U.S. COPYRIGHT OFFICE

PUBLIC ROUNDTABLE ON THE RIGHT
OF MAKING AVAILABLE

MONDAY
MAY 5, 2014

The Roundtable met in the Rayburn House Office Building, Room 2226, Washington, D.C., at 9:00 a.m.

PRESENT

ALLAN ADLER, Association of American Publishers
SANDRA AISTARS, Copyright Alliance
JONATHAN BAND, Library Copyright Alliance
GREGORY A. BARNES, Digital Media Association
JOHN C. BEITER, SESAC, Inc.
GEORGE M. BORKOWSKI, Recording Industry Association of America
ANDREW P. BRIDGES, Attorney
SOFIA CASTILLO, Copyright Alliance
EUGENE DeANNA, Library of Congress
JOSEPH J. DiMONA, Broadcast Music, Inc.
CHRISTIAN GENETSKI, Entertainment Software Association
JANE GINSBURG, Columbia University School of Law
MITCH GLAZIER, Recording Industry Association of America
JIM HALPERT, Internet Commerce Coalition
TERRY HART, Copyright Alliance
LAWRENCE A. HUSICK, Delaware County IP Roundtable
LEE KNIFE, Digital Media Association
KEITH KUPFERSCHMID, Software & Information Industry Association
GLYNN LUNNEY, Tulane University School of Law
PATRICE A. LYONS, Corporation for National Research Initiatives
PETER MENELL, University of California – Berkeley School of Law
SAM MOSENKIS, American Society of Composers, Authors and Publishers
LAURA MOY, Public Knowledge
JAY ROSENTHAL, National Music Publishers' Association
MATTHEW SCHRUERS, Computer & Communications Industry Association
BEN SHEFFNER, Motion Picture Association of America, Inc.
STEVEN TEPP, Global Intellectual Property Center, U.S. Chamber of Commerce
NANCY WOLFF, PACA: Digital Media Licensing Association
STAFF PRESENT
MARIA A. PALLANTE, Register of Copyrights and Director of the U.S. Copyright Office
KEVIN AMER, Counsel for Policy and International Affairs, U.S. Copyright Office
JACQUELINE CHARLESWORTH, General Counsel and Associate Register of Copyrights, U.S. Copyright Office
MARIA STRONG, Senior Counsel for Policy and International Affairs, U.S. Copyright Office
KARYN A. TEMPLE CLAGGETT, Associate Register of Copyrights and Director of Policy and International Affairs, U.S. Copyright Office
AARON WATSON, Attorney Advisor for Policy and International Affairs, U.S. Copyright Office
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Associate Register of Copyrights and
Director of Policy and
International Affairs
U.S. Copyright Office

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Register of Copyrights and Director
U.S. Copyright Office

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Recording Industry Association
of America

Eugene DeAnna
Library of Congress

Professor Jane Ginsburg
Columbia University

School of Law
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Director of Legal Policy
Copyright Alliance

Professor Glynn Lunney
Tulane University
School of Law

Professor Peter Menell
University of California - Berkeley
School of Law

Sam Mosenkis
Vice President, Legal Affairs
American Society of Composers, Authors and Publishers

Matthew Schruers
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Internet Commerce Coalition

Lawrence Husick
Delaware County
IP Roundtable
(On behalf of himself)

Lee Knife
Executive Director
Digital Media Association

Keith Kupferschmid
General Counsel and
Senior Vice President
Intellectual Property, Software
& Information Industry
Association

Patrice A. Lyons
General Counsel
Corporation for National
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Staff Attorney  
Public Knowledge

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General Counsel  
National Music Publishers'  
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Gregory A. Barnes
General Counsel Digital Media Association

John C. Beiter
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Attorney

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Christian Genetski
Senior Vice President and General Counsel
Entertainment Software Association

Professor Jane Ginsburg
Columbia University
School of Law

Professor Glynn Lunney
Tulane University
School of Law

Jay Rosenthal
General Counsel
National Music Publishers' Association

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9:02 a.m.

MS. CLAGGETT: Good morning.
Welcome to the Copyright Office Roundtables on
the Making Available Right.

We are going to start off with
some brief remarks audifrom Register Maria
Pallante, and then, we will get into the
logistics of the actual roundtable discussions
today.

So, I will turn to Maria for her
opening remarks.

Thanks.

MS. PALLANTE: Good morning,
everyone.

And for those who don't know, that
was the indefatigable Karyn Temple Claggett,
who is the Associate Register of Copyrights
and Director of Policy and International
Affairs.

So, a warm welcome to everybody.

I know my staff and I are very much looking
forward to this discussion. It is an important one. It is not one that we have had for a long time in the United States.

I especially want to welcome all of our panelists, but especially those who have come from other cities to join us today. And a very warm welcome to our professors who are here as independent scholars, and a very important part of our debate.

So, as all of you know, but I will say it for the transcript, the Copyright Office is undertaking this study at the request of Congress to assess the state of U.S. law recognizing and protecting making available and communication to the public rights for copyright owners.

When the United States implemented the WCT [WIPO Copyright Treaty] and WPPT [WIPO Performances and Phonograms Treaty], we did so under the permissible umbrella approach, confirming that our exclusive rights under Section 106, taken in combination, adequately
protect copyright owners in accordance with
the treaty obligations.

In the ensuing 15 years, I think
we can all agree that the online environment
has evolved rapidly. There is no question
that some courts have struggled in applying
the statute to current technologies and
activities. There has been some confusion
about the evidence necessary to establish an
infringement claim, based on the activity of
making a copyrighted work available online
without authorization.

Today we will explore a number of
questions -- the degree to which Section 106
continues to adequately cover the rights of
making available and communication to the
public. For example, does our law
sufficiently, today, provide for the actual
distribution of the work and the offering of
the work for download? And does our law
provide for the actual transmission of a work
to members of the public and the offering of
that work for access?

We will look at whether and how we should clarify U.S. law to confirm our treaty obligations and the protections that they require. We will look at how foreign laws have addressed these rights in the past 15 years. And as always when discussing exclusive rights, we are interested in the application of appropriately tailored limitations and exceptions.

My legal staff and I have read all of the public comments and, obviously, the legislative history and all of the relevant court opinions. We are very thankful for both your focus on the past as well as your concerns about the future, and we welcome the discussion today. To the extent possible, we would like to encourage everybody to speak with as much legal detail as possible, as this is, after all, a complex legal discussion.

Thank you very much, and enjoy the day.
(Applause.)

MS. CLAGGETT: Thank you, Maria.

Good morning.

As Maria mentioned, I am Karyn Temple Claggett, Associate Register of Copyrights and Director of the Office of Policy and International Affairs.

Before we actually begin with our formal sessions, I would like to go over just a few logistical points for our roundtable discussion today.

First, the roundtable sessions will be moderated by us here at the table up front. As you are aware, we are in a House Committee briefing room, and all of the participants are sitting on the raised platform behind us.

Participant remarks will be the focus of our discussion today with guidance and questions from the Copyright Office moderators, seated at the front table. We do apologize that our backs will be to the
audience because we will be focused on the
participants, and that, as I said, will be the
focus of the discussion.

Given the number of panelists that
we have for each of our four sessions and our
desire to hear from all participants, we are
going to ask that participants please be
mindful of other people speaking. And tip
your card -- if you guys are familiar with
international negotiations, you know this
process very well -- but tip your card when
you would like to make a comment or ask a
question, rather than simply jumping in, so
that we can easily moderate the discussion.

We will, then, formally call on you to signal
it is your turn to speak. Otherwise,

We also ask that all participants
focus your comments and responses to our
specific questions that we raised in our NOI
[Notice of Inquiry] or additional follow-up
questions that we are going to pose to you
today. And given time constraints and the
number of panelists that we do have, we do ask
that you limit your responses to our questions
for each panelist to no more than about two to
three minutes.

And I want to reiterate that
point. I do apologize profusely in advance,
but if you are going over the time, we will,
unfortunately, have to cut you off. So,
please be very flexible and understanding of
our very real time constraints and our need to
hear from a broad range of viewpoints.

Our final session of the day
invites comments from the audience and, time
permitting, additional comments from the
participants. For the audience, there will be
a sign-up sheet available during the lunch
break, and comments made in that session will
also be limited to two minutes.

Second, as you can see, today's
discussion is being videotaped by the Library
of Congress. Participants, hopefully, you all received a video release form by email. If you have not signed that, please do so. We need to have those before the end of the session today.

For audience members, there will be a short question-and-answer period, hopefully, at the end of each session, in addition to our audience participation session. So, if you decide to participate in that question-and-answer period, you are giving us permission to include your questions or comments in future webcasts and broadcasts of this event.

At this time, I would like to ask everyone in the audience and the participants to please turn off your cell phones or electronic devices that might interfere with the recording of this event. It is actually not our Copyright Office policy, but our friendly ITS policy, just to make sure that they don't have any interference with the
We also, as you can see, have a court reporter who is transcribing the proceedings. We will not have opening remarks from the participants in the sessions, and the participants already know this, but we will just briefly ask everyone up on the platform to identify themselves by their name and affiliation.

If any of the participants or audience members who are not actually participants today have additional comments after the meeting, we definitely have an open-door policy in the Copyright Office. So, we would be happy to separately meet with you on any of the issues that were raised today.

We also may potentially seek additional comments—written comments—to respond to some of the questions and discussions that we talk about today. If we do so, we will provide a formal NOI notice.

Are there any questions in terms
of logistics before we begin the discussions today, either from the audience or the participants?

(No response.)

Okay. So, we will get started with the first session. I am just going to read what the first session will discuss, and then, I will sit back at the table to ask some questions.

The first roundtable will explore how the exclusive rights in Title 17 cover the making available and communication to the public rights in the context of digital on-demand transmissions, such as peer-to-peer networks, streaming services, and music downloads, as well as more broadly in the digital environment. This session will also address evidentiary issues in infringement actions, and we will also carry on this discussion for the second session.

I am going, before we start, to introduce or ask my Copyright Office
colleagues to introduce themselves briefly, and then, we can go around the platform for all the participants.

We will start here.

MR. AMER: Kevin Amer, Counsel for Policy and International Affairs.

MS. STRONG: Good morning. Maria Strong, Senior Counsel for Policy and International Affairs.

MS. CHARLESWORTH: Jacqueline Charlesworth, General Counsel.

MR. WATSON: Aaron Watson, Attorney Advisor for Policy and International Affairs.

MS. CLAGGETT: Okay. Thank you very much.

And so now, I am going to ask for everyone on the panel just to simply state your name and your affiliation, if you are here representing an organization or someone else. I will start with John Beiter.

And just one other logistical
thing. You have to push the button and the
green light will show up if the microphone is
on.

MR. BEITER: So, again, my name is
John Beiter. I am with the Law Firm of
Shackelford, Zumwalt & Hayes in Nashville,
Tennessee, here today representing SESAC, one
of the three performing arts organizations.

MR. BRIDGES: My name is Andrew
Bridges. I am an internet and copyright
litigator in San Francisco and Silicon Valley,
speaking on my own behalf.

MS. CLAGGETT: Thank you.

MR. BORKOWSKI: George Borkowski,
Senior Vice President of Litigation and Legal
Affairs at the Recording Industry Association
of America.

MR. DeANNA: Good morning.
I'm Eugene DeAnna. I am head of
the Recorded Sound Section at the Library of
Congress.

PROFESSOR GINSBURG: Jane
Ginsburg, Columbia Law School.

MR. HART: Terry Hart, Director of
Legal Policy at the Copyright Alliance.

PROFESSOR LUNNEY: I'm Glynn
Lunney. I'm at Tulane University School of
Law.

PROFESSOR MENELL: Peter Menell,
University of California at Berkeley.

MR. SCHRUERS: Matt Schruers, Vice
President, Law and Policy, Computer and
Communications Industry Association.

MR. MOSENKIS: Sam Mosenkis. I am
with ASCAP, the American Society of Composers,
Authors, and Publishers.

MS. WOLFF: Nancy Wolff with
Cowan, DeBaets, Abrahams & Sheppard. And I am
here on behalf of -- actually, we have
modernized -- it is PACA, the Digital Media
Licensing Association, since images have gone
from transparency to files.

MS. CLAGGETT: Thank you very
much, everyone.
For our first question, before we actually explore our current state of the law, we wanted to focus a little bit on the past, and specifically the legislative history of Title 17. So, we wanted to explore whether the legislative history regarding the evolution of the right of distribution in Section 106(3) of the Copyright Act sheds any light in terms of how we should currently construe U.S. implementation of its international obligations to have a making available right.

So, generally, what is the role or should be the role of legislative history of the 1976 Act in determining the U.S. implementation of the right of making available? Does our legislative history provide any direct information in terms of the scope of the distribution right under our current law?

And I am actually going to direct -- sometimes we will direct questions;
sometimes we will not -- this time I am going
to direct a question specifically to Peter
Menell, who already has his flag raised.
Because I was just reading your law review
article last night, so I wanted to direct a
question to you in terms of any insight about
the legislative history of our evolution of
the digital distribution right under our law.

Thank you.

PROFESSOR MENELL: Thank you.

Well, as you know from the article
and from the Copyright Office's work 50 years
ago, the terminology in the statute derives
from 1960s discussions, probably in rooms like
this, involving people like us trying to
update a statute, the 1909 statute.

And there were many discussions
about word choice. What really struck me as
I was reading and teaching about the issue
surrounding internet file sharing was why
Congress changed the words "publish" and
"vend" to "distribute." It seems like an
interesting question. In fact, the 1961 Register Report used the word "publish."

As I discovered in documents that have not gotten a lot of attention, there was a very specific reason. The article spells that out.

But what I want to highlight here is just that judges routinely consider the Copyright Act's legislative history, even when the words appear at first blush to be clear. Even common words can have multiple dictionary meanings. As we see whenever we open Webster's, there are several different choices.

Many provisions of the 1976 Act were crafted during a largely analog era. And so, therefore, judges, including, for example, Judge Gertner in the London-Sire decision, refers to legislative history in trying to sort these issues out.

And so, in trying to understand this issue, I peeked behind the curtain. I
wanted to see what was going on, and, in fact, there are express reasons why they chose the word "distribute," and it had nothing to do with narrowing. In fact, the General Counsel of the Copyright Office, Abe Goldman, says the purpose was to broaden. And as Ed Sargoy, the ABA [American Bar Association] representative, explains, it was largely to avoid confusion that had arisen around publication as a trigger for whether copyright could be forfeited for improper notice.

And so, that is really what I think the article was trying to do, was to explain that story, which is quite interesting.

I will note that one of the comments by Mr. Sanders questions my exploration of legislative history, suggesting that it is improper to consult legislative history predating the enacting Congress. And I will note merely that the Supreme Court didn't get that message. If you read
Kirtsaeng, Tasini, CCNV, Abend, Dowling, and Sony, they all refer to pre-legislative
session legislative history.

In fact, courts will even refer to the CONTU [Commission on New Technological
Uses of Copyrighted Works] Report in interpreting the statute, which is really
outside of the legislative bounds. It is about trying to understand these issues.

And so, that was my purpose, was in exploring that history.

Now I want to note one side piece of research that I did.

MS. CLAGGETT: Briefly, please,

then.

PROFESSOR MENELL: Okay. I came across a brief filed 15 years ago in an
important copyright case in which the attorney contended that the plain language of the
Copyright Act was clear and governed and, yet, proceeded to invoke the statute's legislative
history more than 20 times in that brief.
I commend that attorney's use of what is suggested is a violation of the cardinal principle of statutory interpretation. And we are fortunate to have that intrepid attorney right here among us, and his name is Andrew Bridges. The case was RIAA v. Diamond Multimedia.

And the only thing I want to add is that the Ninth Circuit referred to that legislative history in correctly construing the statute, in favor of Mr. Bridges's client.

So, the contention that it is improper to look at legislative history is not one that is, I think, respected. I think it is common, and I would say every opinion that is trying to grapple with bringing the analog era Copyright Act into the digital age, engages in that process.

MS. CLAGGETT: Thank you

And I will open it up to others.

So, is that the answer? Does the legislative history of Title 17 answer the question for us
and establish that we do have this broad
making available right? And if anyone wants
to comment in terms of the legislative history
showing, or not showing, whether publication
or to publish is synonymous with distribution,
you can answer that question as well.

I will go Mr. Bridges, who might
want to respond specifically and, then, to Mr.
Lunney.

MR. BRIDGES: By the way, the
brief at issue there, for RIAA v. Diamond
Multimedia related to the Audio Home Recording
Act of 1992, which contained a statutory
provision involving something called a "serial
copy management system," the definition of
which had been amended out of the statute
during the legislative process. So, when you
have a statute referring to language that has
been amended out before the bill became law,
there is a bit of a requirement to look at
legislative history.

The same issue does not apply to
the distribution right. The statute itself is
clear about the fact that the distribution
right applies to copies and phonorecords of a
copyrighted work being distributed to the
public "by sale or other transfer of
ownership, or by rental, lease, or lending."

Now the concern is Section 101 of
the Copyright Act defines "copies" and
"phonorecords" as material objects. The
definition is in the statute. So, it requires
not only a distribution; it requires a
distribution of material objects. And it
requires not only a distribution of material
objects, but it requires a distribution of
material objects by sale or other transfer of
ownership or rental, lease, or lending.

So, when that is clear -- it may
be counterintuitive to people, but that is
because these are defined terms; they are
defined terms -- when it is clear on its face,
why go to legislative history to try to vary
the clear terms of the statute?
And I think that here I am just going to wrap up briefly. I think this touches on a fundamental question of respect for copyright law in our society, because when the law says what the law says pretty clearly, but there is a sense that there is a private industry consensus, and we are going to go look at arcane materials and do decades of research to contradict the obvious, it is no wonder that the public believes that copyright law is rigged in favor of certain participants in the process.

MS. CLAGGETT: Thank you, Mr. Bridges.

I am sure we might have some responses to your position with respect to whether you think a download can constitute a distribution under our Copyright Act, but I want to see, first, whether there are any responses broadly in terms of the legislative history, and specifically with respect to whether a publication is synonymous with
distribution, given the legislative history.

So, I am going to turn to Mr. Lunney, and then, I will let any others who want to respond to Mr. Bridges' point about material objects respond as well.

PROFESSOR LUNNEY: So, just a brief clarification to start, it is Lunney.

MS. CLAGGETT: Lunney. Thank you.

Sorry.

PROFESSOR LUNNEY: That's okay.

I would reiterate Mr. Bridges' point in terms of resorting to legislative history when statutory language is clear.

I would also point out that, in terms of the legislative history, even if you can equate the distribution with the publication right, it is not all that clear under the 1909 Act that a mere offering of a copy for distribution or lending in a library, for example, would have constituted publication. Certainly, there are no cases where a library was held guilty of copyright
infringement or liable for copyright
infringement simply by making it available
under the 1909 Act.

So, we don't have a clear
definition of publication in the infringement
context where we can use that definition from
infringement cases in the 1909 Act to define
the scope of the distribution right under the
1976 Act, even if we thought they were meant
to be equivalent.

MS. CLAGGETT: Thank you very
much.

I am going to go with Matt and,
then, Mr. Menell.

MR. SCHRUERS: I think Professor
Lunney said a fair amount of what I was going
to say. If the interpretation of publications
offered is actually sound, we would expect to
see like a pre-1976 Hotaling. And I'm not
aware of any. So, until we see a case that
offers that interpretation, I am not sure I
would put a whole lot of stock in that.
Secondly, a further point -- and maybe I'm just repeating what Andrew said regarding statutory construction -- but it is one thing very much to refer to legislative history to either reinforce the apparent interpretation, and I think I am as guilty as anyone of sort of looking to another sort of source to sort of back up the interpretation that already appears manifest.

It is a very different thing to say this is the language that is clear on its face, the requirement of sale or transfer, and then, to resort to the legislative history to reach an outcome that contradicts the language that seems pretty self-evident.

So, I think it is sort of a common understanding in law schools that sort of legislative history is sort of our resource of last resort. And that applies with particular force when you are trying to offer an interpretation that is at odds with what we have in the statute.
MS. CLAGGETT: Thank you.

And maybe, Mr. Menell, you will have some response to that and whether the legislative history actually contradicts the plain meaning.

PROFESSOR MENELL: Yes. No, I do. I mean, if it was so clear, we would have a hard time explaining Judge Gertner's decision exactly to the contrary. She comes to exactly the contrary conclusion. And this is an opinion that Mr. Bridges praises.

So, I find it rather remarkable that we could call it clear when a district judge who has heard these arguments comes to the conclusion that the legislative history is useful and reaches the exact opposite conclusion.

But I want to look back just a week. The Supreme Court rendered a decision interpreting the word "extraordinary" as it relates to the award of attorney fees under Section 285 of the Patent Act last week in a
case called Octane Fitness.

Justice Sotomayor wrote for a unanimous Court, with the caveat that Justice
Scalia, and only Justice Scalia, did not join footnotes 1 through 3. The Court ultimately
ruled that, quote, "Its analysis begins and ends with the text of Section 285."

So, what did those footnotes discuss? The statute's legislative history.

Thus, even when the Supreme Court is assessing statutory text that appears clear on its face,
eight of the nine Justices considered it appropriate and useful to review legislative history.

MS. CLAGGETT: Thank you very much.

Professor Ginsburg?

PROFESSOR GINSBURG: I wanted to address the second point about whether a copy has to be a physical object.

MS. CLAGGETT: Do we have any other comments in terms of the legislative
history before we move on to that second point about material objects?

(No response.)

Okay, Professor Ginsburg?

PROFESSOR GINSBURG: I think if you look at 106(3) alone, one might draw that conclusion. But, given the number of times that the phrase "digital phonorecord delivery" appears in the Copyright Act, a subsequent amendment -- and a "digital phonorecord delivery" is defined as a digital transmission, and the phrase appears many times in conjunction with the words "reproduce and distribute" -- I think it is pretty clear at this point that the thing that is "distributed" can be a digital object that is not in a freestanding physical medium.

MS. CLAGGETT: Great.

Mr. Borkowski?

MR. BORKOWSKI: Thank you.

Yes, I was actually going to make that point and a couple of others.
If we are talking about not even looking at legislative history, but just talking about the explicit language of the statute, there are a couple of parts of the statute that are interesting. You know, you look at the definition of "publication," which says it is "the offering to distribute copies or phonorecords." And then, it says publication is "distribution of copies of phonorecords."

