



September 15, 2014

Ms. Maria Pallante
Register of Copyrights
United States Copyright Office
101 Independence Ave., S.E.
Washington, D.C. 20559

Re: **Study on the Right of Making Available; Request for Additional Comments**
Docket No. 2014-2

Dear Ms. Pallante:

BSA | The Software Alliance (BSA) appreciates this opportunity to respond to the Copyright Office's request for additional comments on the state of United States law recognizing and protecting the "making available" and "communication to the public" rights for copyright holders.¹ BSA is the leading advocate for the global software industry in the United States and around the world. Our members are among the world's most entrepreneurial and innovative companies, creating software solutions that spark economic growth and improve modern life.²

The central question in the Copyright Office's request is ensuring the copyright law facilitates the ability of new technologies and business models to be fully responsive to customers' and consumers' evolving marketplace demands for content and related services.

¹ U.S. Copyright Office, Library of Congress, *Study on the Right of Making Available; Request for Additional Comments*, 79 Fed. Reg. 41309-01 (July 15, 2014); see also U.S. Copyright Office, Library of Congress, *Study on the Right of Making Available; Comments and Public Roundtable*, 79 Fed. Reg. 10571-01 (Feb. 25, 2014).

² BSA's members include: Adobe, Altium, Apple, ANSYS, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intel, Intuit, Microsoft, Minitab, Oracle, PTC, Rockwell Automation, Rosetta Stone, salesforce.com, Siemens PLM, Symantec, Tekla, The MathWorks, and Trend Micro.

BSA members believe that a proper, critical assessment of these rights should take into account the evolving nature of the market for copyrighted works. Advances in technology and the resulting changes in customer demands are transforming the ways works are distributed and commercialized. Increasingly, customers want to, and do, obtain and use software through licensing and subscriptions, rather than through sales of physical copies of works.

These changes in the dynamics of software supply and demand, based on new technology, are steps in the evolution of distribution models from retail sales of packaged software to digital distribution of software, and more recently, to a software-as-a-service model, in which our customers can access rich software functionality as a service through cloud computing and other online services. Throughout this evolutionary process, BSA members have consistently focused on adopting new technologies and business models to serve their customers more effectively.

BSA provides these comments to suggest that the proper way to view the “making available” and “communication to the public” rights is in the context of how customers today are using these new distribution models to access and enjoy works like BSA members’ software, especially online. Importantly, the common thread uniting these new distribution models is the reliance on copyright licenses to facilitate the commercialization of works like software. Accordingly, any analysis of the “making available” and “communication to the public” rights must facilitate and account for the importance of licensing — rather than sales alone — of works to customers. In order to ensure that businesses that rely on flexible, licensing-oriented distribution models continue to thrive and meet the modern customer’s needs, any changes to how rights are enforced should continue to promote, not impede, innovation.

BSA commends the Copyright Office for the thorough roundtable it held on this issue in May. Given the evolution of customer needs as distribution and business models change, however, BSA was surprised by the lack of focus from roundtable panelists on how the copyright laws can empower companies to meet these new customer demands. We submit these comments to suggest a different perspective and approach to the issues of the “making available” and “communication to the public” rights.

I. Modifications to the Copyright Laws Must Be Viewed from the Perspective of the Evolving Marketplace

BSA members and their customers recognize that the marketplace and demand for copyrighted works are dynamic and interrelated: marketplaces evolve in response to constantly changing customer needs and advances in technology. An effective copyright system must therefore be flexible and adaptive to facilitate and react to these changes in the market.

Rapid advances in technology constantly provide new, better ways for rights holders to commercialize works in the ways customers want to use and enjoy them. Customers, including BSA members’ software customers, now demand access to works anywhere and anytime. They are no longer interested (only) in owning physical copies of works. For example, instead of going to stores to purchase software on disks or CD-ROMs that they would then install on a home or office computer, customers now use online marketplaces to license and use software immediately (sometimes as a download, sometimes as a service), from any location in the world, at any time.

