Applications of RealNetworks, Inc., Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010), the Second Circuit held that a download of a musical file that was not simultaneously played (streamed) to the listener distributed a copy of the work but was not a “performance.” The court ruled that a “performance” must be simultaneously perceived upon reception. But the distinction between transmissions “that are contemporaneously perceived” and those that enable subsequent perception may not fully correspond to the spectrum of online transmissions of works that are performed or displayed. Moreover, such a limited concept of performance seems inconsistent with Congress’ intent, expressed in the 1976 Act House Report to embrace new modes of performance enabled by “any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.” H.R. Rep. No. 94-1476, at 63 (1976). The Second Circuit appears to have anticipated this concern, because it acknowledged in footnote: “Our opinion does not foreclose the possibility, under certain circumstances not presented in this case, that a transmission could constitute both a stream and a download, each of which implicates a different right of the copyright holder.” *Id.* at 74 n.10.

The “umbrella solution” permits the U.S. to implement the making available right through a combination of rights, so long as offers of all kinds of access are covered one way or another. The U.S. experience suggests, however, that parceling out the making available right among the public performance rights on the one hand, and the reproduction and distribution rights on the other hand may not adequately correspond to current or future modes of offering access to content online.

Conclusions

Unless courts consistently interpret the 106(3) distribution right to cover offers of digital downloads, and the 106(4)(5)(6) public performance and display rights to cover all kinds of on-demand offers of content for streaming access, the U.S. will not be in compliance with its international obligations. If courts persist in their current crabbed interpretations, Congress may need to step in. If Congress does legislate in this area, it would be preferable to provide for a true “making available right” echoing WCT art. 8, rather than the piecemeal solution that currently pertains. The “umbrella solution” was devised to enable the U.S. to adhere to the WIPO Copyright Treaties without amending the statute, but judicial interpretation to date has ripped the umbrella’s canopy from its spokes, leaving exclusive rights forlornly drenched by the torrent of uncompensated new uses and business models.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jane Ginsburg", with a long, sweeping horizontal stroke extending to the right.

Jane Ginsburg