And then, when you look at Section 115, which Professor Ginsburg just mentioned, it is explicit that a digital phonorecord delivery is each individual delivery of a phonorecord by digital transmission of a sound recording.

And then, later on, it talks about that, without authorization of the copyright owner, the owner -- let me just read the part of the language here -- "the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has
obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording." That is explicitly plain language.

Clearly, this notion that a digital file, when it is sent from point A to point B, is not a distribution is just not supportable. And no court has ever recognized that. No court has ever said that.

To say that, when I buy something on iTunes and I buy the file, and it is sent to me over the internet into my hard drive on my computer, that that process is totally -- the Copyright Act does not apply to that process, it just makes no sense. It absolutely makes no sense.

And if you were talking about the plain language of the statute, I think Section
115 talking about digital phonorecord delivery, you can't read that language out of the statute.

MS. CLAGGETT: Thank you very much. And I am sure Mr. Bridges will have a response. But I think I know where he is going to go with that and maybe reference other aspects of exclusive right perhaps.

But I was going to follow up and ask a question to the panelists in terms of the case law on this issue, whether there was any case law, in fact, suggesting that a download was not a distribution. And maybe, Mr. Bridges, you had said, "No, there isn't."

Mr. Bridges, do you have any response to that?

MR. BRIDGES: A download is a reproduction. Why we have to double-count, triple-count acts under different distinct rights in order to essentially -- I'm a trial lawyer. The reason people want to allege
[violation of the] distribution right and not violation of the reproduction right is that they think that they can justify, to a jury, massive damages for distribution that sound egregious in the context of mere downloads, as in the case of Jammie Thomas-Rasset, where they wanted to go after her for distribution to justify a $1.5 million jury verdict for 24 downloads.

That is part of the rationale here. It is double-counting, to slip it into a more inflammatory sounding violation.

Actually, 115 I believe does not refer to distribution, that digital phonorecord delivery is not delivery of copies; it is distribution of works. Now what distribution of works means, I'm not sure. But I know that Section 106(3) is distribution of copies or phonorecords, which are material objects. And if somebody thinks that they are not material objects in Section 101, I would like to know what the legislative history is
for that to vary from that text.

Moreover, it is not just
distribution of copies or phonorecords. It is
"by sale or other transfer of ownership, or by
rental, lease, or lending." Now "transfer of
ownership" means, when Person B gets it from
Person A, Person A no longer has it. What do
you call it when Person A has it and shares it
with Person B? You call that a
"reproduction."

MS. CLAGGETT: Thank you.

I'm going to go with Professor
Menell and, then, Professor Ginsburg and,
then, Mr. Borkowski.

Although, I will say we don't want
to spend too much time on this particular
topic because I will say, quite frankly, we
thought it was fairly well-settled, but it
apparently is not quite as well-settled as we
thought.

But I will go over it first with
Mr. Menell.
PROFESSOR MENELL: Well, I think it is completely settled, at least as far as judicial opinions. There are no decisions that come to the conclusion that Mr. Bridges refers to.

And Judge Gertner's 2008 opinion, which he praises, is I think the clearest. In that case, the defendant's counsel, EFF [Electronic Frontier Foundation], made the very same argument that Mr. Bridges presents here. Rather than endorse that argument, Judge Gertner concludes unequivocally at page 173, quote, "An electronic file transfer is plainly within the sort of transaction that Section 106(3) was intended to reach," precisely because it does implicate, quote, "a material object" and because it focuses on the result of that transaction, which is that there is a transfer.

Now I would say that Mr. Bridges's point is certainly a plausible point. You can make that argument. My article goes through
how you sort of fit it in and I say there is ambiguity here, and that is why I think the legislative history is useful.

When you read Judge Gertner's opinion, she completely agrees with that. I mean, she goes through the legislative history.

And I'll note, because Mr. Bridges in his filing says that I don't address this, I want to point him and the Committee -- or the Copyright Office to --

(Laughter.)

MS. CLAGGETT: It feels very formal in here today.

PROFESSOR MENELL: -- Section 8.11(d)(4)(a)(I) of Nimmer on Copyright, which I coauthored, and it so indicates, in which we, David Nimmer and I, discuss Judge Gertner's opinion at length and we make exactly the point that is alleged that I don't deal with. So, it is set forth there.

And I would just say that that
decision directly contradicts this point that
Mr. Bridges is making. And I am not going to
say that his point isn't a plausible point.
I am going to say that it has been raised, it
has been addressed, and in terms of where the
state of the law is, that Judge Gertner's
opinion is, I would say, the most thorough
analysis that we have in a reported decision.

MS. CLAGGETT: Thank you very
much.

I think Professor Ginsburg was
next, then, Mr. Borkowski, and Mr. Bridges.
Did you want to go ahead? Yes.

Oh, okay, you agree with what
Professor Menell said.

Mr. Borkowski?

MR. BORKOWSKI: Yes, I just wanted
to address a point about the distribution
argument with Section 115 that Mr. Bridges
made a moment ago.

Section 115 is entitled
"Compulsory License for Making and
Distributing Phonorecords." It is a limitation on the Section 106(3) distribution right.

If a digital phonorecord delivery were not a distribution, there would be no need to limit that right through a compulsory license. There would be no need for a compulsory license because the right wouldn't exist. The text of the statute I think is plain.

And on this "or other transfer of ownership" point that Mr. Bridges makes in his filing also just now, the transfer of ownership is the transfer of ownership of the copy. It is quite simple, and that is what it is.

MS. CLAGGETT: Mr. Bridges, do you have any brief response to that?

MR. BRIDGES: Well, the point is, it is for the making and distributing of phonorecords, and the "making" seems evident. Two questions: do we need multiple rights?
Should a download also be a performance?
Should a download also be a derivative work?
Should we multiply violations for single acts?
That is what is happening here.

Is a copy the "making" of a phonorecord? Is the transfer of a file that lands on a target storage medium, is that not a reproduction, so that we need to expand distribution to cover it? And then, to shoehorn it into this sale or transfer of ownership, it is not needed, other than to come up with inflammatory reasons for large jury verdicts.

And the last thing I will say is Mr. Menell sort of keeps mentioning the Gertner opinion. I think the Gertner opinion is the best opinion out there. I don't think that any case has gotten it right. I hope that the right client will hire me to make the point in the right case, and that a judge will feel comfortable actually reaching what feels like to a judge a more radical outcome. But
the more radical outcome absolutely comports
with the statute. And if somebody has
contrary evidence as to why 106(3) doesn't
mean what it says, then I would like to hear
that.

MS. CLAGGETT: And I think you
have gotten some responses here today.
Because I do have a couple of
other questions that further discuss the
issues with respect to making available more
broadly, I do want to get the last couple of
responses that we have, and then, move on with
another question.

But I think that we had Mr.
Borkowski, Mr. Schruers, and then, Professor
Ginsburg. And then, I will go on with the
next question.

MR. BORKOWSKI: Thank you.
Because he has said it twice now,
I can't leave this point un-responded to. But
this notion that having a digital distribution
right, which I think plainly exists, to argue
that is just some kind of way to gin up statutory damages or large jury verdicts against infringers, it just shows -- everybody knows the industry and the defendants usually that Mr. Bridges represents, and he does a fabulous job doing that.

But it is those defendants who want to go out of their way to make it virtually impossible for copyright owners to protect their works. And if you do not have a digital distribution right, and if you don't have a making available right, then you have to track down every single download. Or if you have an investigator who is an anti-piracy investigator who shows that a download has happened from an infringing site, and maybe he or she downloads 15 works, while let's say 2,000 are being offered up, you know, please come here and take them for free, that is going to significantly negatively impact copyright owners in protecting their rights.

There is massive, massive
infringement on the internet. And we need
more tools to combat it, not fewer tools.

MS. CLAGGETT: Thank you, and we
will get into some of the evidentiary
questions, I think, a little bit later.

I am going to go with Matt
Schruers, and then, Professor Ginsburg, and
then, John Beiter. Did I get that right?
Yes, okay.

MR. SCHRUERS: I don't want to
weigh-in on the debate about material copies
other than to say, to some extent, the very
informed exchanges here do somewhat conflate
two separate questions, right?

So, material copies is one aspect
of 106(3), and sale or other transfer of
ownership is another question. So, the sort
of analytical framework requires satisfying
these two elements.

A lot of interesting sort of
brain-twisting conversations about material
copies, and I think that is very interesting.
You need to satisfy that to get to a digital
distribution right. You need to satisfy that
and sale or other transfer of ownership -- and
by satisfy, I mean sort of wish it away -- to
get to making available.

So, even if we establish -- and
there is probably good policy reasons for that
-- that digital distribution is distribution
under 106(3) because of material copies, and
it involves digital copies, that doesn't get
us to a making available right. That only
gets us halfway, to digital distribution.
Then, you also need to sort of jump that
second chasm to get to digital attempted
distribution.

MS. CLAGGETT: Right, and that is
actually why I did want to not spend too much
time on this early conversation, because there
are two aspects of the discussion. Once you
accept or not, or assume for purposes of our
discussion, that digital distribution is
covered under Section 106, then you do have to
get to the making available concept as well.

But I think Professor Ginsburg was next.

PROFESSOR GINSBURG: Yes, I think that that is absolutely right. I think that one cannot say that Section 115 is only about making copies because it says to make and distribute to the public. And if you are not going to distribute those copies, those phonorecords, to the public, you don't get the compulsory license.

But the point I wanted to make addresses a different proposition which we may develop further. Andrew Bridges says that a digital distribution right is simply an abusive add-on, and what is going on here is reproduction.

Well, I think there are two answers. One is we could have a real making available right that stops slicing and dicing everything, our current patchwork. I suspect that there is not that much enthusiasm for a
real making available right, and that is
another panel.

But I think that it would be very
problematic to limit the digital communication
of files to a reproduction right in light of
Cablevision. Because under Cablevision, who
knows what's going to happen by the end of
June? But, in light of Cablevision, it is the
user who is, quote, "making" the copy. So,
the reproduction is not occurring at the level
of the entity that is offering the possibility
to make those copies.

A distribution right could
actually fill the gap created by Cablevision,
at least under the interpretation of Judge
Gertner in the London-Sire case. She says
that there is a transfer of ownership when the
copy gets made in the recipient's file, but
that happens because there is a distribution.
So, the act of distribution, at least as
viewed by Judge Gertner, would identify an
infringement at the level of the economic
actor that is causing those copies to be made, even if one were to follow Cablevision and say that the reproduction is engaged in by the end-user.

So, I think that the distribution right, far from being an abusive add-on, might be the only thing that saves us from non-compliance with our international obligations.

MS. CLAGGETT: Thank you very much.

I am going to go to Mr. Beiter, and then, Mr. Schruers.

But it looks like we do have now two final, hopefully, flags on this particular issue, because I do have a specific question that I do want to get to in terms of the aspect of making available.

But if you want to go on to have some discussion in terms of the material object point and digital distribution, we will have final comments right now.

MR. BEITER: Well, I just want to
say I am not really here to focus on the
distribution right because I am here
representing a performing rights organization.
But, just observing the conversation, it does
seem to me that there is a certain amount of
agreement that the language concerning the
distribution right is unambiguous. It just
appears that there is not a lot of agreement
on what it means.

(Laughter.)

MS. CLAGGETT: People don't agree
about what it means. Thank you.

(Laughter.)

I think it was Professor Menell
next, and then, Mr. Schruers.

PROFESSOR MENELL: It is my
understanding that we are going to talk this
afternoon about policy issues. And a lot of
what Mr. Bridges has said on this issue, at
least in his most recent comments, I think go
directly to those questions.

This session I understand to be
about what the law is --

MS. CLAGGETT: Right.

PROFESSOR MENELL: -- how it is interpreted.

So, I want to quote a brief passage from London-Sire. Judge Gertner says, "Congress wrote Section 106(3) to reach the," quote, "'unauthorized public distribution of copies or phonorecords that were lawfully made,'" citing the House report -- "unlawfully made."

"That certainly includes situations where, as here, an original copy is read at point A and duplicated elsewhere at point B." Footnote 28, "It is irrelevant that such an action may also infringe the reproduction right secured to the copyright holder under Section 106(1). A single action can infringe more than one right held under Section 106."

So, the final sentence in this paragraph is, "Since the focus of 106(3) is
the ability of the author to control the
market, it is concerned with the ability of a
transferor to create ownership in someone else
-- not the transferor's ability simultaneously
to retain his own ownership."

Now that was an interpretation. I
would acknowledge that we could have
interpreted it differently. But, if we are
trying to address, as this session is, what
courts have interpreted and how they have done
it, they have used legislative history and
they have come to this interpretation.

MS. CLAGGETT: Thank you.

And I think we have Mr. Schruers.

Mr. Schruers?

MR. SCHRUERS: So, following on
Professor Ginsburg's comment earlier with
respect to Cablevision, I think that is only
correct if we assume that at no point do
secondary liability doctrines enter into the
conversation.

And I mention that, one, because I
fully expect that a lot of parties in future Cablevision-like scenarios will freely resort to secondary liability, and, also, because I think that points out a very important aspect of this conversation, which is that our broad and often expanding secondary liability doctrines here in the United States are part of our international compliance -- I'm sorry -- international treaty compliance.

And so, to the extent there are any gaps, I think one needs to acknowledge not only is there a gap with some agreed-upon international interpretation, but also that secondary liability does not apply in that gap.

And seeing the frequency with which secondary liability theories are alleged, I am not inclined to think there are many cases where plaintiffs wouldn't allege secondary liability.

MS. CLAGGETT: Yes, and I think we are going to have a few questions about the
secondary liability point and whether you should consider that as part of the kind of overall ability to satisfy the U.S. obligations under a making available right, the concept of a secondary liability.

I wanted to turn back to the text of the statute in terms of focusing on the actual issue of whether, putting aside again, assuming for the moment that a digital download is a distribution, whether the act of making that download available to the public is a violation of our current law, which, as we have pointed out before, we have an obligation to. And the Congress, as well as the Executive Branch, has concluded that, in fact, our law does cover making available.

But some of the comments mentioned the phrase that is in Title 17 "to authorize" the distribution as an important aspect of the discussion as to whether there is a making available right in the United States. And so, I wanted to just get some general thoughts as
to what is the role of the phrase "to authorize" in the opening clause of Section 106. And is that important for the interpretation of the scope of the distribution right in the United States and how it relates to making available?

Any takers on that?

Mr. Schruers?

MR. SCHRUERS: Since this is relevant to my previous point, "authorized" is frequently pointed to. Without taking this position, litigants often point to "authorized" as the statutory basis for theories of secondary liability. And indeed, commonwealth countries frequently use "authorized" in their articulation of secondary liability doctrines.

So, I think that is a perfectly good segue to demonstrate that secondary liability theories are going to be relevant here in the context of our compliance.

MS. CLAGGETT: Thank you.
Professor Ginsburg?

PROFESSOR GINSBURG: Whatever "to authorize" may have thought to have been meant when the 1976 Act was drafted, I am not sure that it has been interpreted in a way that is consistent with its interpretation in commonwealth countries. It has been interpreted as secondary liability.

And I think that it is quite problematic to base our compliance with a making available right on secondary liability because it means that the end-user is the first-line infringer. And I don't think that we should base a copyright system on making end-users the first-line infringer.

MS. CLAGGETT: Mr. Bridges? And then, Professor Menell.

MR. BRIDGES: Right. I question that question that she just made, making end-users the primary target, the primary infringer. That was the very issue in Cablevision.
In Cablevision it was not a question as to whether a reproduction had been made or not. The question was, who made the reproduction? And the view was that Cablevision did not make the reproduction.

It is what I call "thumb-based" liability. You are liable for direct infringement if your thumb on the remote control causes the copy to be made. That is the way the Second Circuit came out, and by stipulation, the parties had taken fair use and secondary liability off the table.

So it should not be seen as a question as to whether there is a reproduction or not. Cablevision is about who made the reproduction.

Now it may be unpalatable to sue the individuals, and that takes us right back to the question of respect for copyright law because if individuals are going to be held liable, they may not like the state of the law. But the fact is the individuals ought to
be the first line of attack in terms of analyzing where the infringement occurs.

Whether it is wise to sue individuals or whether individuals have all sorts of fair use reasons for what they are doing is a separate matter. But saying "Oh, we don't want to involve the public in this debate," I think, avoids the real issues going on because ultimately it is a public interest at stake. And the question is, are we just making intermediaries and technology companies the scapegoats for conduct that we really don't want the public to do?

MS. CLAGGETT: And I think that we can explore some of those broader policy questions later in the afternoon in some of our conversations about clarity and, then, the possible benefits of clarity in our law.

I think we had Professor Menell and, then, Professor Lunney. Lunney? Got it. And then, Mr. Schruers.

PROFESSOR MENELL: So, the
detailed answer to your question is that, like
the term "distribute," there is legislative
history that tells us where the word
"authorize" came from.

But I would concur with Professor
Ginsburg that this is not something that
played much of a role in the development of
the jurisprudence. And I think it is largely
because, until around 1998-1999, until the
internet really became the central focus, we
were operating in a system in which the
reproduction right did carry most of the
power, that one could assert the reproduction
right and win.

And so, once we got into a world
where we had multiple layers of players, that
is when this question of where is, as perhaps
Judge Calabresi might say, you know, who is
the least cost-avoider? How can plaintiffs
who are trying to protect their rights use the
full panoply of rights?

And I would agree that that is a
hard question. It has not been modernized. And I hope we will get to those issues later today.

But in terms of how "authorized" developed, it kind of stagnated. We just didn't see that term being invoked. If you go outside of the United States, I think to Australia and some other countries, you will see that that term did take on a broader meaning and might well provide something like a making available right. But it is, at least at this stage, a dormant issue.

MS. CLAGGETT: Thank you.

Mr. Lunney? And then, Mr. Schruers.

PROFESSOR LUNNEY: I just wanted to say that I agree with Professors Menell and Ginsburg on this, since I so rarely get the chance to say that.

(Laughter.)

MS. CLAGGETT: Wonderful. We have one aspect of agreement on the panel today.
That's great.

Mr. Schruers?

MR. SCHRUERS: So, I want to
return to the question about end-users being
the first line of attack. It is certainly not
desirable for end-users to be the subject of
litigation if the file sharing carpet-bombing
that the recording industry did, you know,
back right after the --

MS. CLAGGETT: But I think that
there is a suggestion that the law should
require that.

MR. SCHRUERS: So, that is where I
am going, right? I think making those parties
the litigants is not the same as making those
parties the infringers, right? And in the
same way that Sony v. Universal didn't drag
individual home-recorders into the court, I
think it is a foregone conclusion that the
industrial actors are going to be the
defendants most of the time because that is
where the money is.
And so, we don't need to sort of pretend those actors are the direct infringers, simply because those are the ones who it is most palatable to sue. I think we simply acknowledge that you are suing the party who is secondarily liable for infringement that an end-user is doing.

It is one thing to say that the end-user is the infringer and another thing to say that the end-user is the most desirable litigant. I don't think end-users are desirable litigants, for all the reasons that the Thomas-Rasset case tells us.

But that doesn't mean that we have to sort of disappear them from the whole process and, then, simply assume that the intermediary or the service provider or the device provider is not directly liable. They would be secondarily liable to the extent that the end-user is liable. And simply, we dispute the issue, acknowledging that that party is relevant to the conversation, but,
also, perhaps not the most desirable litigant.

So, it is very important to keep clear in saying who is the direct infringer. It is not the same question as who do we want to drag into the courtroom.

MS. CLAGGETT: But, even for purposes of secondary liability, you would have to prove direct infringement. And so, I think we are going to get into some questions with respect to how do you prove that in the context of someone who is, for example, uploading something on the internet. How can you actually do that under our current law and whether it is appropriately addressing that issue?

I think we had Library of Congress next.

MR. DeANNA: I have never been called the Library of Congress.

(Laughter.)

I just want to take this opportunity to mention one of several of my
many unintended consequences remarks. We talked about unauthorized copies. I just want to go on record as reminding people that libraries and archives have really no resources to track the historical acquisition histories of materials, and that there are many, probably many, many unauthorized copies in the collections of libraries and archives, including the Library of Congress.

In my area, the Motion Picture Broadcasting and Recorded Sound Division, some of the most historically-significant, important films, television broadcasts, sound recordings, radio broadcasts have come from private collectors and citizen donors to the collection. And these are materials that I can tell you most frequently the rights-holders, whether they are the creators, the heirs, or the members of the industry, don't hold physical copies of. So, our role to acquire and preserve and sustain those stands to benefit all of those people significantly,
and we are concerned about that.

MS. CLAGGETT: Thank you.

I think we will have Mr. Bridges and, then, Professor Lunney and, then,

Professor Ginsburg.

MR. BRIDGES: One detail on the question of "to authorize," and I didn't research this, thinking about it for today. But I think there is at least one case where a plaintiff sued a defendant for licensing a work that the defendant did not have the rights to license. And I think it was a lawsuit under the "authorize" prong, and I think that the court decided that the mere granting of a license did not violate the "authorize" prong, that the actual exploitation of a Section 106 right had to have occurred in order for the plaintiff to have a violation here.

So, I think using "to authorize" as a wedge to try to get at offers or inchoate action that doesn't actually result in an
actual exploitation of a Section 106 right
probably would not fly under current law.

Others may know contrary
decisions, but I do recall one decision to
this effect.

MS. CLAGGETT: And I think that is
mentioned in, I think, Tom Sydnor's comments,
I believe.

Professor Lunney? And then,

Professor Ginsburg.

PROFESSOR LUNNEY: I just want to
respond briefly to Matthew's point about
having the direct infringers, the consumers be
the direct infringers, just as a convenient
backdrop. I think we got into a lot of
trouble by using them that way. In Napster,
the Ninth Circuit sort of causally brushes
aside the direct infringement questions,
causally brands everyone an infringer because
they are not before the court.

And then, when it gets turned
around in 2003 and they start suing individual
file sharers, I think it is a problem. I would much rather have a system that is rational with respect to the people who can control the infringement than going after the consumers just as a hook to get those parties involved.

Now it may be some of the secondary liability standards with the sort of knowledge and other aspects of it that make it not so much a strict liability tort are better tailored to address the copyright infringement issues in this context. But I think it is extremely problematic to have those consumers on the hook as direct infringers as a necessary sort of predicate for the secondary liability standard.

MS. CLAGGETT: Thank you.

Professor Ginsburg?