Rights holders need the flexibility to respond to this evolving marketplace. In the software industry, BSA members have continually used and adapted licensing and distribution models to meet our customers' needs. Oracle's Cloud Computing services, for example allow Oracle's business customers to subscribe to packaged cloud computing services to reduce their up-front software and IT costs, and to unify their operations. Adobe's Creative Cloud service uses a subscription model to allow customers to use Adobe's creative software across devices, to store their works in the cloud, and to purchase only the software they need.

Evolving distribution services like these, developed to meet the demands of the modern software customer, can only succeed with dynamic, robust licensing agreements. Any change in the copyright laws must ensure, first and foremost, that rights holders have the ability to determine how best to commercialize their works in order to adapt to the changing marketplace and meet their customers' demands. If rights holders have the flexibility to experiment with and implement different licensing models, market competition will work to everyone's benefit.

If the copyright laws fail to facilitate rights holders' uses of new technologies and business models to satisfy their customers' needs and interests in the future as the market continues to evolve, however, the resulting inefficiencies in the market for copyrighted works will decrease customer welfare. Customers, dissatisfied with offerings from rights holders, are likely to view copyright as impeding, rather than facilitating, access to creative works and innovation.

Rights holders would then find it more difficult to meet customers need, and customers would find it more difficult to take advantage of what modern technology allows: the ability to use and enjoy authorized copies of works when they want them, on the devices they choose. But with a copyright system that empowers rights holders to innovate with new distribution and licensing models, everyone wins. Customers get what they need, and rights holders are able both to meet customer demand and to commercialize their works.

BSA members are well aware that the issue of copyright enforcement will always be a critical component of any discussion about the commercialization of copyrighted works. Copyright enforcement is more difficult in the digital world; new licensing and distribution models help alleviate infringement by meeting market demands, but they do not solve all enforcement issues. Recognizing this, BSA submits that any change in enforcement that is meant to protect rights holders must be carefully tailored to ensure that innovation — including in new technologies and business models for distributing copyrighted works — continues to flourish. A strong copyright enforcement regime need not impede innovation.

II. Meeting Customer Demand Through Evolving Business Models

Customers increasingly demand flexibility in the ways they access, use, and enjoy content — including in ways that were unimaginable just a few years ago. If rights holders were forced into a legal system designed for 8-tracks and mimeographs instead of datacenters and tablets, for example, they would not be able to meet the needs of 21st Century customers. Business models must evolve with the markets they serve.

Use of the cloud, for example, is now ubiquitous. One survey reports that 94 percent of companies now use some type of cloud computing service.³ Other research suggests that 90 percent or more of all consumer technology will integrate cloud services in 2014,⁴ while by 2015, one billion individuals will use cloud storage.⁵ Cloud computing provides many advantages to both individuals and businesses of all sizes. One clear advantage of cloud computing is that it gives customers affordable, immediate access to software on any device by storing that software in the cloud, rather than by tying customers' use of it to a single copy on a particular device. This technology meets the modern customer's need for access anywhere, anytime, on any device. Critically, it is made possible by the development and enforcement of licenses that give rights holders flexibility in how to commercialize their works—and give customers important benefits that they would not obtain through the “sale” of a physical copy.

Given the inherently digital, intangible nature of software, software companies have relied heavily on licensing-based models for decades. IBM pioneered licensing models in 1969 when it separated hardware and software. Licensing, rather than sales, allowed IBM to protect its economic interests in its software while also providing customers with rights that exceeded what they would have acquired from a sale: through licensing, customers have more choices, lower prices, and various post-transaction benefits that they would not receive through a sale. The developments of the last decade, from IBM's division of a computer's physical and operational components to today's cloud-based, software-as-service models, demonstrate just how far we have come — and how much customers' expectations have changed.

Even as technology and customer needs change, licensing remains the predominant business model. Licensing has many advantages over sales and, often conveys more to the customer than would be covered by a sale. A software license may entitle a customer to updates and patches that improve functionality and interoperability; a license may offer discounted software upgrades that protect customers from malware; and the license may explicitly authorize the developer to install updates on the customer's computer. A license may also allow a customer to install software on more than one device, which a sale would not do.