PROFESSOR GINSBURG: I will return the favor and say that I also agree with the desirability of going after the economic actor and not the end-user, not only as a matter of
litigation, but even in terms of how we want
to conceptualize the system.

But this comment goes to, will
basing enforcement on secondary liability
actually work? And I think there is a
significant problem with that because--again,
assuming that the Cablevision model remains
viable, so that the end-user makes the copy--
let's suppose the storage locker is sitting on
a server outside the United States, right?
So, where is the copy made? Is it made in
Vanuatu?

And at that point, there could be
a violation of Vanuatuan copyright law, but
under U.S. precedent, notably the Subafilms
case, there is no secondary liability under
the U.S. copyright law for enabling an
infringement outside of the United States.

So, that would, then, get one into
the question, first of all, is there a
violation of the copyright law where the
server is (perhaps opportunistically) located?
And that may certainly raise litigation costs in trying to figure out what pleading and proving foreign law.

And then, there is the problem that in lots and lots of countries they don't have secondary liability the way we do. So, this could actually be a rather clever scheme to insulate a digital-delivery business model.

MS. CLAGGETT: Thank you.

Mr. Bridges?

MR. BRIDGES: Thank you.

I wanted to go back to the issue of individuals versus the "economic actors."

I think that the recording industry made a very, very fundamental mistake when it went after Napster because there were people who believed that it was okay to download things; it was just not okay to be Napster.

By not bringing enforcement against individuals, the enforcement did not bring home to the public that they have a responsibility and they have obligations under
the law.

And I remember, I think it was at a hearing in the Senate, I think Senator Schumer, if I am correct, was saying that his daughter was downloading music from Napster "while it was still legal," was his phrase. He didn't stop to think that his daughter was doing anything wrong. He just thought that Napster was okay until the court said it wasn't okay, but that the only question was about Napster's conduct.

So, I do think that putting the public front and center in enforcement, I completely agree. I don't think that it is wise to go out and sue lots of members of the public.

But that brings me to my second point. A good reason to put the public front and center is it is sort of like how the society feels about wars maybe when there is a draft instead of a volunteer army. And when people think that their sons and daughters may
get sent off to war, they might feel a little bit differently about going into war.

If the public thinks "we are going to get sued and we are going to be held liable for a $1.5 million jury verdict for 24 downloads, what do we think about this system?" And I think actually keeping the focus on the public will help provoke the public debate that is so necessary in this arena.

MS. CLAGGETT: I see a lot of raised flags in response to that. So, I think we have a lot of discussion.

And maybe Mr. Borkowski can respond to this first, because I think some of this is putting perhaps some of the content owners in somewhat of a Catch-22, because, on the one hand, you say, well, we shouldn't have these $1.5 million statutory damage awards against users, but, on the other hand, they should go after the users, but, on the other hand, it is not a wise thing for them to do.
So, Mr. Borkowski, do you have a response to that?

MR. BORKOWSKI: I do. This is an argument for essentially eliminating copyright protection completely. Because what Mr. Bridges is arguing is, you know, you don't focus on the facilitators of the infringement. What you do is you have to focus and make people take responsibility for their actions. Nobody really believes that.

The whole notion is that, you know, if you go after individuals, then, all of a sudden, there is going to be this huge groundswell of protest. And where this argument goes is that, therefore, we are going to water-down the Copyright Act even more to prevent true enforcement of infringement.

You have to go after the facilitators. The facilitators are the ones that cause the problems, and the Napsters of the world -- I litigated that case proudly on behalf of the record industry.
The Napsters of the world are the problem. They are the facilitators. And you have to go after the facilitators. This is why the Supreme Court unanimously in the Grokster case pulled out this notion of inducement, which may or may not be part of contributory infringement. Who knows? I always plead it as a third cause of action separate from contributory infringement.

It is these actors who are inducing others to infringe, and they are responsible, they are clearly responsible. You could say that the individual is responsible, sure, okay, morally, let's say. But that doesn't mean that the intermediary is not also responsible.

And it is these doctrines of secondary liability which are extremely important and do allow us to go after those who are really creating the problem of copyright infringement on the internet.

MS. CLAGGETT: Okay. Thank you
very much.

And I think we are going to
Professor Menell, then Mr. Schruers, then back
to Mr. Bridges, although I will want to turn
it back again to the making available concept
because I think we are talking a lot about a
lot of very broad, general concepts in terms
of secondary liability, who should we sue,
users, or are statutory damages too high, and
I do want to make sure that we focus on the
issue of making available. And so, we are
going to have some specific questions in terms
of, under our law, what particular activity
does violate Title 17.

But, first, we will go to
Professor Menell.

PROFESSOR MENELL: I do think that
we are again bleeding into what is the
alternate policy choices. You know, I am very
anxious to talk about that, but I feel that
would be jumping the gun.

The one point that I will make
right now is that I am feeling déjà vu. In April 2002, I moderated a panel at the Computers, Freedom, and Privacy -- underline "privacy" -- Conference that took place in San Francisco. And a senior attorney at EFF made exactly the point that Andrew is making, although he was perhaps even more aggressive in saying that you are targeting the wrong people.

And we have recently relived that because I relate that story in an article, and it was disputed whether or not it was said. We got the transcript; it was said.

But I do think that we are in this sort of very delicate space where we can easily make arguments on either side of how we should go forward. And as my comments do discuss, we are, I think, largely talking about issues of remedy. I mean, remedy is what is driving so much of this, that if we had sensible remedies, I think the making available issue is -- I'll use a term of art...
-- a no-brainer.

I don't think we really want to get into debates over whether someone should be able to put a recently-released film into a folder that is available to the public at large.

And that relates to something that Professor Lunney also raises in his comments, and on which I would agree with him, that the porn troll litigation that is going on is, I think, very counterproductive to the entire copyright system.

One of the advantages of having a clear making available right is that we don't even get into the joinder question because it means that every member of the Bit Torrent swarm is him or herself liable under 106(3). And that would modestly improve what is, I think, a very pathological part of our copyright system right now.

I would hope that everyone on a panel like this would say that was not what
the founders or the drafters of the 1976 Act
or anyone thought the copyright system should
be about, trying to use the threat of exposing
someone's private viewing habits as a basis
for extorting a large settlement.

And so, the making available right
actually does clarify and clean up that kind
of litigation. But I think we ought to step
back and try to rationalize more than just
making available in order to get past this
roadblock.

MS. CLAGGETT: Thank you very
much.

I am going to go to Mr. Schruers,
and then Mr. Bridges.

But I am going to preview my next
question about the making available right,
which is to have some focus on the discussion
in terms of, okay, we are assuming for
purposes of our discussion that digital
download is a violation of the distribution
right, but we want to now take it a step
further in terms of making available.

And the question will be to the panel, first of all, just a very broad, how do we implement the making available right in the United States generally, to focus on? And then, I am going to have some specific questions in terms of particular activity.

But I will start now with Mr. Schruers and Mr. Bridges to close off this aspect of the discussion that we have right now.

MR. SCHRUERS: So, going back to what Andrew said before and his sort of draft analogy, I do think there is something important to take away from the observation that it is easier to have an utterly-ridiculous copyright system so long as it stays before the radar, right? As long as nobody notices how ridiculous it is, we don't really have to worry about that, right? As lawyers, we can rationalize it; it is hard to rationalize things to the public. And so, if
you are sort of afraid to have airing the
litigation laundry, then maybe we need to
think about how well the system is
functioning.

But I also want to focus on the
targeting the right people. I think the word
"target" or "attack" or "go after," these are
all very ambiguous. The point is --

MS. CLAGGETT: Sue maybe for
infringement?

MR. SCHRUERS: Right. So, I think
"sue" is really the best way, is the best verb
to use.

There are a lot of reasons we have
seen why plaintiffs want to sue the
intermediaries, the service providers, the
device manufacturers, whatever. That's fine.

You are the author of your complaint; you can
sue whom you see fit.

But my point is that, just because
it makes sense from a pecuniary standpoint and
from a litigation convenience standpoint to go
after the device manufacturer or the service provider, or so on, that doesn't mean that you can now pretend that that actor is the direct infringer. They may well, once a burden of proof has been met, be established to be a secondarily-liable actor, and many remedies still apply against that actor.

But, to the extent that is any merit in the argument that we don't want to be dragging end-users into the courtroom, it doesn't mean you can wish the end-user away. The end-user is a party to the transaction and proof of direct infringement by the end-user will be an element of the burden of proof against the intermediary.

Because once we start using theories such as making available to transform those who were previously secondarily liable into direct infringers, you have very much upset existing balances in the statute. And now, you may well have transferred an entire third tier of tertiary-liable parties into
secondarily-liable parties. And I don't think we have fully explored the consequences of that.

MS. CLAGGETT: Thank you.

Mr. Bridges, do you have a brief comment?

MR. BRIDGES: Very brief. I am pleased to be able to agree with Professor Menell.

And this is a little bit on a tangent, but I think it is important to say it here. He said that the remedy issues are really driving a lot of the discussion. Let me be clear: I think statutory damages are the single most distorting and corrupting aspect of copyright law. That should be amended today. And then, when that gets fixed, I actually think then is the time to see what other changes to make in copyright law.

But the discussion is so distorted. In the last decade, I have not
defended a single case where the damages claimed were less than $1 billion. And my current case right now, over 30,000 photographs of a soft-core porn company, the claim is $4.5 billion.

The LimeWire case, Judge Wood pointed out that the plaintiffs were seeking trillions of dollars, "more money," my quoting approvingly the defense brief, "than the entire revenues of the recording industry since Thomas Edison invented the phonograph."

When that gets fixed, a lot of the other discussions here can be put into a different light.

MS. CLAGGETT: And that is, I think, some of the discussion we will discuss a little bit later in terms of benefits of clarity and how that might look. But we don't want to have a specific discussion exclusively about statutory damages.

So, I want to go back to the question that I previewed in terms of going
back to making available -- how does the
United States implement the making available
right in its law? We talked a little bit
earlier about legislative history and the fact
that legislative history, or at least some of
the recent legislative history that was
uncovered suggests that Congress did, in fact,
intend to very clearly cover a making
available right.

We talked about the fact that
publication was very broad under the 1909 Act,
and distribution was simply seen in some
people's views as synonymous with publication
or to publish.

And then, we discussed briefly
whether "to authorize" would be another hook
to talk about the act of making available
under United States law.

So, I wanted to broadly have the
question about U.S. law, how do we implement
the making available right? And then, I want
to go through just a couple of brief examples
of particular conduct. For example, the act
of a person simply putting a digital file in
their shared folder on their computer, is that
the act of making available, and does that
violate, in and of itself, U.S. law?

So, I will start with Professor
Ginsburg.

PROFESSOR GINSBURG: I think we
might need to start by seeing if we all
understand what "making available" is in the
same way. Because, as I read the comments, I
think that there might not be full agreement.

MS. CLAGGETT: That is a very good
question, actually, because -- and we might
discuss this more a little bit later on when
we talk about how different countries have
implemented it. But it seems like there was
a large consensus that, yes, we do have a
making available right, but, then, different
people disagreed as to whether that right, for
example, would cover the activity of just
offering something for sale --
PROFESSOR GINSBURG: Exactly.

MS. CLAGGETT: -- offering a

download.

PROFESSOR GINSBURG: So, I believe

that the making available right covers not

only the actual transmission or delivery, but

also the offering, whether it is offering a

download or offering a stream. The standard

in the WIPO Copyright Treaties is clear in

that respect, but I think we will probably

defer that issue to the last panel.

But if one starts from the

position that the making available right

includes not merely actual communications,

downloads or streams, but offers to download

or stream, then the next question is: Was

Congress right in saying that, under the so-
called umbrella solution, we actually had a

sufficient patchwork of rights?

And that, in turn, requires an

understanding of both the public performance

right as covering the offering or the proposal
to communicate a performance or a display of
the work, and also of the distribution right
as covering the offer to distribute.

    So, in that respect, I agree that
the steps there, the question is whether, as
a matter of positive law, we have filled in
all those steps. I think that the cases on
the digital distribution right are a little
all over the map. So, while the PTO Green
Paper says, somewhat hopefully perhaps, that
our positive law does recognize a digital
distribution right --

    MS. CLAGGETT: And we have said
that as well.

    PROFESSOR GINSBURG: Right.

    Excuse me. And the Copyright Office has also
said that. I suppose there is some room for
doubt, although I agree with Professor Menell
that the better interpretation would reach
both the actual distribution of a file and the
offer to distribute a file.

    I had thought that, at least on
the public performance right side, we were in compliance. But, as a result of Cablevision and Aereo, I am less confident of that conclusion because of the nifty trick of turning everything into a private performance by virtue of an intermediate consumer-made copy that is the source of the communication.

So, I suppose that it is possible to interpret the extant copyright law in a way that would cover what I think is the full scope of the making available right, but I think that there are divergent interpretations. And so, it would be necessary to have a consistent interpretation.

On your question about putting a file in a shared folder, I think that if the sharees are sufficiently numerous, they are a substantial number of persons beyond a family and its circle of social acquaintances, then I think that that would be a making available to the public.

MS. CLAGGETT: And just to follow
up really quickly before I turn it over to the others, you mention that, if interpreted correctly, our law, you know, our extant rights would cover making available. And could you just explain in terms of how the law would work in that regard if it is, in fact, interpreted in that way, and whether there are courts that have so found that with respect to the current state of our law.

PROFESSOR GINSBURG: So, I think that Judge Gertner's decision comes closest on the distribution right side, through the evidentiary device of presuming that an actual transmission or an actual distribution has taken place. But I don't think it should be necessary to do that.

The Elektra case, by going with the publication right -- and I defer to Peter on this -- maybe comes closest, although I suppose there is not complete agreement on publication.

And with respect to the public
performance right, I think that the language
of the definition of public performance is
actually quite close to the formulation of the
making available right.

The principal problem I think is
not necessarily doctrinal. I mean, I think
that the bits and pieces are there, but it is,
rather, one that a couple of people have
alluded to, which is right now the way the
business slices up the rights, it runs the
risk of having to get multiple clearances, and
that doesn't seem desirable. Now some of this
may be slowly being worked out, but an
advantage of a making available right is that
it would sort of force a simplified clearance
process. But, even if we remain with the
current patchwork, I think it will be
necessary to find ways to not make people pay
more than once.

The last thing I would say in that
respect concerning the patchwork and, also,
who owns which rights, is that we have thought
that we could tell the difference between a
download and a stream; we could tell the
difference between a reproduction
distribution, on the one hand, and a public
performance, on the other hand. That is the
"ringtones" case. But I think that the court
there was looking at two ends of the spectrum
when they invoked the metaphor of the record
store for a download and the radio for a
stream. That ignores that there may be a
whole lot of activity in between those
extremes whose characterization as a public
performance or as a distribution, as a digital
distribution of a copy or a phonorecord, may
not be so obvious. And that, again, raises
the question of, are we going to be making
people pay twice for what economically should
be a single operation?

MS. CLAGGETT: Thank you very
much.

I am going to go with Professor
Menell, then Professor Lunney, then Mr.
Bridges. Lunney. Why do I want to keep doing that? Professor Lunney, then Mr. Bridges, and then Ms. Wolff.

So, Professor Menell?

PROFESSOR MENELL: The question you ask is one that I think built into it is how courts have gone about this process of adjudicating these different skirmishes. And if you look across all of those, there are these waves and patterns.

And I think that is why many of the comments reflected a degree of, everyone was clear, as my fellow panelist said, on the statute being clear; it is just they disagreed on what it meant.

(Laughter.)

And that is because district judges are not experts in copyright law. They rely almost entirely upon the briefs that lawyers file in the cases, that the clerks are typically not trained at the sort of level of research that would have to go into the
archeology of 1960s legislation. And so, what you get depends on whether that judge has a particular approach to reading a statute or the amount that is put into the briefs.

What shocked me, when I went back and when I started this research, I pulled the briefs in every single case that adjudicated the distribution right in a file sharing context, and none of them found any of these materials that I found. And it surprised me in part because I would have expected the record companies and some of the motion picture studios, who were paying very top law firms to find the answers to these questions, I would have expected them to do this.

And what I learned -- and this is, I think, sort of true across a lot of area of copyright -- is that people often stop at the House report. And if the House report doesn't -- and I am talking about the House report that issued at the final legislative term where the law issued -- if it doesn't have
much on it, you don't see that in the briefs.

Well, I believe that when courts start to look at this richer trove of material, they will come to a coherent analysis. I think Professor Ginsburg has woven it together. I think Judge Gertner did an amazing job, given that she didn't have all of that information.

The one case that did was the Tenth Circuit Diversey case. That is the only case that has confronted this issue at an appellate level since at least my research was available.

And I don't know that the court fully read and agreed with everything. It cites that work. And in my work with David Nimmer, I think we tried to come to a coherent analysis that is faithful to what Congress was trying to do and the passage of time and development of technology.

Congress can put a finer point on this right now. I mean, this is, I think,
worthwhile, given that we have a lot of money being spent litigating cases. And I have no doubt that there will be further skirmishes.

So, the answer, I just don't put a lot of faith in decisions, even Judge Gertner's decision, just because she didn't have the evidence. So, when you don't have good evidence, you don't often get the correct answers.

I do believe that courts like this evidence, not everyone. Justice Scalia, probably being the extreme example, wouldn't look at it. But most judges I think do care about trying to be faithful to this institution.

When I think about how Congress in the 1960s would look at this issue, I think they would find this to be, as I said earlier, a no-brainer, that making a file available to the public at large -- so, let's just take one term from the 1909 Act, "to vend" -- "to vend," that was an expressed right.
So, do you think that, if a bookseller had unauthorized, illegal copies of a book in the window with a price tag on it, that an investigator would have to photograph someone actually purchasing the book or they would have to go and get evidence of someone who bought a book? No. I think that you would bring a lawsuit. You would say, "They're vending it," just as today I think we could talk about putting it in a file-share folder is making it available to the public, which is the concept of publication. Publication doesn't require a reception.

And so, we are just trying to kind of come to common-sense approaches. What makes it not common sense is what Andrew and I do agree on, which is that I think the remedies are also out of step, but we can talk about that later.

MS. CLAGGETT: Yes. Thank you very much.

I am going to go to Professor
Lunney.

PROFESSOR LUNNEY: Thank you.

So, I wanted to start where Jane started, and that is we really don't know what the treaties require, right? So, we have language from the treaties, but we have no authoritative source interpreting it.

And so, when she made certain statements in her comments about this is what the right means, I was curious to know what she would cite. And, of course, she goes to the Court of Justice for the European Union and some other states that have implemented, but they are not binding; their interpretations are not binding on us. And certainly, in those states where it has been adopted, it has been inconsistently applied.

There's at least some decisions that she has acknowledged that come out the same way as Cablevision, other than making available language.

So, when I look at our law, and
particularly the P2P file sharing context or file sharing more generally today, the difference in litigation between having to prove a download and not having to prove a download is relatively small. If you see a file listed in a share folder, how do you know it is really that file? Not everything on the internet is what it says it is; that may surprise you. But you actually have to download it, and then, when the investigator has downloaded it, that often, at least in the courts' opinions -- the litigators have argued this, but the courts have come out and said that is enough to show the download.

So, as a practical matter, that sort of minor technical difference in the evidentiary requirement seems to me is not going to put us out of step. Whether we require proof of download or don't as part of the prima facie case, it is still going to be an element you are going to have to show to prove that it was, in fact, the work that you
are claiming it was that was made available.

So, it seems impossible to me that that would put us out of step with our treaty obligations. And so, that is where I want to start.

MS. CLAGGETT: Thank you very much.

I am going to go to Mr. Bridges now.

MR. BRIDGES: Thank you.

I want to criticize a casual, shorthand, paraphrased approach to copyright law. Our Copyright Act is like the Internal Revenue Code, and you could say we are going to tax acquisitions at such-and-such a rate, and you could have this general concept of acquisition or you can distinguish between a sale of assets and reverse triangular merger, and all sorts of gymnastics that corporate lawyers do so well to guide themselves through the tax code to minimize taxes.

There is no distribution right in
American law. There is a distribution right of distributing "copies or phonorecords to the public by sale or other transfer of ownership. . . ." That is the right. It is the right to distribute certain things in certain types of transactions.

Now that we have been talking about the making available right -- the making available right we have heard referred to a number of times -- I disagree with Professor Lunney and Professor Ginsburg about whether it is clear as to what the making available right is. Let me read to you from the WIPO Copyright Treaty, Article 6.

It's "the making available to the public of the original or copies of works through sale or other transfer of ownership." That is not just "making available" disembodied from these particular aspects.

And the Agreed Statement to Article 6 of that provision of the, quote/unquote, "making available right"
explains that the term "copies" that are subject to that making available right refers "exclusively to fixed copies that can be put into circulation as tangible objects."

So now, there is another form of making available that comes in under the right of communication, and that is different. That corresponds to our performance and display rights. But when we talk about the making available right, let's use the very, very terms that the treaty has, if we mean to be referring to the right that the treaty describes.

MS. CLAGGETT: Thank you very much. And I will just point out that we referenced, for example -- and Professor Ginsburg might have some response on this as well -- WCT Article 8, because we were actually talking about the on-demand, interactive context and the digital context.

MR. BRIDGES: Right, and I am dividing up the distribution and performance
prongs. Distribution corresponds to Article 6, and performance corresponds to Article 8. So, we are coming back to the 106(3). That is Article 6.

MS. CLAGGETT: Okay. I want to turn to Ms. Wolff next.

MS. WOLFF: Sort of a segue, because the aspect I was interested in is the communication right, in particular, the right of display. Because I think if you are looking at that right, and if you look at the 106 rights, that we do have the right to publicly display works.

But I think the courts have misinterpreted, and they have done what Andrew Bridges has said; you know, we should be separating now distribution from display. The courts, unfortunately, have tied reproduction to display, and I think they have misinterpreted the display rights, such that visual artists really don't have a making available right with works once they are
And I think it started with the Perfect 10 v. Amazon case, where they limited the process in which you communicate a visual work to one in which it is served on that particular server. So, I think the server test, unfortunately, couples the reproduction right with the display right. And I think that too narrowly interprets the right of display, which deals with the right to transmit or otherwise communicate the display of the work to the public by means of any device or process.

So, what happens is, if you use clever technology devices, you can essentially cut and paste an image and do inline linking or framing. So that the end-user, the one who is viewing the communication just sees now even a large high-res image which doesn't even now relate back to the original site where it came from.

So, by not having it on the
server, there is no actual copying. So, you
never have any direct infringement. And
unfortunately, it creates the actors who are
making available images, and in many cases now
not even the thumbnails that were in the
Perfect 10 case, but high-res, large images to
the public. And it is causing very decreased
traffic to the site which has legally
authorized the display of the image and has a
very high increase in piracy, when it is very
easy just to right-click a high-res image.

So, that is where I think that the
courts have really taken some missteps in
looking at the display right and requiring
that there has to be a copy on a server of the
direct infringer.

MS. CLAGGETT: Thank you very
much.

And I was just going to say that
we have about 10-15 minutes left. We did want
to get an opportunity to see if there were any
audience questions or comments, rather. So,
I am going to really just end with the last number of flags that we have up, and then, we will turn it to the audience in case anybody from the audience has some remarks that they would like to make in response to any of the questions we raised in the first panel.

I am going to go to Mr. Borkowski first.

MR. BORKOWSKI: Thanks. I will try to be brief. Just a couple of points I wanted to make.

Since we are talking about the language of whether it is the treaties or whether it is the Copyright Act, putting aside the legislative history, Section 506(a)(1)(c) of the Copyright Act imposes criminal penalties for the distribution of a work being prepared for commercial distribution by making it available on a computer network accessible to members of the public. That could not be clearer. The Copyright Act already recognizes making available explicitly.
And also, if you look at the
definition -- and I said this at the very
beginning of this panel -- the definition of
publication, or Section 101 of the Copyright
Act, publication is "the offering to
distribute copies or phonorecords." And then,
publication is further defined as "the
distribution of copies or phonorecords." So,
the offering to distribute is already
recognized by the Copyright Act.

I think it is clear that, if an
online user puts something in his or her share
folder, that volitional act is enough to be
making available, whether she deliberately
enables it or does not change the default that
is usually to share, which is usually what the
intermediary, secondary infringers try to get
people to do.

I am just going to wait. This
isn't directly relevant. I will be one
minute.

I have to say that I do disagree
with Mr. Bridges and even Professor Menell. Statutory damages are one of the most important tools that copyright owners have. They have a deterrent effect, and they are critical to enable us to fight large-scale online piracy.

The Rasset-Thomas case is always used as this example of, oh my God, look what happened. Well, three separate juries of her peers found her liable for lots and lots of money.

Talk about individual responsibility. A jury of peers, three separate times. I just want to make that crystal clear.

And by the way, the amount that was awarded per infringement was substantially less than $150,000. I am not aware of any large-scale infringement case in which any jury has come close to awarding the maximum.

So, whatever is pled in complaints by plaintiffs' lawyers, you know, billions of
dollars, Dr. Evil, whatever, it is not realistic. The awards are never nearly close to maximum.

MS. CLAGGETT: Thanks.

MR. BORKOWSKI: All right.

MS. CLAGGETT: I am going to go to Mr. Schruers, Mr. DeAnna, Professor Ginsburg, and then, end with Mr. Beiter.

Thank you.

MR. SCHRUERS: So, regarding the language in Section 506 that Mr. Borkowski quoted, I think that is actually a limitation on the language, right? It is one particular modality by which it might be distributed. That doesn't mean that that modality satisfies the distribution.

So, you know, if it had said distributing it by throwing it out of an airplane, that wouldn't mean that every time somebody threw something out of an airplane that violated the distribution right. I mean, you still have to satisfy all the other
elements.

In fact, I think that is dispositive in the other direction. It shows that when Congress wants to say making available, they say making available.

If you look in Chapter 9 regarding semiconductors, when referring to "distribute," we do define "distribute" there to include distribution or offers to distribute. So, the language is pretty clear when it needs to be.

Ultimately, I think what some of the previous commenters indicated, this is just about litigation burden and the allegation that it might be harder to prove actual distribution than it is to prove making available.

And yet, some of the end-user cases that we are looking at, making available is viewed in some of these cases as sufficient evidence to satisfy a civil liability burden that distribution actually happened.
So, ultimately, the use of all of this legislative history, which we don't actually know the parties didn't find -- all we know is that they didn't find it or they didn't see fit to cite it, right? -- to come to an outcome that is supposed to make an alleged evidentiary burden more convenient I don't think is very persuasive.

If we are going to go pointing to places where the evidentiary burden is outside some acceptable standard deviation, you know, you can just as easily make the same case about statutory damages. In statutory damages, the evidentiary burden is very easy. One is required to make no evidence of injury.

So, given that that hasn't been sufficient, hasn't provided sufficient motivation to change statutory damages, I don't see why an allegedly elevated burden on the allegation in the cause of action with respect to just actual distribution is that onerous or at least so onerous as to require
a change.

MS. CLAGGETT: Thank you very much. And I think we will get a chance to explore those in a little bit more detail in the next panel, which addresses some of these same issues, because we didn't get a chance to explore those issues fully in this panel.

I am going to go next to Mr. DeAnna.

MR. DeANNA: Thanks.

I just want to quickly note that in the case of Diversey a library was found to have infringed by simply cataloguing this item that was in their collections. And if that, in fact, is something that is going to hold or continue, the impact on what we do, that is, preserve, preserve things for the future, sustain them while they are in copyright and beyond their copyright protections, is very much at risk. Because the cataloguing process, the documenting of these items in a catalogue system is an absolutely essential
step prior to digitizing these in libraries and archives for preservation. You take that out and you have chilled the whole act of preservation, and you have a collection of analog materials deteriorating.

And I will say that a lot of these issues will continue into the digital realm as materials are produced and distributed -- I shouldn't even say that -- digitally, that libraries and archives will continue to have these collections there that are no longer marketplace items that they need to sustain. And so, being able to catalogue them and have metadata on them is an essential aspect of what we do.

Thank you.

MS. CLAGGETT: Thank you very much.

I'll go to Professor Ginsburg next, and then, Mr. Beiter. And then, we will end with Mr. Menell, actually, because he did have his -- and then, if there are no audience
participants, I will go to Professor Lunney.

PROFESSOR GINSBURG: Yes, I think Nancy made an important point about another gap in the positive law, that it is not clear that the display right, which is part of the making available right, is fully covered by virtue of decisions like Perfect 10.

And this gets into a topic which perhaps you had intended to raise as a concrete example and was addressed by a number of the comments, which is, is linking a making available? In the international panel we can talk about ECJ's [European Court of Justice] recent decision.

I want to refer particularly to the comments of the Digital Public Library of America because it is absolutely true that linking is a very important function, in the library context, very important public benefits.

Does it follow that if linking were to be considered a form of making
available, that would be the end of libraries, and so forth? And I think not because we have Section 512(d). I don't think any of the comments referred to Section 512(d), which states that "A service provider," which that term has been interpreted so extremely broadly in the case law, that I think it would pretty clearly cover a library. "A service provider shall not be liable for monetary relief, or, except as provided for, injunctive or other equitable relief, for infringement of copyright" -- so distribution right; display right, excuse me -- "by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including hypertext link, if the service provider" then complies with the notice and takedown provisions.

So, I think that if one were to say that at least certain kinds of linking, such as the framing that occurred in the
Perfect 10 case, was a form of making available, that is I think not necessarily a problem because that is what Section 512(d) is for.

MS. CLAGGETT: Thank you very much.

I am going to actually have to close it with Mr. Beiter, so that everybody I saw earlier -- and then, I am going to open it up to the audience for a few minutes, if they have any final responses to some of our questions. If you do, please line up now at the podium, and then, we will have about five minutes of audience remarks. And if we have any time, which I doubt we will do, we will go back to any participants that I wasn't able to call on. And obviously, in the next panel we will be able to continue our exploration of this issue.

Mr. Beiter?

MR. BEITER: Well, speaking now specifically about the public performance
right, I think we are in agreement that Congress did express the idea that it believed that the rights then extant in the copyright statute were sufficiently broad to encompass the making available right. Unfortunately from the public performance standpoint, the courts have since interpreted that right more narrowly. Generally, it involves decisions that are not technologically neutral, going back to the ASCAP AOL decision in the rate court, where there was a bright line set between downloads which are distributions and streaming which is public performance. Although that may stand as precedent, as my son informs me, the technology has overtaken that decision, and that there is contemporaneous ability to listen as you download, as we all know now.

And then, the more recent Cablevision and Aereo cases, again, not technologically neutral, which I believe is a hallmark of the WIPO Treaties when it comes to
making available right, the focus again being
on the technology by which the end-user avails
him or herself of the work, and determining
that one transmission, each transmission being
private, even though there would be maybe
multiple transmissions, an entire business
model, built upon multiple transmissions.

So, from SESAC's perspective, the
public performance right has been narrowed,
and the question of whether it still
encompasses its share of the making available
right under the treaties is in question.

One other thing I wanted to say,
the terminology in the panel and the papers
today, there has been reference to end-users
and I think, alternatively, to consumers. You
know, words are important, and I think
definitions are important. And I think my
sense, as a non-legalistic sense, a consumer
is somebody, in my mind, who pays for
something, pays for the end-product, pays for
the service.
And although these end-users, not all of these end-users may be consumers, and I think there is a certain patina of legitimacy and benevolence in being a consumer, and I don't think that that is necessarily to be applied to all end-users.

MS. CLAGGETT: Thank you very much.

And I want to thank all of the participants.

We actually are a little bit over time as well. So, I don't think we have any time to go back to any of the participants, but we will have an audience session at the end of the day in which we can explore these issues further.

Do we have anybody from the audience who wants to make remarks in response to anything that was raised?

(No response.)

All right. We will have a very, very short 15-minute break and come back at 11
2 o'clock with our next session.

   Thank you very much.

   (Whereupon, the foregoing matter

4 went off the record at 10:48 a.m. and went

5 back on the record at 11:02 a.m.)

6 MS. STRONG: Thank you, everybody,

7 for joining us for panel two of today's

8 hearing.

9 As you heard in the first panel,

10 the discussion is about the existing rights

11 under Title 17, and this is part two of that

12 same panel, the same objectives.

13 What I would like to do right now

14 for the record is if we can just go around the

15 dais and the platform, and if you would just

16 introduce your name and your affiliation?

17 Thank you.

18 MR. BAND: I'm Jonathan Band for

19 the Library Copyright Alliance.

20 MR. DiMONA: I'm Joe DiMona, Vice

21 President of Legal Affairs with BMI, the music

22 licensing company.
MR. HALPERT: I'm Jim Halpert.
I'm General Counsel to the Internet Commerce
Coalition.

MR. HUSICK: I'm Lawrence Husick.
I'm a member of the Delaware County,
Pennsylvania IP Roundtable, here speaking
solely on my own behalf.

MR. KNIFE: I'm Lee Knife. I am
the Executive Director of the Digital Media
Association.

MR. KUPFERSCHMID: Keith
Kupferschmid, General Counsel and Senior Vice
President for Intellectual Property, for the
Software and Information Industry Association.

MS. LYONS: Patrice Lyons, General
Counsel, Corporation for National Research
Initiatives.

MS. MOY: Laura Moy, Staff
Attorney at Public Knowledge.

MR. ROSENTHAL: Jay Rosenthal,
Senior Vice President and General Counsel at
the National Music Publishers' Association.
MR. SHEFFNER: Ben Sheffner, Vice President, Legal Affairs, the Motion Picture Association of America.

MR. TEPP: Steve Tepp, on behalf of the Global IP Center at the U.S. Chamber of Commerce.

MS. STRONG: Thank you all very much.

We look forward to this panel, which will cover much of the similar issues, at least in terms of questions, that you heard on the first session. However, of course, we have a different panel; we have different roles of expertise. So, we look forward to an engaging question and discussion.

But I would like to start off this panel with the same question that we presented in Panel 1, which is exploring the role of the legislative history. What should that role be, especially as we have seen and have heard from the prior panel about the courts' difficulty in either accessing or
understanding some of the legislative history involving the 1976 Act as amended.

So, with that, I open the floor for, what should the role of legislative history be?

Mr. Band?

MR. BAND: So, just to kick things off, my father is a professor of comparative literature. And so, I grew up in a household where no text was clear; everything had levels of meaning. And so, I think, as a practical matter, the plain language means what it says when you agree with what you think it says, and, otherwise, you would want to always look at the legislative history.

So, I think, as a practical matter, you are always going to look at whatever sources of information that are there to help you interpret what you are looking at. And then, as a litigator, you will either use what is helpful and whatever that is not helpful you will say is not authoritative or
MS. STRONG: Thank you.

Mr. Kupferschmid?

MR. KUPFERSCHMID: Thank you.

I'm far from an expert on legislative history, and I sort of defer in that regard to the folks on the first panel.

But some of the statements said there, for instance, that terms we are talking about here were created, were drafted at a time where we didn't really envision the digital landscape, the environment that we are in today.

And so, I think by the very nature you see us trying to apply terms that were created in the analog world to a digital world. And by their very nature, there is going to be some ambiguity. How do you apply those? What do those mean in this context?

And because of that, I think legislative history plays a big role to find out what the intent behind those terms is.
So, where somebody says, "Well, you know, this term is clear on its face," well, it might have been clear on its face back in the analog world, but I don't think you can say that anymore, given how much has changed between now and the 1976 Act.

MS. STRONG: Ms. Lyons?

MS. LYONS: Yes. Well, having been around at the 1976 Act, I notice that some terminology goes well before. They talk about publication under 1909, which was clearly the dividing line between whether you made copies available, and that was physical, because they distinguished that from broadcasting.

Now, with the 1976 Act, we did, with all due respect, get into digital because we had actually had many experiments going on. We had the whole holding up of some of them at the last minute, some of the considerations. And then, we had the special consideration afterwards for what it meant to be a computer
program.

So, I would say that in the computer program/computer database, it was clearly coming up in the last days of the 1976 Act. And then, it was spot-on for the discussions just following.

MS. STRONG: Thank you.

Mr. Tepp?

MR. TEPP: Thanks.

We heard some claims in the prior panel that the statute is utterly clear and requires no reference to the legislative history. And the interpretation that was offered, curiously enough, is contrary to the interpretation that for the past 15-plus years has been taken by the Copyright Office, the successive Administrations, and Congresses, through control of different political parties.

So, it seems that there is, indeed, some difference of opinion. There is certainly a legislative and statutory basis to
conclude that the distribution right, which is I think the central issue here, does cover or is implicated by acts of making available. That could be through the term "to authorize," qualifying the 106 text, as well as through the definition of "publication."

But the fact that the United States Government, writ all, has accepted both in terms of its implementation of the WIPO Internet Treaties as well as successive free trade agreements, that that is what U.S. law covers, and we did not yet get into the Charming Betsy Doctrine, which, of course, instructs where there is some question of statutory interpretation of domestic law, the interpretation that keeps the United States in compliance with its international obligations is the strongly preferred interpretation. And that is a quite venerable doctrine, dating back nearly to the founding of the Republic.

All those mitigate at the very least to look at the legislative history, and
probably much further, to conclude that U.S. law does, in fact, at this time, and has all along, included a making available right as an element of the distribution right.

Thank you.

MS. STRONG: Mr. DiMona?

MR. DI MONA: Thanks, Maria.

I would like to bring this around to the public performing right. I know a lot has been talked about the distribution right this morning already, but BMI represents the performance rights in music.

I think the legislative history is very important and helpful and instructive in the public performing right. I think we have a number of things that happily come together.

We have a very, very broadly-worded public performing right. We have legislative history that supports that broad ruling and amplifies on it greatly. And we have a very broadly-worded international treaty that also agrees.
The problem is a couple of the courts have come out with decisions that don't agree with any of those things, and those decisions arise primarily in some commercial context, which I hope we will have the opportunity to talk about a little bit later in the course of this panel.

But I think the legislative history is helpful. I also want to bring out the fact that some of these commercial contexts, where we think the performing right has been unduly curtailed, have their root in people complaining that, "Well, there shouldn't be two fees for one act," or, "There shouldn't be a multiplicity of rights."

I think fundamental to the 1976 Act was the idea that, yes, there are multiple copyright rights. They can be separately alienated. They can be bundled in different fashions. And so, that is an important part of this where Congress said, yes, there can be multiple rights. And there's plenty of
instances in commercial reality where more
than one right is paid for one seeming
activity or bundle of activities. And
hopefully, we will get into that.

But the short answer is, yes, the
legislative history is quite important.

MS. STRONG: Thank you.

Continuing on, I guess, to follow
on again some of the earlier discussions,
could we have your views on that relationship
between publication and distribution in our
law and as the terms are used? I think we
heard some discussion on that this morning.
To the extent a lot of the players here on
this particular dais also represent
corporations, not just the academic community,
I would like to particularly know if you have
any legal views that have affected your
ability to generate new business models.

Ms. Lyons?

MS. LYONS: Yes, and I am going to
come back on this periodically because I have
been working with the internet community now
for almost 30 years or so and watched the
evolution of the technology and the difficulty
between the copyright law and the patent law.

And some of the concepts -- for
example, you have a software program that
performs a method, all right? And some of
them argue -- I remember I was on this one --
you were talking about, and I will try to keep
focused on your question, publication versus
distribution. If you are looking at what it
means to publish in that environment, it is a
process. So, it is not like you have
something that you, then, put from here to
there. It is a process. It is a software
process.

So, if you look at some of the
discussion this morning -- and I will stop
here -- it is that you have to look at what
you are talking about. There seemed to be a
notion that you downloaded, say, a file.
Well, a file is just a logical way of linking
through a concept or a tag, which just happens
to be called a folder or file. But you are
not really talking about running the file.
You perform or run the program in which works
may be embodied.

Just to give you a brief comment,
I was on this copyright subcommittee for one
of the bar associations that are
participating. And there is a big copyright
case out in California between two major
corporations, and they chose to leave all the
patent claims out. Well, you know, if you
went to back and, then, you tried to compare
the two, it might have really helped.

But, okay, we looked at the
copyright. And I had a so-called Subcommittee
on Copyright. It got down into somebody
saying on the phone call, "Well, a book is a
copyright work." And I said, "Well, how many
copyright lawyers are on the call?" It was
like a dozen folks. They were all patent
lawyers. Okay?
And so, I said, all right, let's look at the copyright statute. You have literary works and, then, you have the expression of that work, and you have it structured. And in the old days, the old days of print on paper, that used to be English fixed on paper and print. But, if you get rid of that and you have the value, and you are managing that value, and you are representing it in some digital form of expression, then I said, let's start the dialog. "No, no, no, a book is a copyright work." I chose to disagree.

MR. AMER: Just to follow up a little bit on this question about the relationship between publication and distribution, do any of you see any significance to the language in 101, the definition of "publication," which says that "the offering to distribute copies or phonorecords" constitutes publication. Does that suggest that Congress intended the two to
have different meanings?

I guess Mr. Band.

MR. BAND: Well, I guess the main focus of our concern, which is my client's concern, in this whole area has to do with some of the cases that were mentioned in the previous panel, the Hotaling decision and the Diversey decision, and whether simply having a book on the shelf constitutes a distribution and, therefore, can contribute to liability, and that really becomes a problem as a practical matter.

And where you see those cases, the reason those cases came up was really because of a statute of limitations problem. I mean, there had been probably an infringing reproduction, but that may have happened many years ago. And so, there was an effort to say, well, okay, we want to hold someone liable. How are we going to hold them liable? And they sort of jerry-rigged this notion that somehow, by having a book on the shelf, that
is sort of like this ongoing distribution
that, then, contributes to liability.

And so, getting back to your
question, I mean, I think the concern here is
that you have certain -- you know, there is a
structure of rights and, then, there is also
a notion of limitations, where it is
exceptions or in this case the statute of
limitations, to confine the scope of those
rights and the ability to bring actions
against it.

And so, so much of what is going
on here is trying to find a way around what is
really going on. So, it is either to find a
way to assess liability after the statute of
limitations or to find liability when it is
hard to prove the infringement and you are
trying to lessen the evidentiary burden.

And so, I think we need to really
say, what's going on here and what are we
really trying to do? So, in terms of saying,
what did Congress intend, well, Congress
I didn't intend anything. We all know that. It is sort of what comes out of -- I think we can say that in this room here, too.

(Laughter.)

I mean, it is sort of like what comes out of a process of bargains and negotiations and deals that happen over time and that leads to all kinds of inconsistencies that, then, are thrown in the lap of the court. And the court has to sort of figure out, well, how do I -- so, the notion of you have one definition and another definition, and they don't necessarily make sense. To think that there was some overriding intelligence that sort of said that they do make sense and they are clear -- we know they aren't clear here. And so, we don't need to pretend that they are. It is a matter of trying to figure out how do we make the best we can out of the sausage or, more importantly, figure out what is the best way going forward.
MR. AMER: And I think definitely we are going to talk about the statute of limitations implications, if not in this panel, then in the afternoon.

I think Mr. Kupferschmid.

MR. KUPFERSCHMID: Thank you.

And before I address your question, actually, I think I will go back and answer a little bit of Maria's question as well. I just have one sort of caveat for my comments on this panel and the next panel I will be on, which is that SIIA [Software & Information Industry Association] represents technology companies that make software and information products, sort of the serious side of copyright, if you will.

(Laughter.)

MS. STRONG: As opposed to the --


So, anyway, in terms of what I will be talking about, it is really focused
more on the distribution right because it is pretty darned hard to perform software or an information product, for that matter.

So, with that in mind, let me try to answer the question. If you look back at the legislative history, both the Senate and the House reports, where they considered the terms "distribution" and "publication," it was pretty clear they considered them to be synonymous.

If you look at the language of the report, and I will quote here, they refer to "the exclusive rights of reproduction, adaptation, publication, performance, and display." So, they don't say "distribution"; they use the word "publication" instead.

And there's other references in the report in that regard as well. So, they thought, I think, that they were or they used them synonymously. And that is why I think the definition is, Kevin, as you point out, I think it is significant, because there is no
definition of "distribution," but there is of "publication." And so, that is kind of all we have to rely on, and that definition of "publication" does include offers to distribute.

As Jonathan mentioned, at the end of the day, all we have is what is in front of us and the language we have to interpret the best we can. I think he was not assuming a level of intelligence. I will assume there is a level of intelligence here and try to interpret what those terms meant or mean.

MR. AMER: I think Mr. Husick -- am I saying that right? -- was next.

MR. HUSICK: Yes. My impression, having read the legislative history, is that we are dealing with a problem that the information industry knows all too well, the problem of backward compatibility.