³ RightScale 2014 State of the Cloud Survey, <http://www.rightscale.com/blog/cloud-industry-insights/cloud-computing-trends-2014-state-cloud-survey> (last accessed Sept. 5, 2014).

⁴ Press Release, Gartner, Inc., Personal Cloud Services Will Be Integrated in Most Connected Devices by 2013 (Mar. 6, 2012) (available at <http://www.gartner.com/newsroom/id/1942015>).

⁵ Press Release, IHS Technology, Subscriptions to Cloud Storage Services to Reach Half-Billion Level This Year (Sept. 6, 2012) (available at <https://technology.ihs.com/410084/subscriptions-to-cloud-storage-services-to-reach-half-billion-level-this-year>).

As the software industry increasingly migrates to cloud computing and similar online service models, customers enjoy new flexibility in their access to software: they can access only what they need, pay only for what they want, and use software across multiple devices. License agreements facilitate new business models (such as subscription-based and advertising-based business) that help foster new customer relationships and opportunities that a sale of work cannot.

This transition to licensing-based business models is also happening for works other than software. Customers are increasingly accessing books, movies, and music through various licensing and access models, which increasingly complement the more traditional model of purchasing and owning physical copies of those works. All of these customer-focused developments are possible only through a copyright system that permits rights holders to adapt their distribution models to the modern marketplace.

The scale of these marketplace changes makes clear that there are tremendous economic efficiencies to be gained when rights holders are able to adapt their means of distribution to customers' changing demands. But these benefits could be threatened if copyright laws impede rights holders' abilities to distribute their works in ways that accord with how modern customers wish to access them. Copyright laws that ignore this need would fail both rights holders and customers. They would be "eight-track" laws for a streaming media world.

III. The Making Available Debate as Part of the Paradigm Shift

Discussions about copyright law are too often reduced to the issue of copyright holders' right to exclude others from using their works. While the right to exclude is an important component of copyright law, in today's license-based, customer-driven economy, focusing only on the right to exclude risks ignoring the important role of copyright in enabling new business models that *facilitate access* to works. If we consider rights holders' interest in meeting the demands of the evolving marketplace, we can frame our discussion in a much more productive way and create new opportunities for both rights holders and customers.

When viewed from this perspective, the issues raised in this proceeding — whether the rights included in Section 106 encompass the "making available" and "communication to the public" rights — can be recast in terms of whether modern copyright law enables rights holders to provide customers with access to the authorized copies of works they want, when they want it, where they want it, and how they want it. In other words, the central question in the Copyright Office's request is not whether copyright law excludes enough, but whether it facilitates the ability of new technologies and business models to be fully responsive to evolving marketplace demands for content and related services.


BSA believes that, for the most part, copyright law continues to allow forward-thinking companies to meet the ever-evolving demands of their customers. BSA recognizes, however, that the law, like business models, is never static and a lack of clarity in the statute can lead to changes that would stunt rights holders' abilities to meet customers' needs in a rapidly development technological world.

Given licensing-based business models' long history of success in building strong, productive businesses and helping customers meet their needs in a changing marketplace, the discussion about the "making available" and "communication to the public" rights should account for the need to protect rights holders' and customers' abilities to enter flexible, enforceable licensing agreements. Rights holders and customers alike have relied for decades on copyright law's enforcement of licenses, and modifications to copyright law should be carefully crafted so that they do not upend that long, successful relationship between rights holder and customer.

If the Copyright Office ultimately recommends that Congress amend or clarify the law concerning the scope of a "making available" or "communication to the public" right, BSA submits that its recommendation should be based on the perspective suggested in these comments. Any change in the law should facilitate, rather than impede, the ability of rights holders to respond to the needs of the changing marketplace. A critical component of this facilitation is rights holders' and customers' ongoing expectation that the licensing agreements they enter will be flexible, predictable, and enforceable.

Thank you again for the opportunity to share our views on these important issues.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim Molino".

Timothy Molino
Director, Policy