And that is that, under the 1909 Act what you were concerned with was publication. And so, the discussion was
framed in terms of publication, and only later did the term "distribution" come up and make its way into the exclusive rights enumerated.

And so, it is not entirely clear in reading the legislative history or in referring to any of the other preexisting materials, dating all the way back to the early 1960s, that anyone had any idea that those two were different, but, more importantly, that they had any idea that they could be different in the digital domain.

And so, if we are faced with the conundrum of what they thought, we need to face up to the idea that they may not have thought about it at all, and that it is, therefore, up to us to think about it carefully and, if appropriate, call on Congress, maybe not to reword the statute, but just maybe to give us a little bit more legislative history and tell us, if it is even conceivable, tell us what the sense of Congress might be.
MR. AMER: Mr. Tepp?

MR. TEPP: Thank you.

I think the last two comments illustrate clearly what is obvious to anyone who looks at the history of copyright, which is that the notion of distribution, the notion of publication are inextricably intertwined. So that, when on the previous panel certain panelists quoted, and repeatedly, the language of the distribution right, "sale or other transfer of ownership by rental, lease, or lending," well, that is, of course, also the definition of publication. And the definition of publication, as we have just been saying, also explicitly includes offering to distribute copies.

Now, in the statute, publication is different from distribution. In the history, they are probably not. At the very, very least, this, again, is good cause for the Office to look into the legislative history to achieve better clarity where the statute lacks
that clarity.

And in terms of practical effects here, what I would like to note is that the harm of the current situation, where we have a split in the courts, where we have the Copyright Office, the Administration, and Congress saying one thing, we have commentators and some courts saying another thing, that is not good for the copyright system generally.

We will never have absolute clarity, but improved clarity would be beneficial to everyone with a stake in these issues. To the extent that the Copyright Office's previous statement on this was of a relatively informal nature, certainly, this proceeding and whatever results of it would be an opportunity to provide a repetition of the Copyright Office's views but within a more formal document with a more vibrant analysis behind it that would be more likely to be given deference in future court cases; and,
thus, give us better clarity.

Thank you.

MS. CLAGGETT: Thank you.

And I have a quick follow-up question, but I know there are a couple of people waiting in terms of the publication versus distribution and the legislative history about that evolution.

Is there anything in the legislative history that suggests that Congress somehow was intending to limit distribution in some way, more so than the understanding of publication or to publish at the time, or, as we had discussed before, were those really intended to be synonymous? Is there actually anything suggesting that there was an intent to limit distribution in a manner that "to publish" was not limited?

MR. AMER: Ms. Lyons?

MS. LYONS: Yes. There has been some confusion. I remember the publication cases, because if you published without notice
of copyright, it was the dividing line; it was
a bright line. But it wasn't so bright; there
was fuzziness along the edges. As in any
human endeavor, nothing is crystal clear.

So, particularly in the
broadcasting area, what did it mean? And
there was some uncertainty. You know, the
limited publication, the publication to the
general public, what did that mean?

So, in the legislative history,
particularly the House report -- somebody was
mentioning life ends with the House report --
well, it was pretty authoritative, as I
recall. They do have a specific provision
with respect to broadcasting. They clarified
that point, that distribution, in the sense
that if no copy changes hands -- and they
meant copy in the physical, tangible sense --
if no copy changes hands, there is not a
publication, as I recall. I don't have the
wording before me. I would have to look it
up.
MS. CLAGGETT: Were there any responses to that or was there anybody else waiting to respond to that initial question, the previous question that Kevin just asked?

MR. AMER: Oh, Mr. Halpert?

MR. HALPERT: Steve was kind enough to speak about practical effects. And I think while the legislative history is what it is, and there is a pretty strong argument that the statute is ambiguous here, one needs to be mindful, also, of having an offer to make content available producing under the current statutory damage regime a massive, massive liability that would probably violate due process.

So, even if one were to accept the premise that the legislative history should apply and this right should exist, we need to think practically what that effect will be. And the Copyright Office should not make a recommendation that unequivocally says offering works for a download, per se becomes
a trigger for starting to calculate what would be astronomical statutory damages, without any requirement that the rights owner actually prove their case that works actually were downloaded or streamed to a different source.

It is easy enough to do that by going to the site or source and obtaining works through, basically, an enforcement test. But if one all of a sudden wipes away that element of proof, under the huge statutory damages that exist now and the very, very long term of copyright, it winds up being quite a different calculus and I think would put some pressure on the overall structure of the Act.

That is not to say that, if somebody does upload a work, for example, for download, that they shouldn't be subject to injunctive relief or some other remedy. But simply mechanically applying this could produce some absurd results down the road.

MR. AMER: Thank you.

So, I think it was Ms. Lyons.
MS. LYONS: Yes, please.

I believe my colleague here mentioned something about a book on the shelf. You don't download a book. You have a copyright work that may be expressed in the form, and the data structure is the print on paper, but if you get rid of that, you have the value.

Over the recent years, since the nineties, when we were working with the Association of American Publishers, and later with the International Publishers Association, and we helped them stand up the International DOI [Digital Object Identifier] Foundation, which has now been joined with the movie and cable folk, you represent that information as a data structure, and a machine-independent data structure that can be persistently identifiable. And then, you can perform operations on it.

And so, most of the discussion is not perform or distribute. You access to
perform stated operations on a sequence of
bits, so the performance of operations. And
then, you get smack-dab into, well, what is
the structuring of this information? Are
there patents involved? And are you
performing somebody's patented method?

So, it would be very interesting
to brief you on some of these newer methods.
This goes back to when Pat Schroeder was
leading the Association of American
Publishers, and I see Allan Adler. He could
probably share some more information about
that with you.

MS. STRONG: Just a follow-up
there before we move on, just so I am clear on
your point, because it sounds like you are
talking a lot about data structures. Is it
your contention that an electronic or digital
copy of a book is not a copyrighted work?

MS. LYONS: Well, first of all, a
copy is a physical object in the law, all
right, except if you are talking about copy as
a reproduction. And that has always been confusing to folks.

You know, you have this definition. All right? And if you tie it back to distribution of a copy, in my humble opinion, they meant physical object.

And in the WIPO Treaties and the comment to Article 6, they say tangible object.

So, they have been dancing around the need, really, to address what is actually happening now in the internet environment, because that is what has gotten people really; it has gotten their interest.

I have now gone into many discussions about how you would apply this in other areas. Copyright really was the first one out of the gate to address this. Now you have banking and health and whatever.

So, what I am saying is that you have the digital representation of information of various forms, and you structure that
information in ways that it can be accessed
and processed. You can perform operations on
it.

And then, you can identify
different things. You can identify the target
of the process. And so, whether or not there
is a publication, making available, usually,
we talk about access to perform operations,
but that access may not be just simply a
download. It is interactive. You know, you
can perform, say, Angry Birds or a distributed
program. And that is really a software
program that is based on and incorporates
maybe video, graphics, music, but it is
basically software.

So, the focus of what you are
talking about, I would just humbly suggest
that maybe that could be shifted a little bit.

MR. AMER: Mr. Tepp? Then, Mr.
Sheffner, and then, Mr. Band.

MR. TEPP: Thank you.

So, just to put the focus back on
what the issue that the Copyright Office has
covenanted this process for is, it is the
threshold question of whether U.S. law
provides a making available right in full.
And there are, of course, a collection of
rights in U.S. law that provide elements of
that. The one that has gotten the most
attention this morning is the distribution
right, though, of course, not the only one.

Questions of statutory damages
that several panelists have now raised in a
rather polemic fashion are really not the
subject today. And as Professor Ginsburg on
the previous panel pointed out, there may well
be ways in which some of the concerns that are
being raised could be addressed.

If there is no threshold
implication of an exclusive right by making
available, then there is no issue; there is no
adequate protection; we are likely not in
compliance with our international obligations,
which I will discuss in a later panel.
But I don't think the Office should be influenced or distracted in its question that it is looking at now by claims about statutory damages, with which I don't necessarily agree. There are other processes that this Office may undertake and that another body is already undertaking to look into those questions. And I will be happy to prove people who disagree with me wrong in those proceedings.

Thank you.

MS. CLAGGTT: Thank you, Steven.

That is true; we are not focusing on the issue of statutory damages broadly, although it has been raised in some question in terms of the interrelationship between statutory damages and whether there is a fear of making available. But, as you point out, the Patent and Trademark Office is looking specifically at the issue of statutory damages under the Green Paper process.

MR. HALPERT: If I could make one
point in response to that, the specific charge is for feasibility of creating this right, which also goes to the practical implications. Again, I am not disputing the existence of the right, but I think that part of the study needs to examine feasibility. And simply saying some other entity is undertaking in a multi-stakeholder process a discussion about this issue does not absolve the Copyright Office of a responsibility to consider the practicality, just as some of the practicalities of other proposals the Copyright Office does weigh. And I think it is entirely appropriate here.

MR. AMER: Okay. Mr. Sheffner?

MR. SHEFFNER: Yes, I actually wanted to respond to Mr. Halpert's previous point, which you just reiterated, about practical effects.

So, in determining whether the current statute includes a making available right, we have all these interpretative tools.
We start with the plain language of the statute. Then, we go into legislative history. Professor Menell has done a heroic job in digging up a lot of material that no one else had found. And as long as there is only one Justice Scalia, rather than nine Justice Scalias, litigators are going to cite legislative history.

We, then, have what Steve referred to earlier, the Charming Betsy Doctrine, which I think is critically important in this area. Basically, it says, if the statute is at all ambiguous, it should be interpreted in a manner consistent with our international obligations.

And then, another thing the courts will look at, another sort of interpretative tool, of course, is looking at the practical effects or the policy.

And I am also going to cite Professor Menell who said something at a speech, a talk I heard him give a couple of
years ago, which has really stuck in my mind, which is, when we are thinking about this, why in the world would we want a legal system which says that, if you have a shared folder and you have a file consisting of a recently-released motion picture or song or a piece of software, why in the world would we want a legal system which says that is perfectly okay?

You are sharing with potentially millions of other people on this peer-to-peer network. What policy reason is there to say that is not violating anybody's rights? It is a rhetorical question, obviously. I think the answer is pretty clear.

And even Mr. Halpert, I think, in his previous comments acknowledged that you should be able to get an injunction to stop somebody from having that file sit there in their shared folder, which I would certainly agree with.

But, again, there is no policy
justification for saying, yes, that's a perfectly legal and fine activity, to be having a file in their shared folder, making it available to potentially millions of people who are also part of that peer-to-peer network.

MR. AMER: Thank you.

Mr. Band?

MR. BAND: So, first, just responding to something that someone earlier said that also was mentioned on the first panel, which is sort of like, again, one of these things looming in the background. I think the proponents of saying that a distribution covers digital transmissions, it is like be careful what you wish for. Because -- and this is certainly what was implicit in the earlier panel -- but that, then, really gets into the whole issue of digital first sale.

I mean, if somehow, to the extent that the first sale doctrine is about the
exhaustion of the distribution right, then
that would certainly suggest that, once it is
transmitted to me, then I have the right to
resell it if the copy that I got was
distributed to me. So, that is the first
point. So, that really needs to be thought
through: to what extent does saying that it
is a distribution, a digital distribution is
a distribution within the meaning of Section
106?

But the second point -- and this
gets to Ben's point -- I mean, I completely
agree that, if something is in the share, if
there is a work that is in the share folder,
that would certainly look like something that
should be actionable. But I would think that
that would be actionable, first and foremost,
under the reproduction right.

And this, again, gets to what we
were talking about in the previous -- or what
they were talking about in the previous panel,
about who is doing it. I mean, you don't have
to worry about the end-user who is downloading it. It certainly would seem to me that the person who is uploading it, who uploads it into their share folder, that that is a reproduction and that that, presumably, would be an infringement because I can't imagine that they had the right to upload that copy into the share folder.

And to the extent that they had a license, if they even bought that work under the license, I am sure the license did not authorize them to upload to the share folder. So, that seems to me to take care of it right there.

And, still, you get to the statute of limitations. If it was just sitting there for three years and no one ever accessed it, then maybe we settle because the reproduction happened three years ago, and that is the end of it, unless there are ongoing copies being made because of the nature of the way the computer is working.
So, I think that there are ways of getting to all of the rights. There are ways of preventing all of the infringing activities we are talking about. We just don't need to start distending certain rights because, if we do that, then we have all kinds of implications, that some might be good for some people, but they also might be very bad for some people.

MR. AMER: I think Mr. Husick was next, and then, Mr. Halpert.

MR. HUSICK: In response to Mr. Sheffner's question, I think he has put the rabbit in the hat by saying "recent." The reason that we might want a regime that looks like that is that copyright is for most people forever, certainly in excess of their remaining lifetimes.

And here, an analogy to patent law is especially apt. I am a registered patent attorney. In patents we have a requirement that you file. We have a requirement that you
record transfers. We have a clearance system
that works, and we have a rights system that
at least arguably works.

I will note, parenthetically, that
many of the people who are on this panel with
me, and were on the previous panel, would in
a patent context be referred to as trolls
because they neither create the works nor
perform them, but merely seek to collect rents
for them. And we are engaged on the patent
side in that discussion right now.

The reason that we might want a
regime like that is because end-users -- and
I am the founder of several nonprofit ventures
and foundations where we are consumers, as
well as an attorney who represents producers
of IP -- the reason is that it is almost
impossible to clear certain works; that it is
impossible to know whether a work is, in fact,
still under copyright protection in many
contexts. And I mean economically impossible
because the cost of clearance far exceeds the
value of most of the works.

And so, we might well want a regime that protects end-users while going after the real guilty actors, in this case those who facilitate mass copyright infringement.

MR. AMER: Thank you.

We are going to go to Mr. Halpert, then Mr. Kupferschmid, then Ms. Lyons. Then, I think we will move on to another question.

MR. HALPERT: Actually, I will pass at this time.

MR. AMER: Okay. Mr. Kupferschmid?

MR. KUPFERSCHMID: I just wanted to address a couple of points that Jonathan made.

One about, first, even though these aren't really copies, I am just going to, for this group here -- but, on first sale, obviously, that is a much longer discussion here. But, of course, combining two points
that Jonathan made, you also do have
reproduction that is occurring at the other
end when you are making a digital transmission
of a work. And that needs to be considered in
the context of the first sale doctrine.

More importantly, I want to raise
the issue of something uploaded to a shared
folder which was asked. And Jonathan
suggested that -- or maybe not suggested --
said that it would be covered by a
reproduction right. Well, that is not
necessarily the case, especially in this world
of cloud computing now we live in, where it
could be a very legitimate reproduction, but
you may be distributing that by providing
access to it, making it available to a whole
bunch of other people.

So, it may not be an illegal
distribution. You may be sharing that access
code or otherwise providing access greater
than you have the authority to do, in which
case you don't have this falling under the
reproduction right, but it would fall under
the distribution right, as well as other --
you know, it could be an anti-circumvention
violation. It could be a violation of the
Computer Fraud and Abuse Act. There's a whole
bunch of other things that could come into
play here.

MS. LYONS: The whole idea of
files and folders, in the early internet when
they were doing the work to stand it up, the
identifier resolved to ports on machines, was
really the real original internet of things.
You had a computer, one right there. Okay?

So, then, Tim Berners-Lee came
along and did a very easy, understandable way
to have procedures, that you didn't have to
necessarily know about how to get to certain
information and their location.

So, the notion of files and
folders came in more with the web. If the web
came along today, it would probably be just an
app, just to put things into perspective.
So, the whole notion of having folders and files, I think we have gone beyond that with the Apple App Store and the various other projects out there where you can have running programs that are based on or incorporate preexisting copyright works. But, then, they are converted into new forms of expression.

So, I will come back on this later because the one right I find is the conversion, the making of the derivative work. This came up in Aereo where you had transcoding. You had going from one to another, and that was, in my view, making derivative works.

And so, that is the kind of thing I think really, if we are going to reconsider this, and talking about the existing rights, to what extent the existing right of derivative work, making a derivative work, may address some of the issues that you are talking about and trying to pigeonhole into
the old copies.

MR. AMER: Thank you.

We had a mention of -- oh, did you have a comment on the previous? Sorry. Go ahead.

MS. MOY: Sorry. Yes. I just wanted to respond quickly to Ben's statement that there is no policy reason to not want an exclusive right that would cover someone placing something in their shared drive.

I just wanted to say that -- I know others have mentioned cloud computing as well -- there are situations where, for example, someone working at a company might back up their hard drive to a drive that is accessible to others on the network, or situations where someone may legally download copies of articles that they have access to and place that research, for example, in a folder on a drive that other members of the company have access to.

So, I just think that there is a
real slippery slope problem here that does
present a policy justification not to extend
a right to that situation that Ben describes.

MR. AMER: Okay. I think that may
lead us into another question. And this
touches, obviously, on a topic for the
afternoon.

But there was some disagreement on
the last panel about what it is that the WIPO
Treaties actually require. There seems to be
broad agreement that the United States is in
compliance, but not uniform agreement
necessarily about what compliance means.

And so, I wonder if any of you
have views as to whether the treaties allow
member states to require evidence of an actual
distribution or do the treaties require member
states to impose liability only for the
offering of a work?

Mr. Tepp?

MR. TEPP: Without stealing

thunder from myself for the last panel of the
day, I will just say that the term "making available" has a plain meaning, and it's making available.

MR. AMER: I think Mr. Band.

MR. BAND: Well, except what is very interesting is, when it says "making available," then, underneath it, the actual text looks an awful lot like what we call the distribution right about, again, distributing copies. And it is very clear that they are talking about making copies available.

And so, I think that I am sure that there is a principle of statutory construction out there, and if there isn't, there should be, that treaties should be interpreted in their narrowest possible way.

(Laughter.)

And I think that --

MS. STRONG: Maybe somebody will answer whether there is such a doctrine.

MR. BAND: But it seems that it is a pretty -- the language of the treaty is
simple, direct, pretty bare-bones. And so, it seems to me that to start suggesting that the treaty meant to go far beyond what is obvious from its terms, and again, it seems very clear that it is really in Article 6 that it is talking about making copies available. The simplest and the plain language to me is that it is talking about making physical copies, and that is all that it was applying to.

MS. CLAGGETT: Steve, I think you have a response to that?

MR. TEPP: Yes, and this came up in the last panel. It is a misreading of the treaty. Article 6 is not the making available right at issue here. It uses the term "making available" in regards to what is understood and the negotiating history. And I will get into it in the last panel of the day.

It is the distribution right. And they had to word it that way because of the way some countries apply their distribution right more narrowly than the United States
Article 8 is the making available right that we are referring to for this purpose.

MR. BAND: What is called the right to communicate, right?

MR. TEPP: It is a subset of -- in, actually, the WCT, it is explicitly a subset of the communication right, yes. And in the WPPT, it is set out separately from the communication to the public right, where the communication to the public right has more flexibility in terms of national implementation and there is no such flexibility with regard to the making available right in the WPPT, that it must be an exclusive right.

So, Article 6 is a non sequitur here.

MR. AMER: Mr. DiMona?

MR. DiMONA: Thank you.

And I will say that I am a little bit uneasy sitting in between the library representative and the internet commerce
representative, but I know I have got Jay and
Ben and Steve down at the end there.

MR. HALPERT: We are all here
seeking truth.

(Laughter.)

I am quite centrist, actually, in
my view. So, feel comfortable.

MR. DiMONA: So, my understanding
is that the treaty compels the right of making
available in both the communication right,
which would be the performing right here in
this country, and the distribution right. It
is very plain that making available means the
offering, not requiring a distribution.

And, you know, I just think that
there have been cases here. For example, my
colleague Sam Mosenkis from ASCAP handed me
the FilmOn X case, for example, which involved
the Aereo-type service. And the court there
found that FilmOn X's service violates the
exclusive right to perform the copyrighted
work by making available copyrighted
performances, so that any member of the public can access them at any time they want.

So, there are courts here who have agreed that the performing right in our country meets this. I think it is pretty clear.

MR. AMER: Mr. Husick? Oh, that's from before?

Ms. Lyons?

MS. LYONS: Yes, I have noted in the past that Article 6 definitely refers to tangible copies, at least if you take into account what you might consider the legislative history of that provision.

And you would have to get into -- if I scratched my head, I used to work in intergovernmental organizations -- the Vienna Convention on the Law of Treaties, wanted to take into account the legislative history, or whatever, but I am not briefed on that today to give you a clear answer on it. But I could do that.
Let's play a fantasy game of soccer. Okay? And we are going to have music and lights, and it is going to be distributed play. Everybody has to have certain elements that they are going to so-called download. And there is going to be actually simulations of plays that various people can play roles.

So, all of this is not made available insofar as you can access it to perform certain operations and you can play different roles. And if there is music, if there is lights, if there is whatever, you are looking at programs that are operating and running it in a distributed environment.

So, if we are going to do something, looking at the copyright law today, and not look at the actual technical implementations that are taking place out there in the internet, then it may be that you could run against concepts in copyright that are being defined in the patent law for you.

I happened to bring along a recent
case, Ancora Technologies v. Apple. It is a Federal Circuit case from March 2014. They get into the notion of what it means to be a computer program, and they defined it in terms of just instructions, not statements and instructions. So, they are differing. They are trying to redefine copyright law there. They talk about performing methods, and they talk about the concept of copy, which is definitely something in play in the first panel and this panel.

And they talk in terms of volatile memory versus non-volatile memory. And they kind of are agreeing, to one of the ordinary skill in the art, a volatile memory is memory whose data is not maintained when the power is removed, and the non-volatile memory is memory whose data is maintained when the power is removed.

Now, oftentimes instead of volatile versus non-volatile, they talk about static versus dynamic. So, when a copy, so-
called for copyright purposes -- and getting back to your question about European Treaties, if you go into the discussions about uploads to satellites and cable communications, they don't have the same concept of copy. The reason they don't is statutorily they are not required, as the U.S. was, to have fixation in tangible form as the point of attachment for copyright protection. So, a lot of them, the work is protected, just as if you get up and sing a song; it doesn't have to be fixed.

So, we pay a lot more attention to the fixation in tangible form than they would. So, when you have these kinds of conversations, which used to be my job several years back, about what it means to be communication of broadcast programming -- they were talking about direct satellite broadcasting at the time I was directly involved -- the communication right, the communication to the public, which in the United States is covered by the public
performance.

And here, you have to look into the definition where they talk not just about transmit, but communication more broadly. Because there is the definition of transmit, which is more an analog-based concept; whereas, images and sounds are received beyond the place where they were sent, or something to that effect.

But when you get into the digital representation, what you are talking about is the data structures moving in commerce from A to B. And they may be based on or incorporate preexisting audiovisual works or music, but it is not what is being communicated.

MS. CLAGGETT: Thank you.

MS. LYONS: So, communication is a better concept here.

MR. AMER: Thank you.

I think, picking up on the last question about what it is that the Treaties require, there has been some discussion of the
Charming Betsy Doctrine. And so, I think the question is, assuming that the treaties do require members to cover the offering to distribute, is it reasonable to construe the distribution right -- for purposes of the Charming Betsy Doctrine -- is it a reasonable construction to construe our law as providing that right? And if so, is that dispositive? Does that essentially answer the question, if that is a reasonable interpretation?

Mr. Kupferschmid?

MR. KUPFERSCHMID: So, we have got a tough question here because you are asking us, do we comply with an international treaty that requires us to provide a right of making available? And I will disagree with Steve here a little bit, not entirely, but a little bit, in saying, making available? I don't know exactly what that means. I think the treaty describes it a little bit, but there's a lot of questions inherent in the terminology "making
available," right? So, we have got that ambiguity.

We have got ambiguities in our own law in terms of what it means to distribute something, what the right of distribution covers and doesn't cover.

And so, there's, I think, a lot of wiggle room in terms of do we comply or don't we comply with our international obligations. I am going to take a little bit what I think is somewhat of a minority view here.

I went through the cases, like I said, limited to really just looking at the distribution cases and whether you needed to actually distribute something or to download it, rather, or just merely making it available, is that sufficient? And in looking through all those cases, I thought the vast majority of those cases did cover -- the court did come out and say there was a making available right.

Now, to do that, you have to give
some definition. You have got to define a
little bit what it means to make available.
And the two filters that I saw that the courts
were generally using, if you apply these two
filters throughout all these cases, virtually
all of them say this is a making available
right.

The first one is, has the
transferor completed all the steps necessary
for a public distribution, so that the only
steps that are further necessary to transfer
ownership are those required by the
transferee? Okay? So, it is up there.
Anyone can come at any time and download the
material.

And then, the other criteria,
which comes up I think more often, is that,
underlying, the alleged infringer must have
had the capacity to transfer a copy. And by
that, I mean he must have possessed a copy.
Okay?

So, for instance, I can say, "Hey,
I would like to sell you Lee's car." Okay, have I made his car available to you? Well, I don't own his car. I don't have any right to make his car --

MS. CLAGGETT: And beyond that, not only do you not own the car, but you don't actually have the car in your possession.

MR. KUPFERSCHMID: Yes, exactly. And so, I think you see a lot of cases where people will interpret as, okay, there's no making available right. But if you apply these two filters, you will see that it actually did come out on the right end. And either maybe the plaintiff just sued the wrong party; maybe secondary liability theories come into play because they provide the means for making available as opposed to making it available.

So, I think looking through that lens, because making it available is not as clear, at least in terms of the treaty, the WCT, it is not so clear as some people may
think.

MR. AMER: Mr. Band?

MR. BAND: So, of course, I disagree with the premise of your question. But, having made that clear, so assuming that the treaties do require what you say, what you are assuming that they require, then I would say that our case law, again, quite clearly satisfies that because there have been all these cases where sort of the offering has been considered to be sufficient to lead to distribution liability.

Now, again, I might disagree with the reasoning in some or maybe all of those cases, but, unfortunately, I am not a judge, so what I think doesn't really matter.

But I think the point is that, first, as a general matter, we always comply with our international obligations, right?

That is always the case, as Karyn --

MS. CLAGGETT: Exactly.

MR. BAND: We always do that.
Second of all, I think even in this specific case, regardless of how you interpret the obligations of the WCT, I think either way, we are complying with them. Rightly or wrongly, we are complying with them.

MR. AMER: I think Mr. Halpert.

MR. HALPERT: Thank you.

I would just like to add to Keith's very good comment about the scope of the right of making available.

To the extent that one were actually to try to insert it into the Copyright Act, again, there are ways that we can achieve compliance with international norms without doing this. But I want to be very clear about the lack of clarity with this term, and I think some fairly serious constitutional issues, if it were to be codified in U.S. law.

And I think as we talk about a "right of making available" here in a sort of
 loose way, it is important not to lose sight of these.

    First of all, the right of making available would be very different than the existing rights in the Copyright Act. It would encompass both distribution and public performance. So, the question would be, why would we do something that overlapped with existing rights to that extent?

    Secondly, the degree of activity that is required to engage in any of the acts that are specifically limited by Section 106 is missing. You can have the effect of making information available -- this goes to the secondary liability point that Keith made -- simply by not implementing a copy control technology that a particular copyright owner or a copyright troll would want you to implement.

    This would have implications for hardware, for software, and possibly service-based offerings that were not subject to some
either fair use or limitations on liability in
Section 512. And it would, I think, implicate
First Amendment concerns because it would go
to, as used by plaintiffs, would go to whether
you restricted access to information, because
the opposite of making information available,
the way not to make information available is
to restrict access.

So, it would create a bias toward
filtering or blocking content and, also,
potentially create liability simply for using
ordinary software that has the effect of
making copies. Even writing a journalistic
article that mentions the availability of
infringing work somewhere on the internet
could be deemed to be making information
available.

So, my point is that it is an
unconstitutionally vague term if codified in
U.S. law, and we need to be very clear about
what we are talking about, rather than
assuming, simply assuming, yes, we are
fulfilling the international obligations; that
this is, in and of itself, a freestanding
right, as would be interpreted by U.S. courts
in ordinary copyright proceedings.

And this goes in a core way to the
feasibility of attempting to codify this in
U.S. law. And I think there would be a very
serious drag on innovation if it were to be
codified in U.S. law.

And I apologize that I am bringing
this up on this panel.

MS. CLAGGETT: Yes, because I was
going to say, we are going to explore that a
little bit in more detail in terms of the
panel after lunch, in terms of the benefits of
clarification, if any, as well as any
potential downside of actually codifying
something specifically in our law.

MR. AMER: I think Mr. Husick was
next, and then, Mr. Sheffner, then Ms. Lyons.
Mr. DiMona has a comment. And then, I think
we will go to another question. Oh, and then,
Steve Tepp.

MR. HUSICK: Just to expand a little bit on what Keith said earlier, as a practical matter, I can name any collection of bits on any storage medium or network anything I want. And so, it is to the copyright owner to demonstrate that a copy has been made without authorization.

And therefore, as a practical matter, the work either has to be reproduced or performed in order to assure yourself of that. Because format transformation means that you can't just fingerprint the file; you can't just do an MD5 checksum and say, "Yes, that's the same file," because all you are doing is inviting format transformation as a matter of process.

And so, as a practical matter, a defendant will be able to say, if you create a freestanding right in which there is no requirement to verify the identity of the work, that you have simply not met your prima
facie burden because I may have a file on my iPad right now named "zerodarkthirty.m4v," and I may not, but it may not be the work that everyone thinks I'm referring to.

MR. AMER: I think Mr. Sheffner was next.

MR. SHEFFNER: So, the question that I raised my flag to respond to is, does current law put us in compliance or in violation of our international treaty obligations? And I will admit I am not an international lawyer.

So, I asked the question, well, what exactly does it mean to be in compliance with our treaty obligations? And just to repeat the position that we took in our written submission, we believe that the statute as properly interpreted does keep us in compliance with our international treaty obligations.

Now there has been discussion that the case law, the split of the case law as to
whether merely making something available by, for example, putting a work in your shared folder and making it available to others on a peer-to-peer network is itself an act of infringement. There is a split in the courts whether, as I think Keith said, that the vast majority go in favor of the plaintiff. There is a minority in favor of the defendant.

So, I would say that, under some of those interpretations, we would not be in compliance with our treaty obligations. But, again, as properly interpreted, it would be.

I realize this is bleeding into the second panel, but we are not calling for a change in the statute at this point. I think it is very important to watch the development in those cases, to make sure the courts interpret that properly for, among other reasons, keeping us in compliance with our treaty obligations under Charming Betsy.

But, again, to reiterate some suggestion that we made in our written
comments, we do think it would be very helpful, coming out of this process, for the Copyright Office to state clearly what it believes would be a proper interpretation of the law, the statute, and, again, one that would keep us in compliance with our treaty obligations.

MR. AMER: Thank you.

Ms. Lyons?

MS. LYONS: Yes, please. I am going to discuss a bit your points you made.

What does it mean to be a copy? I said earlier that a file is a method of logically linking. It is a tag system. It is not a copyright work. It is not even the expression of the work. So, you are not downloading; you are not copying files.

You know, rebuttal time will come.

So, what is the form of expression we are talking about? We are talking about the digital representation of the work. The work is incorporeal; the literary work, it has
to be expressed in some form.

If you express it in the form of a computer program, which is I think the normal way on the internet that information is made available and processed, and you perform operations on this symbolic language, represented in the form, and, in fact, it is your bits. You know, when you convert that symbolic logic to binary form, that is when you get into the world of the data structuring, the data structures. We call them digital objects.

We recently had an X.1255 recommendation adopted at the ITU [International Telecommunication Union] in Geneva, where the governments of the world decided on "digital entity" as the way forward for this machine-independent data structure.

So, if you have this, the work incorporeal, you are not downloading the work per se. You are downloading the expression of the work as it has been incorporated in some
other form. And so, you are making this
derivative work.

You also talked about format
transformation. This gets into the broadcast
case, the Aereo. They received the signal
from the State Department, not the State
Department -- I'm in Washington; I'm sorry --
the Empire State Building. And they had their
antennas there, and they took it.

I have some of the articles I read
about their technical methods. They actually
transcoded. In other words, they converted
the information. So, they made another
derivative work and perhaps several derivative
works in the process of making that
information available.

So, if you want to look at what it
means to be making available, then you have to
get into the technology of what you are
talking about.

MS. CLAGGETT: Thank you, Ms.

Lyons.
MS. LYONS: Otherwise, it is going
to run out of steam.

Thank you. Thank you.

MR. AMER: Mr. DiMona was next, I
believe.

MR. DiMONA: Thank you.

In my opinion, the World Copyright
Treaty, the main goal of this particular part
of it was to bring interactivity squarely
within the scope of copyright, to make it very
clear that interactive, on-demand services
were within the concept of the communication
right; whereas, the older European laws were
more broadcast-oriented.

And in doing that, they also steer
the law towards the liability of the service
provider that is making available the works
for people to download. And that point is
tied up with the offering.

I think it is pretty clear. I
think that some of the criticism that you
heard this morning about cloud computing and
First Amendment, to me, are sort of red
herring arguments in this context. It is just
trying to create concerns and confusion.

I think cloud computing systems
can and should be licensed. I think the
courts and Congress could easily make the
difference between commercial services that
are broadly making copyrighted content
available and certain unusual circumstances
where somebody who works for a business
accidentally put an article into the company's
cloud computing system, and some other person
in the company read it. You know, I don't
think that that is the focus of this.

I think those types of situations
aren't really what is understood by a broad
making available right. And I just think that
First Amendment concerns really shouldn't be
worried about here. Fair use and other
doctrines handle those type of situations.

MR. AMER: Thank you.

Mr. Tepp?
MR. TEPP: Thank you.

Let me begin by being clear that I am not advocating recodification of making available right in U.S. law. The argument is it is already in there; it has been in there. There is no need to recodify it. And I don't necessarily agree with some of the claims that were made about supposed harm that would occur if it were re-codified.

But getting back to the core question of whether the Charming Betsy Doctrine controls, of course, some other panelists have said, well, there is some flexibility and some lack of clarity. Of course, there is some flexibility in implementing the making available right. I will get into some of the more detailed discussion of that in the later panel on this very subject.

But when the alternative that is being offered is categorically that making a work available does not implicate any
exclusive right in the United States copyright law, it is very hard to see how we would be in compliance with a making available right in the treaty that we have signed onto and implemented.

So, when we have a statute that is less than crystal clear and a doctrine of avoiding interpretations that bring us into non-compliance, that doctrine does seem sufficient to be determinative, but I hasten to add, it doesn't need to be determinative because the legislative history of U.S. law also leads us to the same conclusion.

Thank you.

MR. AMER: Mr. Halpert?

MR. HALPERT: And I think that I ultimately agree with Mr. Tepp, but the key question is: what does this term actually mean in the context of U.S. law? And the First Amendment and other innovation implications of this are not to be ignored.

And so, your initial response,
"What does the right of making available mean to say?," "It means making works available," isn't really adequate to address this concern. And it also doesn't address the potential due process concerns with multiplying statutory damages of, say, $80,000 per work that is compiled to come up with some multimillion dollar figure against somebody who, yes, is violating copyright, but the scale of the sanction could be absolutely massive. It also could have some deterrence on entities if the make available right applies to secondary liability that are innovating, trying to come up with good business models.

So, again, the injunction, a basic single-work type of sanction would be appropriate, but I think we need to be careful in approaching this right to make available and assuming the broadest possible interpretation, particularly given how litigious the U.S. legal system is, and in many ways quite different than other national
regimes around the world that have adopted this sort of right to make available.

And understanding how this works in context is extremely important, and I think it would be helpful to be a good deal more precise about what the meaning of the term actually is in the context of U.S. law, accepting your point that we should be in compliance and the Copyright Act should be interpreted in a way that puts us in compliance with our international obligations.

MS. CLAGGETT: Thank you very much.

I think we only have about 15 minutes left, and we did want to, again, give the opportunity for the audience to respond to anything that was raised on the panel.

I think we just have one or two more final questions from people here at the table, and then, we will turn it over for the last five or ten minutes to see if there are any audience questions or remarks in response
to the discussion.

   MS. STRONG: Thank you.

   I think it is time, as our time wanes, to turn a little more toward the quantum of evidence that is needed in these cases. And we have heard a little bit in the first panel, and I think Mr. Band mentioned the Diversey and Hotaling case earlier.

   But I would like to hear your views on the quantum of evidence that is needed for the making available case in the case under 106(3) of our law and your thoughts on the line of cases, including Diversey and National Car. And what would have been or what should be, in your view, the result if those cases apply in the non-tangible realm? Because those were more the tangible realm.

   MR. AMER: Mr. Sheffner?

   MR. SHEFFNER: Sure. I think to answer this question, you need to look -- and I am going to stick to the peer-to-peer context -- you need to understand how the
technology works. So, all the different members or people who have signed up to participate in this peer-to-peer network each have on their computer a shared folder. They have the files that they want to share with other members of the network sitting in a particular folder.

An outsider, anybody, can sign up to be a member of the network and can see what is in any of the peer's shared folders. So, they know what that particular peer is making available to other participants in the network.

What they can't see, however, is the actual transfers from one peer to the next. So, that is why we have this situation where it is really easy to know what somebody is making available, but we don't necessarily know, we don't have a way to know what they are actually transferring from one peer to the other. So, that is why we are in this situation.
And one of the reasons why we can't see what one peer is transferring to the other is because the operators and designers of these peer-to-peer systems don't want you to know. The main reason they don't want you to know is because this whole thing was designed to infringe copyright, and they don't want people to get caught.

So, we are left with a situation where they have designed these networks not to create evidence or not to store evidence. So, the only thing that we can know is what somebody is making available.

Now courts have recognized, to go back to my previous answer, this is not a situation where you want to just say, "Oh, sorry, the law doesn't cover that." So, they have done various things.

Some of them have said, "Well, if you have an investigator do a download, that counts as an unauthorized distribution."

That's fine.
We have some, like Judge Gertner in the London-Sire v. Does case, who say, "Well, making available itself is not distribution. However, it is a logical evidentiary inference that, if I have a bunch of files in my shared folder and I am a member of a peer-to-peer network, that they actually are being transferred." So, at least at the initial stages of the litigation, that is good enough.

I am glad we have those doctrines, especially in light of some of the case law which has said that merely making available is not distribution itself. But they don't go far enough. And again, the law should recognize, for all the reasons we have talked about so far, but, in addition, because of these evidentiary reasons, that merely making copyrighted works available on a peer-to-peer network is itself an act of distribution.

MR. AMER: Can I ask you a quick follow-up? And others are welcome to respond
to this, too.

We had a panelist this morning say that, as a practical matter, it doesn't make that much difference whether you require evidence of distribution because in practice what plaintiffs typically will do is have an investigator download the file in order to verify its authenticity.

I just would be interested in your views as to that, if evidence of distribution is really required as a practical matter.

MR. SHEFFNER: Well, I would say many courts do allow that sort of evidence to count, a download by an investigator or, say, a "buy" by an investigator will count as an unauthorized distribution. But the courts are not unanimous on that point.

So, I think it is important -- and again, courts are not unanimous on the point that Judge Gertner made -- so it is important to have that backstop. And I would hate for courts' sort of unwillingness to allow those
sort of alternate methods of proof to hinder
a copyright owner's ability to enforce their
rights.

MR. AMER: Thank you.

Mr. Kupferschmid I think was next.

MR. KUPFERSCHMID: So, Maria asked
about the National Car Rental case. I want to
address that because I think that has little
to no bearing on the discussion here. That is
a sort of somewhat complicated fact pattern.
And the court in that case held that the
making of the programs, the software programs,
available for use for a third party did not
constitute distribution.

So, this case is distinguishable
from other cases involving the scope of
distribution rights because in this case
Computer Associates' claim involved
inappropriate use of the software. A copy of
the software was not transferred, was not
offered to the third party -- I think it was
EDS, if I remember correctly -- nor made
available to them. All they did was use it for their benefit.

So, really, that is not making it available. It is just using the software; they were using the software, National Car Rental, not the third party here. They never gave this offer to the third party. They never offered it to them.

So, in that context, what we are talking about here, this case is largely irrelevant I think.

MR. AMER: Mr. Halpert?

MR. HALPERT: Thank you. Sorry about this.

It does seem to me that the investigator example is an utterly straightforward application of a distribution, and the courts that are refusing to recognize that would benefit from a Copyright Office report that said that this is a form of distribution.

Where I have some question and
doubt is whether, for purposes of calculating statutory damages, which normally have to be proven by the plaintiff pretty specifically, one can simply count up the number of files that were uploaded and say, "Yes, all of those were, in fact, made available," and we should have a calculus multiplying by whatever the figure is going to be for all those works.

But it seems to me that if one can't prove in a closed network of the sort that Ben was describing that files were shared among other users, perforce, there has to be a form of proof with at least one party who is communicating with somebody in this illegal network that, in fact, works were distributed or made available, whatever word it is one would like to use.

MR. AMER: Thank you.

So, I think we are going to end with Mr. Band, Mr. Husick, and then, Ms. Lyons, and then, open it up to the audience.

MR. BAND: Well, it seems to me,
as I said before, that in the kinds of cases that the rights-holders seem to be concerned about, that the reproduction right on its face would take care of the problem. And to the extent that you have certain international obligations that have certain labels to them, again, we have things parallel to that. And whether we get to the same result by principles of secondary liability, as was discussed in the earlier panel, or reproduction right, or whatever, it really doesn't matter, I mean as long as there is a way to enforce one's rights.

And it is certainly in the situation that Ben was describing where you have this peer-to-peer network and someone is making all these files available for sharing, you know, again, I just don't see how that could not be seen as an infringement of the reproduction right. Chances are those copies were themselves infringing when the person got it. And even if they weren't, if they were
licensed, they were not licensed to be shared with everyone. So, by putting them into the share file, you are breaching the license and you are probably, again, exceeding the terms of the license agreement and infringing the reproduction right, and so forth.

So, it just seems to me that you have more than enough there. If you want to pile on and, then, say, okay, if the investigator downloads a copy, again, if the court wants to call that a distribution, fine. I don't really think that is a distribution. I think that that is the making of another copy and that there is a contributory infringement, whatever. I mean, the point is that there are more than enough tools to get at that, and we don't need to sort of, again, distort the existing rights to cover that situation. We get there anyway.

MS. CHARLESWORTH: I just had a follow-up for Mr. Band.

But when we think about what the
harm is here, isn't the harm the fact that the file is being distributed to thousands or millions of users? In other words, you are positing that the law should focus on the reproduction right and the uploaded reproduction, the single reproduction. But, I mean, does that really track what the real issue and harm is to the copyright owner?

MR. BAND: But you're assuming, of course, that it has been reproduced. I mean, you are assuming that it has been --

MS. CHARLESWORTH: Yes, I am assuming that in a peer-to-peer -- let's assume that the file has, in fact, been widely shared. But to take Mr. Sheffner's explanation, you can't really demonstrate that.

But I am saying what the copyright owner is concerned about is the widespread dissemination of the work. But your solution is focused on the individual copy that is being uploaded, and I am saying, you know, is
that really where the harm is or is the harm in the dissemination?

MR. BAND: Right, but to the extent we get into the remedies, I mean, because you are not going to be able to prove actuals regardless, you are in the statutory damages area anyway, and so it really makes no difference whether it is a reproduction, infringement of the reproduction right or an infringement of the distribution right. I mean, I think that the plaintiff is going to bring evidence that it was part of this network.

And frankly, you know, I might disagree with others -- and this is my own personal opinion -- but the damages, the statutory damages, in principle, that have been assessed in these cases, some of these cases, to the extent that there is a way to suggest that these are the only copies of the stuff available online, and so forth, you know, the damages, to the extent that they are
consistent with what the range that Congress has given, you know, Jammie Thomas took her chances and she got caught, and that is life.

But I really don't see a problem with, you know, if there are statutory damages available for infringement of the reproduction right, that seems to be sufficient. I mean, you don't get, the rights-holder doesn't get more statutory damages. I mean, it is the same $150,000 maximum.

MS. CLAGGETT: And we are getting really close to the end, and I did want to see if we had any final audience participation from people who are waiting. But I think we had two more people to speak very, very briefly, and then, we will see if anybody from the audience wants to respond to anything that was mentioned on the panel.

MR. HUSICK: Just a very quick comment that we seem to be focused on the minority of courts that are not willing to accept investigator evidence. We have a way
of correcting that, and that is we appeal
those cases until we get a clear statement of
the law. We don't need to go monkeying with
things. That will develop in due course in
good time, Justice Scalia notwithstanding.

MR. AMER: Ms. Lyons?

MS. LYONS: Yes, and there are
methods being developed -- that Apple case I
mentioned had to do with licenses -- a method
of having programs that would go in, not just
to the application programs, but to the actual
BIOS to check whether they were in conformance
with license requirements.

But, more generally, and I know
they say it is not the file; it is the
information represented in digital form. And
if you structure it as a data structure that
is persistently identifiable, then I would
suggest we could get into a discussion of what
it means to be a copyright notice in this
context. Because the copyright notice as it
now is, I would suggest, it is pretty
meaningless.

And it would be interesting to have a way, once you had this information and it is not being transferred, you're going in to process it, that you could actually, then, see here is the notice, and you can actually have along with it in the data structure itself boundary conditions for use.

MS. CLAGGETT: Thank you very much.

I think at this time we are going to turn it over to see if there are any audience comments. And it seems like we do have two.

Just a reminder, if you could just keep your comments to two minutes, and we will be right on time in terms of closing this session.

PROFESSOR MENELL: Okay. Well, it is really a clarification question. Mr. Band is making some assumptions in deciding that the copy that is on the host computer is a
violation of the reproduction right.

But the way in which a lot of file
sharing technology works is you may have
ripped a CD, and I know you would defend that,
and I would defend that as being a fair use.
There is no violation.

And so, what happens is they,
then, download or acquire a program that will
then make their hard drive available. Okay,
that is what a peer-to-peer service becomes.
So, there is no 106(1) technical violation
really until someone else downloads. And that
is why 106(3) serves a very valuable role in
dealing with that situation, which is the
common situation.

We don't know -- I mean, we do
through hashtags perhaps know that the client
computer did have an illegal copy, but in many
cases that is not going to be easily provable.

So, 106(3) does -- and I want to
distinguish that from the argument that was
made on the first panel by Mr. Bridges. Mr.
Bridges was saying that a forensic copy would not be enough. He wants proof of some third party, and that is very hard to come by, for the reason Mr. Sheffner raises. And so, I think common sense would get us to a 106(3) cause of action here as well.

MS. CLAGGETT: Thank you.

Professor Ginsburg?

PROFESSOR GINSBURG: I wanted to address a remark of Jonathan's which was also in Andrew Bridges's written comments, which is the superficially-appealing symmetry of saying that, if you accept a digital distribution doctrine, then you have to accept a digital first sale doctrine. And I think that that at first blush sounds pretty good, but actually doesn't work because Section 109(a), in its references to "that copy" and "a particular copy," is the codification of the longstanding doctrine that distinguishes between physical copies and the incorporeal rights. So, it is the flip side of Section 202.
And 109(a) makes perfect sense when you think about it in the context of chattel rights versus incorporeal copyright. Section 106(3) doesn't say -- it says "copies" -- it doesn't say that particular copy. It doesn't say that copy. And that is because the language in 106(3) can cover a non-physical chattel; whereas, I believe that 109(a) is all about physical chattels.

MS. CLAGGETT: Thank you very much. I think we have one final comment, and then, we are going to close and break for lunch.

MR. BRIDGES: I just wanted to discuss the concern about the difficulties of proof for plaintiffs and the suggestion from Ms. Charlesworth that, well, but that file may have been shared with lots of people. Implicit in that was the suggestion that maybe we need to presume it has been shared with lots of people because one can't prove the actual dissemination to others.
My concern is, as a litigator -- and statutory damages are relevant here -- we are talking about $150,000 per work infringed. And plaintiffs come into court saying, "Well, we're alleging 10,000 works infringed. Please don't make us prove that we really own all 10,000." And they're saying, "Please don't make us prove that the violation actually occurred. Let's have a deemed distribution, please. Oh, and please don't make us prove actual harm; we want a presumption of irreparable harm. And, oh, please don't make us prove damages; we get statutory damages."

So, we have an entire regime here where plaintiffs get to claim $150,000 per work infringed without having to prove anything. Why don't we just declare 300 million infringers in the United States? And then, we can work backwards to see who should pay what.

But if you are going to have a system that really allows getting all the way
to the end of the case with hardly any actual proof, then I think we have got a crazy system. And that is one reason I am concerned about the respect for copyright law, as we twist things more and more and more in favor of those who are asserting claims.

Thank you.

MS. CLAGGETT: Thank you very much.

And we want to thank the panelists who have served on this session. This has been very, very informative.

Just some housecleaning: we are going to take a lunch break from 12:30 to 1:45, and then, we will be back in this room for Session 3, which will look into the benefits of clarification and whether there is any benefit or downside from trying to tinker with Title 17.

Thank you very much.

(Whereupon, the foregoing matter went off the record for lunch at 12:34 p.m. and went back on the record at 1:46 p.m.)
MS. CLAGGETT: Okay. Thank you very much. We, I think, had a very, very informative first half of the day where we talked about how the current exclusive rights in Title 17 do cover a making available right in our law. But we also had a number of comments that acknowledged that courts have struggled to really understand the contours of such a right.

And so now, on this panel we really want to focus to some practical issues with respect to how U.S. courts have considered the making available right and whether it would be of some benefit to the courts, to parties and litigants, and others, to have further clarification in our law in terms of how the United States does implement a making available right.

So, I am going, just as we did the other panels, I am going to start with just
asking everyone to identify themselves just by
their name and their affiliation. We are not
going to have opening remarks. And then, we
will start off with some questions.

I will start first with Allan.

MR. ADLER: Allan Adler. I'm
General Counsel and Vice President for
Government Affairs for the Association of
American Publishers.

MS. AISTARS: Sandra Aistars, CEO
of the Copyright Alliance.

MR. BAND: Jonathan Band, Library
Copyright Alliance.

MR. BARNES: Hi. I'm Gregory
Barnes. I'm General Counsel of Digital Media
Association.

MR. BEITER: John Beiter, still
with the Law Firm of Shackelford, Zumwalt &
Hayes, still representing SESAC.

MR. BRIDGES: Andrew Bridges. I'm
an internet and copyright litigator in San
Francisco and Silicon Valley.
MR. KUPFERSCHMID: Keith Kupferschmid, General Counsel and Senior Vice President for Intellectual Property for the Software and Information Industry Association.

MS. LYONS: Patrice Lyons, General Counsel, Corporation for National Research Initiatives.

PROFESSOR MENELL: Peter Menell, University of California at Berkeley School of Law.

MS. MOY: Laura Moy, Public Knowledge.

MS. WOLFF: Nancy Wolff with PACA, the Digital Media Licensing Association, an association that is involved in licensing images primarily.

MS. CLAGGETT: Great. Thank you very much.

I think we are going to start off first with just a very broad question. Then, we will see if panelists want to respond. And then, we will drill down into some specific
issues.

So, in terms of the initial broad question for all the panelists, I just wanted to ask -- again, we had some discussion earlier today about courts struggling to actually assess how or whether we have a making available right in our law. For example, what type of actual evidence is necessary to prove a distribution under our law?

So, the broad question I have first is whether there would be any benefit to parties, to litigants, to users even, from further clarification, either through legislative amendment or through a Copyright Office report in this area.

Sandra?

MS. AISTARS: I guess I would start by saying that in an ideal world we might have legislation or a statute that would be drafted a bit more clearly. But, given the circumstances in which we find ourselves, it
is probably not realistic to redraft the statute as it currently exists.

However, I do think it would be helpful to have further guidance from the Copyright Office, perhaps setting out more specifically the evidentiary requirements, the specific attributes of the various rights involved in Section 106, and how the making available right is implemented through those.

MS. CLAGGETT: Thank you.

Do I have anyone else?

John Beiter?

MR. BEITER: Thank you.

The comments that SESAC submitted were joint comments with ASCAP, BMI, the Music Publishers, and the Songwriters Guild of America. I am speaking for SESAC, but the comments are joint.

These organizations believe that the making available right is already implicit in the enumerated rights in 106, but believe that some clarification might be in order.
MS. CLAGGETT: And when you say "clarification," do you have a distinction between clarification through a legislative change or clarification by the Copyright --

MR. BEITER: Yes, legislatively. We don't think it would be an expansion of rights because we believe those rights are already there. Possibly including a phrase specifically invoking making available in the list of exclusive rights.

MS. CLAGGETT: I think next is Ms. Wolff, and then, Professor Menell.

MS. WOLFF: I think when you look at the display right and the way courts have interpreted on the internet, there may be a time soon where they may need some clarification. Because the display right for visual art is really the only right they have online, and if the display right can be circumvented by technology, so, in effect, any website user can have the benefit of a full visual display, but by clever framing never
have to license because it doesn't reside on their server. And if the courts continue to require that a copy be made on the server of the website that is taking advantage, you know, the benefit of the visual display, it could eventually eviscerate completely any kind of licensing or any display right for visual artists.

So, I think if this broadening of -- and maybe "broadening" is the wrong word -- but if technology is continued to be developed, so that there are ways of framing or displaying images, and there's never an infringer down the road that you could ever obtain any kind of judgment against, you could put all the images in some foreign offshore country, we will really have a problem if there is no more licensing model for our visual images. And I think that is, with technology advancing, something that there is a lot of concerns within the industry.

MS. CLAGGETT: Thank you very
Professor Menell?

PROFESSOR MENELL: In light of the conversation this morning, I think that there was nearly unanimous agreement -- I won't say "unanimous"; there was one member of this panel that I think disagreed -- but I think the idea that you could establish a violation of 106 by showing that someone has taken a copyrighted work and put it into a folder or some internet-accessible location from which the work can be accessed by the public, which gets into a whole bunch of other issues, but those are, I think, being worked out in other venues right now, that having that clearly established would greatly simplify litigation that is going on in many different parts of the system.

As I mentioned earlier, it would clarify the joinder issues. It would, I think, dramatically reduce some of the discovery costs. There are a whole bunch of
sort of aspects of what we are talking about
today that reverberate through the entire
litigation system.

That said, I certainly think that
it would be unwise for Congress to do this
without also taking on issues such as
remedies. I think on the panel this morning
we heard from the Library of Congress that to
expose libraries to potentially wide-range
liability because of repositories that they
have, you know, if we are going to discourage
preservation materials, those are all things
that I think would be unfortunate, unwise, and
time-sensitive. The longer we wait to clarify
these rights, the less preservation there will
be.

And so, I would try to identify
all of the issues that are reasonably closely
related. And I will also add that, once you
are opening up remedies, that also opens up
512; it opens up orphan works. There are a
lot of different parts of the system.
So, I don't think we can easily cabin this issue. And I, as a scholar, wouldn't want to see that. I would like to see a much broader engagement.

MS. CLAGGETT: Thank you very much.

Mr. Band?

MR. BAND: So, I think I agree with what Peter just said. You know, the hip bone is connected to the thigh bone, and so forth. So, certainly, on one level you can say, yes, you know, clarification is always a good thing because there's always some ambiguity and uncertainty.

But to start sort of clarifying the nature of this right would require redefining the other rights to make sure you don't have unnecessary overlap, and you have to think about the impact on contracts and, then, you have to say, well, is it just prospective, retrospective?

And then, statutory damages I
think clearly would be part of the discussion and, then, exceptions. So, it gets very, very confusing very quickly, and you have to say, you know, is the situation so bad that it is worth, to use another overused metaphor, just like picking at one thread in a knitted sweater and, then, the whole thing will fall apart?

So, I think, as a practical matter, and here I agree with Sandra, maybe there is some ambiguity, but we are probably better off letting the courts deal with the cases as they arise, as opposed to trying to deal with it legislatively, because the only way to deal with it would be to really deal with all the moving pieces at the same time.

And I think to the extent the option then, if we are not doing legislative amendment, then we are saying, oh, clarification in the Copyright Office. But I think, to some extent, it is the same problem, meaning the Copyright Office needs to be very
cognizant that sort of squeezing over here,
again, to use another metaphor, it is like
squeezing this part of the balloon will cause
something else to move somewhere else.

And so, you have to be very
careful, start saying, you know, "We think
this." Then, you have to sort of think of all
the possible ramifications, and not all of
them going through what we have already talked
about here. But, as I said, what about the
impact on first sale?

I agree with Professor Ginsburg
that there is an argument as to why this would
not -- you could interpret this in one way, so
that it would not have an implication for
first sale, but I think that that is something
that would be litigated. I mean, I think that
there is a very good argument that -- you
know, she has her argument, and I think
someone would come up with a counter-argument
based on the statute. And so, again, you have
to tread very, very carefully in this area.
MS. CLAGGETT: Thank you very much.

I think we have Mr. Beiter next.

Okay, so I am going to go with Mr. Bridges, Ms. Lyons, Mr. Kupferschmid.

MR. BRIDGES: Thank you.

I think that courts do a good job of working kinks out over time. Maybe it takes longer than some people would like, but I do think that law tends to get clarified over time and the more courts work with things.

I need to confess to some real cynicism in copyright policymaking when I hear the words "clarification," "harmonization," and "rationalization," because I have never encountered in my recent memory any occasion where those drove at any object other than expanding the powers and rights of copyright owners.

And I have heard one instance today in the display right: what I heard from
my friend Nancy involved a case that I
litigated and won, Perfect 10 v. Amazon.com.

And what I am hearing from her on the
"clarification" is actually she wants a
different outcome. I don't consider that to
be a clarification; I consider that to be a
change.

I am concerned as to what
stakeholders the Copyright Office has closest
at heart, and to what extent the professionals
who tend to congregate inside the Beltway
would be driving that process, when I do think
that copyright law is for the nation, and for
the entire nation, and that is its first
beneficiary. And so, the enthusiasm that I
perceive here among certain persons for the
Copyright Office to make a statement is one
that, frankly, I don't share.

MS. CLAGGETT: Thank you very
much. I will not make a comment other than
that, we hold you all very close to our
hearts.
(Laughter.)

And that is why we seek public comments from everyone and anyone who actually wants to submit them to our office.

MR. BRIDGES: And I very much appreciate that.

MS. CLAGGETT: Thank you.

I think Mr. Kupferschmid, and then, Ms. Lyons, and then, Mr. Glazier.

MR. KUPFERSCHMID: All right.

Thank you.

As I mentioned in the earlier panel I was on, we do not think that any type of further clarification or amendment to the statute is necessary. If you look at the cases, the overwhelming, vast majority of the cases, using the sort of two filters I put in place earlier -- I can repeat them if people want me to -- using those filters, I think that the vast majority of cases prove that there is this making available right under U.S. copyright.
So, if you are asking me, do I think it is necessary for some kind of amendment or clarification, the answer is absolutely not, certainly not in the legislation area.

If you are asking, would there be a benefit to clarification, sure, why not? I mean, just to further clarify things, but certainly not legislatively. I mean, it would have to be some type of statement.

There is also the possibility that danger comes with the clarification; what we think is a clarification actually sort of further confuses the issue. And therefore, if you are asking, would I prefer that such clarification, if it comes, come from the Congress or the Copyright Office, I would choose the Copyright Office, just for that purpose.

But you ultimately have to ask, where do we stop? I mean, there are a bunch of different areas in copyright law that could
stand to be clarified. And so, why are we just picking on this particular area?

And then, lastly, I just want to address the Hotaling case Professor Menell referred to and the gentleman this morning, also mentioned, about worry about potential chilling effects on libraries. I mean, that case is 17 years old. So, if there is some chilling effect, let's see what it is and let's see if there's something that needs to be addressed. There ought to be sufficient evidence, if there is some type of chilling effect, by this point.

MS. CLAGGETT: Thank you very much.

Ms. Lyons I think was next.

MS. LYONS: Yes, please. Thank you.

This is very good you're holding this right now to take the temperature of the room, see what they think.

Going back historically, it is
sort of a generational thing, you revise the
copyright statute. And sometimes war would
intervene historically, and so, they would put
it off for 10 years or more. But, on cycles
of 20 years, usually; now we are well beyond
that.

Technology changed dramatically.
Like when broadcasting came in, it was
necessary to reevaluate the law. There are
many provisions of the law that could be
impacted on the concept of copy, for example.
If that is kind of made something other than
what it was, I think, really intended to be,
then that could ripple to many things. The
first sale doctrine, they had the Section 104
proceeding a few years.

If the making available right, on
the other hand, is going to fall on the
communication to the public, the public
performance right, then you are going to get
into, are we going to slap compulsory licenses
on the whole thing, when maybe you are really
talking about performing computer programs,
and you just don't know that this is the new
kind of expression that you are dealing with.

So, my suggestion would be that
maybe it is way overdue, that they have
studies. You know, the Copyright Office used
to do this in the past. They would have
studies, and Congress would mandate that they
do this, not just for particular issues --

MS. CLAGGETT: We still do.

MS. LYONS: -- but more generally.

Okay. Now I will get to my point
-- more generally, so that you could actually
look at the interrelationship between the
different pieces. Otherwise, you are just
going to poke your finger and it will have
ripple effects that may be unintended.

MS. CLAGGETT: Thank you very
much.

I think I am going to go to Mr.
Glazier, Ms. Wolff, Mr. Barnes, and Mr.
Beiter.
MR. GLAZIER: Thank you.

Until it gets to a point where the courts start interpreting the law in a manner different than Congress intended, there is no reason for Congress to amend the law. I don't think we are to the point yet where courts have interpreted the distribution right or the performance right in a manner that is so different than what Congress intended in trying to make sure that we were complying with the WIPO Treaties, when this was being debated in 1996, that we are yet to the point where Congress needs to go in and amend to correct the courts who have now veered away from the original intention.

The intention was made pretty clear. It is not like this question wasn't debated, and debated very extensively, during the treaty negotiations by the PTO and the NII [National Information Infrastructure] report, by the Committee during the hearing process, and the drafting practice for the
implementation legislation. And the consensus was that, for the broader rights in 106, we were in compliance; making available was covered, and that within the patchwork of distribution, reproduction, and performance, there was no need to re-skew or otherwise affect standing meanings at the time.

But when Congress revisited specific situations where electronic theft was the subject, and they wanted to address whether or not distribution, for example, covered making available, they were quite specific. So, in the NET Act, when Congress was looking at the response to the LaMacchia case, where I think we called them "bulletin boards," which was described in Section 506 as making available on a computer network to members of the public or accessible to members of the public, they basically described the making available right in the context of Section 506 and the criminal copyright law, specifically adapting making available to that
particular context and showing what their intention was. And the Copyright Register at the time was pretty clear about what she thought the intentions were.

So, I think the idea of relating this to other elements in the copyright law, like first sale, are political markers which are part of the legislative process that might indicate, if Congress was ever going to do this, we want to make sure this is put on the table as a tradeoff. I don't think they are actually related to the subject that Congress identified, that the Copyright Office identified.

So, I do think it is a great idea for the Copyright Office to reiterate after these court cases what it believes the law is and what Congress intended. I think the Copyright Office is the guardian of the national interest when it comes to copyright law and policy, and the Copyright Office does that job pretty well.
And if, for some reason beyond the guidance that has already been given by the Copyright Office in the past, and I hope after this process, the courts still veer away in a direction that was unintended by Congress, perhaps Chairman Goodlatte, who was the author of the NET Act, where they very clearly spelled out what making available meant vis-a-vis a computer network and accessibility to members of the public, will once again clarify it, if he has to. But I don't think we are there yet.

MS. CLAGGETT: Thank you very much.

I think we had Ms. Wolff, and then, Mr. Barnes, and then, Mr. Beiter.

MS. WOLFF: To go back to the display right, and I am not sure now today that a visual artist has much of a display right when you look at the type of framing that is involved that has advanced much further than even it was in the Perfect 10 v.
Amazon case. At that time, you got a small thumbnail. When you clicked on it, you went directly to the website where the image was located, and the website was grayed-out.

Now, with the current-way image searches, when you click on the thumbnail, you don't get any reference to the website; you just get a high-res visual of the image. And for many people, that is all you need, and that is the display right. That is what gets licensed, and that is the enhancement of that web page, is that visual image.

So, I think things have changed even since the Perfect 10 v. Amazon case, and not every court has agreed that that is the right way to look at it. You have the Flava Works v. Gunter case in Illinois.

So, I think that sort of the per se linking of the reproduction with the display is something that is not in the Act, and the courts have tied them together. And I think that maybe could possibly be clarified
by even the Copyright Office, and looking at each one of these six rights are distinct, and you can have a violation of one without a violation of the other.

MS. CLAGGETT: Thank you very much.

I think we had Mr. Barnes, and then, Mr. Beiter.

MR. BARNES: Yes. I am a little confused now because I agree with most of what Mitch has said, which is atypical.

What I will say, though, is I think the way the question was initially posited, "courts struggling" I guess the way it was framed, I don't know if courts have struggled that much. I think if you look at what most of the comments you guys have received on this topic thus far as indicators, I mean, most people feel like they have got it right thus far, and they have been able to deal with the situation, and it has allowed for the flexibility that most U.S. authorities
have acknowledged in the bundled rights.

And so, I don't know if at this point we need a clarification via the Copyright Office and/or through legislation.

What I really hear as kind of this underlying theme is, you know, we want you guys to stand ready in case we lose certain decisions and we are not happy with the outcome. And I don't know if that is the right way to approach this problem.

What I will say, though, is, if there is going to be clarification, I think it has to come through the legislative system and it can't come through just some type of advisory opinion offered by the Copyright Office because, as Jonathan pointed out, I mean, there are a lot of related components that attach to this that will be affected, and statutory damages just being one that has been discussed. I mean, the Copyright Office on those topics can only discuss recommendations. They can't make changes in law and they can't
advise the courts necessarily to apply statutory damages in a different fashion. So, I think it is very dangerous for the Copyright Office to kind of go in that direction. I think if it is going to be handled, it would have to be handled by the legislative system, which, then, can look at several different components.

MS. CLAGGETT: Thank you very much.

I think we had Mr. Beiter, and then, Ms. Aistars.

MR. BEITER: I promised Jay Rosenthal that I would say this. But when the topic came up a while back about who are the stakeholders most near and dear to the hearts of the people in this room, I would be really be remiss if I didn't say that our organizations represent songwriters, and I am thinking about the guy who is sitting in Nashville right now writing a song and struggling with the second verse. Those are
the stakeholders; I am going to use the word "author" because that is what they are. And any gathering like this that doesn't note that is -- well, we always should.

Secondly, we also believe that the Copyright Office, it would be very helpful if the Copyright Office would provide some guidance concerning the existence of the making available right within the exclusive rights under 106.

And thirdly, again, we are not thinking in terms of expanding rights. If it becomes necessary to take a legislative route, we believe that a clarification of what we believe is already existing could be easily accomplished with some language in 106.

MS. CLAGGETT: Thank you very much.

Ms. Aistars?

MS. AISTARS: I just wanted to comment on what my colleague Mr. Barnes said. Two things.
One, we actually did say quite clearly in our comments that we do want both the Copyright Office and Congress to stand ready in case the courts do rule in certain cases, in particular, with regard to the public performance right, in ways that put us in a situation where we no longer comply with our treaty obligations and where we no longer have an effective public performance right. And so, that is, indeed, our position on the issues. I don't think that that is anything to be ashamed about or to try to hide.

Secondly, as far as why I think this isn't necessarily the time for legislation, and why I would prefer the first step to be guidance coming from the Copyright Office -- and Jonathan Bend alluded to this in his comments as well -- the one area of flexibility I think that clarification from the Copyright Office affords us is that what you do does not necessarily change how issues are dealt with in contract law between
parties, existing contracts between parties.

And my worry is that, if we start
changing definitions without an adequate
understanding of existing contractual
relationships that have grown up over many,
many decades, that we actually disrupt a
licensing system that is working fairly well
and put ourselves in a situation where it
becomes even more challenging to effectively
license rights.

MS. CLAGGETT: Thank you.

Mr. Beiter? Oh, you didn't have
anything?

MS. STRONG: As a follow-up
question, and I will pose a hypothetical,
would any of your views change with respect to
the need for potential clarification if the
Supreme Court were to rule in the Aereo case
in a position contrary to the brief filed by
the United States government?

MS. AISTARS: My position would
not change. That was what I was referring to.
MS. STRONG: Even after the Aereo case?

MS. AISTARS: Uh-hum.

MS. STRONG: Yes?

MS. CLAGGETT: Yes, I think she was saying that her position was that --

MS. AISTARS: No, no. So, my position was, if the courts rule incorrectly in cases dealing with the public performance right, namely, Aereo, we may very well be seeking legislation to address that issue.

MS. STRONG: Thank you. I just wanted to make sure we are putting all the pieces on your view together.

Others?

MS. CLAGGETT: Ms. Lyons?

MS. LYONS: Yes, I will reiterate because I think it would be even more urgent to start the process now. Because, basically, in my view some of the basic technical issues weren't briefed to the Court. So, the Court judges on what it is presented.
And if the whole notion of transcoding or the making of the derivative work in this context, it is uninformed as to what may be actually happening. And so, the pattern may play a big role in this. And yet, that could dominate copyright in ways, and it already is, as a matter of fact. Over the last couple of years, maybe the last 20 years, there is an imbalance really between copyright and patent.

And when you get into the performance right, for example, performing a patented method, and you represent that with a patented data structure, well, you see, that used to be called expression of a work, and you used to have public domain ways of doing that.

And so, a novel, for example, is a public domain way of structuring a literary work. And if it is fixed on paper, people can actually write novels in that form.

But when you get into managing
information in the internet environment, the
data structures themselves, although we have
a data structure we have made available in the
public domain, there are many different
highly-patented ways of doing that.

So, to what extent the basic
rights under copyright are being severely
restricted without actually examining the
technical background? So, I reiterate, I
think this is a timely point at which to
fundamentally rethink what we are doing.

MS. CLAGGETT: Thank you very
much.

I am going to go to Mr. Band, and
then, Mr. Glazier.

MR. BAND: Sure. So, in response
to Maria's hypothetical, I think a lot would
depend on exactly what the reasoning of the
Court was. If, in the highly-unlikely event
that they issued a ruling that was sort of so
sweeping that it really would encompass cloud
computing, then, yes. Then, I would think
that we would want a statutory change.

But if they were to adopt something more narrow, something along the lines of what the SG was recommending, then I don't think that, even though I may or may not agree with all the reasoning of the Court, I would think that at that point it would be probably not necessary for Congress to get involved.

I mean, again, it is always a bit of a -- there is this notion that, well, when Congress gets involved and they clarify, that you really have clarity. And I think you only get a little bit of clarity. I think there's always going to be new fact patterns, new situations.

And again, Aereo is a perfect example where, you know, building on what Patrice was saying, one of the problems was, because of the strange way Cablevision was litigated and the issues that were never resolved in Cablevision because of the
stipulation, that led Aereo to be litigated in a very strange way.

And so, you don't have in Aereo -- none of the courts looked at the most basic issue, which was, who was doing this, right, the whole issue of who was the volitional actor? There is no decision on that.

So, in many ways, what the Supreme Court really should do is remand and figure out who is the volitional actor, but that is probably not going to happen.

But the point is that, you know, it doesn't matter what the statute says, given that in that case it is not clear, and all the briefs are sort of talking past each other, because there is no ruling as to who was the volitional actor, and, obviously, if ultimately Aereo is the volitional actor, they lose. If the users are the volitional actor, I think Aereo wins. And who cares what the transmit clause says?

But I think that that is the
point, is that you might not like the result. You go to Congress. You come up with some kind of clarification. But, then, there is going to be the next case, new fact pattern, and we are not necessarily going to be any better off than we were with the existing statutory framework.

MS. CLAGGETT: Thank you.

I am going to go to Mr. Glazier, and then, Professor Menell.

MR. GLAZIER: Thank you.

I think the question in Aereo, if Congress had to amend the law, might focus a little bit more precisely on what "to the public" means than it does on "making available" or "distribution" or "performance" or "right of communication."

You know, in that case I don't think that the concept of making available is as much at stake as are you making it available to the public. And right now, whether it is the distribution right or the
performance right or transmission in 106(6), "to the public" is the key piece there. And even where Congress clarified the distribution right in the NET Act for purposes of Section 506, it was to make available on a computer network accessible to the public.

So, I think if Congress were to open up the Copyright Act because of Aereo in order to address the issue in Aereo in the government’s brief, it would have to focus on whether or not what Aereo did was actually a one-to-many public act, even though they tried to get around it by using 1950s technology in a 2014 sort of a cloud computing case.

If the question is, while the patient is on the table are there opportunities to address other acts within the copyright law, whether it is for politics and tradeoff, which I think are some of the things that Jonathan has put on the table, or things that might need to be clarified, like Professor Menell has put on the table, I think
that is a little bit of a related, but
separate question. But I am not sure that
Aereo itself, it might be the catalyst, but I
am not sure that it itself raises the making
available question, nor should it be
interpreted by anybody that a result in Aereo
somehow means we don't have a making available
right.

MS. CLAGGETT: Thank you.

Professor Menell?

PROFESSOR MENELL: I tend to agree
with Register Pallante's call for a much
broader review of the entire copyright
statute. And I realize that we are here for
a more limited purpose, but I feel that this
is going to take some time and we have, I
think, good reason. I think we are well past
the period which the 1976 Act is obsolete on
so many dimensions. We have come up with a
whole bunch of kludgy solutions. We are
relying on courts to come up with other
kludges.
And while this is happening, we are losing a lot of the public. And I say that because this is not the crowd where that broader public is present.

And Andrew's point about, you know, he is worried that we won't have the right people in the room, and that this process is -- when you go back to the 1960s, it was a pretty open process. It is true that it didn't include consumer groups and some other groups because that was less in play. Today it is in play, and I think that we are a country that is democratically-governed. And so, I worry about the path dependence of waiting for the Supreme Court to do things and Congress to react.

I think Congress can be proactive. We are long past a point at which Congress should be looking at these issues. Just let me pick a specific example that relates very closely.

So, the last time we looked at
damages was in 1999. It was the Digital
Deterrence Act, and it was focused on a very
particular pathology. It was a pathology of
perhaps a bulletin board service that is
putting video games up. The software industry
was perhaps united with the recording industry
and the motion picture industry. And that was
the target.

Within a year of that legislation,
Napster happened. And Napster completely
changed the terms of the debate. And I don't
think anyone who was coming up with that
regime was thinking about the issues, and so,
making available followed after that.

So, we can say courts might get
this right, but, meanwhile, the world -- and
I don't mean that in just kind of a general
way -- I mean, I think we have an opportunity
to lead on this issue. We ought to lead on
this issue. We have leading industries.

And I realize right now there is a
lot of nervousness because no one wants to
open up the Pandora's box. But Register Pallante has already done that, and the Patent Office is starting to do that. And I hope that Congress will see that this is not an issue where we want to just wait and react.

I think we have a lot of facts, a lot of knowledge, and the process that unfolded 50 years ago could be replicated on a shorter time. It doesn't have to take 20 years. It could happen much sooner. But it would take several years. And this process I think is really helping. And I would love to have a discussion.

I mean, no one is quite willing to do it, but I do feel that there are a whole bunch of really valuable improvements that we could make, and it could get perhaps a stronger takedown regime, but much more rational damages. And making available is intertwined with that.

MS. CLAGGETT: Thank you. And the only thing I would just clarify is just that,
yes, the Copyright Office, Register Pallante

did mention a review of the entire statute.

How that review ends up, as to whether there
should be or there is a need for legislative
change is something I think we have not
concluded, and certainly Congress is still
considering that as well.

Did I have anybody else to
respond? Oh, Mr. Adler?

MR. ADLER: I thought it was very
interesting that, when you asked the question,
you didn't pose it in terms of whether or not
the Aereo decision came out the wrong way or
in a way that you would not have supported.

You mentioned the United States' position.

And I think, on this issue, the
United States government, the Executive Branch
is really vested. For 16 years, they have
adhered to the same position that they took
originally, which was that the umbrella
approach would work in terms of the United
States honoring its obligations as a signator
to the WIPO Treaties.

That approach, obviously, was very attractive at that time because I think there was still a certain resonance from the fact that some 20-odd years earlier we had done the same thing. As part of the United States accession to Berne, it accepted the responsibility of moral rights by saying that, well, we already have that embodied in a number of areas of federal law and state law, and they pointed to defamation law, rights of publicity, privacy, and a variety of things like that.

I think what simply happened here is that this turned out to be a tougher issue because so much has changed around the basic premise, unlike what happened with moral rights, where there was relatively little change around the basic premise that said moral rights could be addressed through an umbrella approach.

So, I think that it is really
critical that, to the extent that the position on this issue of the Executive Branch of government as far as I know has not changed at all, and, in fact, I suppose some would argue that the government has doubled down in terms of carrying its position forward into international trade agreements that it has with respect to the view that at least the United States government, for purposes of trade policy, believes it knows and understands what the making available right is.

I would hope that, before we turn this issue over to the kind of food fight environment that would ultimately ensue if Congress were asked to try to deal with this issue among the many other aspects of copyright review that it ultimately may consider as fodder for legislative revision, I would think that the United States government could do a great service by making sure that in every case where this issue
arises they introduce a brief stating their position with respect to the making available right.

If they cannot present their position as to why the umbrella approach is still a valid way of the United States complying with its obligations with respect to this right, then I think we probably have crossed the threshold that might call for congressional action.

But, until that happens, I don't think that the actions of less than a handful of lower-level federal courts, the actions basically of just a few judges, should ultimately determine that this issue has to be thrown back to Congress, and that the Executive Branch, which advised Congress on the umbrella approach, and the Congress, which accepted that approach and has stood by it all these years, should be suddenly sent back to the drawing board because a few federal judges got the issue wrong.
MS. CLAGGETT: Thank you, Mr. Adler.

I think it is Mr. Band next.

MR. BAND: So, I might agree with what Allan said; I might not. I am not sure 100 percent.

(Laughter.)

But I will say that I don't think that the government needs to be intervening in every single case where the making available right comes up. You know, there are many treaty obligations and, arguably, you could say that the U.S. Government needs to get involved in all of them by that logic. And I just don't think that that is the case.

And I think, again, in this case, you know, I have always thought that the notion that somehow what the Court does in Aereo has anything to do with the international obligations concerning the public performance, again, is sort of misplaced.
How a court rules in any given case turns on those specific facts, and, you know, the treaty obligations go much more to statutes and what Congress does, rather than what happens in any given case.

And again, I would like to reiterate, especially in this case, given that if the Court were to find that the volitional actor is the user, and that there is significance to all of these dime-sized antennas, then I think that that is fine. And that is the way the Court rules, and it is not a public performance because it is not public. And that has nothing to do with what our treaty obligations are because the Court has interpreted that there is this intermediary intervening copy, and that makes a difference.

And I don't see why any treaty obligation would have an impact on that interpretation, frankly, of the facts. And so, I think this notion always that, oh, ruling this way or ruling that way will
somehow interfere with our international obligations, I think that that is -- you know, cases turn on facts, and the specific facts make a difference.

MS. CLAGGETT: Thank you very much.

I think we will go into a slightly related question. So, I think a number of panelists have mentioned that they would not necessarily think that there needed to be legislative change, that clarification might come from Copyright Office guidance, for example.

And so, one question we had would be, is there any consensus or agreement as to what that Copyright Office guidance should look like in terms of making available? Is there a consensus in terms of what U.S. law covers in that instance?

And so, we talked about these issues a little bit in the earlier panels, but I wanted to kind of go back to some of the
specific examples that we weren't able to finish discussing before.

So, for example, in the case of someone who puts a digital file in a share folder, would the Copyright Office or would a guidance saying that that is, in fact, a violation of the distribution right be something that the panel would agree is appropriate? So, I will just throw it out there, and then, we can talk about some of those other specific examples that we didn't get a chance to talk about, like linking and other things like that.

So, I wanted to just open it up with a general question, and then, look at specific activities if we were going to provide guidance in this area.

I will start with Mr. Bridges, then Ms. Lyons.

MR. BRIDGES: Thank you.

I will start with a question, frankly, on a matter where I think I know a
little bit, but I may be ignorant. Has the
Copyright Office issued guidance as to whether
a purely-online website is published?

MS. CLAGGETT: No, I don't believe
that we have.

MR. BRIDGES: I think that is
because it touches the very issue here.
Because the Copyright Office has issued
guidance that says, "For a publication to
occur, there must have been a distribution of
copies to the public by sale or other transfer
of ownership, rental, lease, or lending, or an
offer to do the same."

And so, if we are going to build
this discussion around publication, the fact
that the Copyright Office, on the fundamental
building block of the discussion here has not
taken a position, or if the position is there,
it is the works that are available only online
have not been published, then I don't think we
are talking about mere Copyright Office
clarification, but we are talking about an
adjustment and possibly a change in Copyright Office guidance on some issues.

This takes us back to the point Ms. Lyons made, which is once we start going into this, there are all sorts of unintended consequences. And then, will the Copyright Office take a position on whether "copy" in Section 109 for the so-called first sale doctrine means the same thing as "copy" in Section 106(3)?

I think once we want to go down this -- my view is on guidance -- guidance should not be a vehicle for changing established positions or for putting a system out of equilibrium by focusing on the burning issue du jour.

MS. CLAGGETT: Thank you.

Ms. Lyons?

MS. LYONS: Thank you.

Copyright guidance and statutory interpretation, I remember the regulatory proceedings when I used to be in the Office of
General Counsel at Copyright, and then, there would be litigation afterwards, everybody: "How could you make that decision?" and that sort of thing.

So, a careful evaluation, rather than trying to get into statutory guidance, which is somewhat similar to regulatory proceedings, might be a more advisable way to consider here, especially when making available may be viewed as a type of public performance. And if you get into that, there is -- I mentioned today the patent law -- but there is an even bigger morass. It is the communications law, and what does it mean to be broadcast and cable and TV?

I have been following several proceedings at the FCC where they are trying to grapple with this very issue. Because when you have information that is structured using the internet protocols, and it is made available through what you might call broadcast facilities, just maybe whatever
computational facility you might have, and take the labels away and look at the functionality, what is actually happening, you may come out with a better way to approach it.

Because, otherwise, you open the door where people are going to get frustrated and they are going to say, "Well, we're going to use it anyhow and nobody is going to get paid." And you are not to be going litigating everywhere.

I was in a meeting in Europe where a big telco group had invited me as a copyright expert. And actually, somebody from a U.S. university got up in this rather small group and suggested there should be a compulsory license for everything on the internet. Well, you see, I took a pause, counted to 10, and then, addressed the issue.

So, the temptation is there to say, "Oh, this is too hard." And so, whatever they consider the broadcast, the 111, and all the licenses and public performance, they
really need to step back and see, if you are
going to consider this a public performance,
and making available appears to be in that
kind of genre, what are you going to do? Are
you going to, then, say, "Here's a better way
to do it?" And you can't ask the FCC for
guidance as to what is cable and broadcast in
that context because maybe they really don't
know right now.

MS. CLAGGETT: Thank you.

Mr. Band?

MR. BAND: So, addressing

specifically the issue that Maria asked -- I
think it was Maria who asked it -- about
consensus with respect to putting a work in
the share file, you know, I think there
probably would be a degree of consensus that
that is implicated by 106, but what part of
106 there might be disagreement on.

So, not to sound too much like a
broken record, you know, I would view that as
certainly the courts have found that to be a
distribution right, you know, an infringement
of the distribution right. I think it would
probably be better to classify it as an
infringement of the reproduction right.

And here, I just want to respond
briefly to the question that Professor Menell
asked at the end of the last session, when I
made the same point, which is it does seem to
me that it is more of a timing issue. In
other words, if a user first uploads or first
installs peer-to-peer software, and then,
after that, places a work on their hard drive,
and by virtue of the peer-to-peer software,
that work sort of by default is automatically
in the share file and automatically is made
available, it seems to me that that probably
would be an infringement of the reproduction
right.

It could be, if the order was
reversed, in other words, that the work was on
the hard drive first, and then, the software,
the peer-to-peer software was placed. Maybe
that wouldn't, in that specific case there
wouldn't be an infringement of the
reproduction right with respect to the music
file that was already on the hard drive.

But, presumably, a person is going
to keep on adding more music after they
already have the peer-to-peer software on
their computer. And it would seem to me that
when you do add more music files already you
already have that, the file sharing software
on your computer, that anytime you add it in
a way that sort of automatically makes it
available, that that would be or should be
seen as an infringement right. And so, again,
it seems to me that that takes care of the
problem.

MS. CLAGGETT: I guess we have got
a number of people. So, I am just going to go
kind of down here, because I didn't reference
the specific order, but I will go with Ms.
Moy, Professor Menell, Mr. Kupferschmid, and
then, Mr. Glazier.
MS. MOY: All right. Thank you.

So, I think in the last panel I brought up the issue of cloud computing and the possibility that a broader making available right would cover uses of cloud computing that we would have no intention of covering.

So, I don't know whether or not we are in consensus with respect to this, but I think that any clarification coming out of the Copyright Office would have to consider very carefully what happens in the situation where someone saves a PowerPoint presentation with a copyrighted image on a drive that is accessible to members of a company with, say, 500 employees? Or what happens if somebody backs up their hard drive to a shared network? Or what happens if someone accidentally indexes a folder that is in their Dropbox that contains copyrighted works, to make it available publicly through a link on the web, even though they don't share that link? What
happens in each one of these situations?

And I think someone else mentioned

on the last panel that I don't think anybody

who is in favor of a broader making available

right would want to cover these types of

instances. But I think that it is very

important that we consider those and make sure

that, if we are going to clarify that some

placing of copyrighted works in a shared

calendar constitutes distribution under 106,

then we need to make sure that it doesn't

cover those other uses.

MS. CLAGGETT: Professor Menell?

PROFESSOR MENELL: How you

accomplish this goal of assisting courts and

assisting Congress is an interesting question

of governance. You know, what is the role of

the Copyright Office in this complex web of

institutions?

I think there is a tiered set of

approaches. But one approach might be to,

through an official document that has -- I
will use the Orphan Works Study as an example -- that provides a very scholarly approach to the issue, that tries to sort of look out at all of the work that has been done, and to try to organize that, so that courts and lawyers can access that. I think that is sort of a low level of intervention.

And especially in this area, the reason I entitled my article "In Search of Copyright's Lost Ark" is because I think we have lost some of that institutional memory. It is now there, and I think that people are going to reference it increasingly. And so, to help to make that more accessible to the public.

It was interesting to me, just because two members of the Copyright Office, staff who I have great admiration for, David Carson and Rob Kasunic, both wrote excellent articles about this problem leading up to it. But we have lost connection, the institutional memory, and that is what had
happened even by 1976. So, to the extent that you are playing just sort of an archival role, you will help that process.

Now some Justices and judges might not consider this pertinent. We have heard a lot about whether or not legislative history is appropriate. I think that we are inevitably drawn to getting behind that curtain, that we want to see what people were talking about and how they thought about it.

And I think when you do that, often it does achieve clarity. And so, this is kind of a very low-level intervention that I don't think anyone could really object to. You are just telling the history of how a law came to be, in which the Copyright Office was the central actor. And so, I don't know that it requires you to do that much more than what I and Professor Nimmer have tried to do, but it does matter that it comes from an institution like this.

There are, I think, steps above
that. And we have heard reasons why perhaps
those steps ought not to be taken, at least
aggressively or immediately.

My instinct is to try to see how
the Green Paper process plays out in
conjunction with some of the things that
Representative Goodlatte is doing and what you
are doing, but building towards what was
referred to earlier as really trying to set
forth the group of studies that would enable
the nation to look at this set of questions.

But if you are looking for what
can be done in the short-run, I think just
providing that history would be a valuable
service.

MS. CLAGGETT: Thank you very
much.

Mr. Kupferschmid?

MR. KUPFERSCHMID: We asked what
Copyright Office guidance should look like.
I will go back to my earlier answer, which I
don't think the Copyright Office -- I don't
think it is necessary to provide any clarification or guidance here. There is a real risk that, when you do so, you may create, inadvertently create, a whole new can of worms or level of confusion.

But, to the extent you decide otherwise, I think, actually, Mr. Adler had a good example or a good suggestion about filing briefs, maybe not every case, but in certain more complicated cases or something, which gives the Copyright Office the ability to look at the factual scenario in that case and determine how it should apply.

But if the Copyright Office were to go down this path in terms of defining or clarifying what it means, or the making available right, what it means to make something available, you have got to define what that term means. What does it mean to make something available? What types of actions? What are the parameters of doing so with the limitations? And that, like I said,
I think that is fairly difficult.

I want to raise some other issues that people -- or address some other issues that people said. Mr. Bridges mentioned, well, in order to do that, you have to define copy as being consistent, with 106(3) and 109 have to be consistent. And that is just not the case.

I mean, the first sale doctrine, 109, talks about the particular copy. So, we will move on from there and save that discussion of the first sale doctrine for another day.

Jonathan, in addressing the shared file issue where they are copying a shared file, reverts back to sort of that it should be a violation of the reproduction right. And that is somewhat antiquated thinking because of the cloud computing issue where you have something that is legally, legitimately put up in the cloud, is not illegal reproduction, but access to that may be limited to one person or
a group of people. But, then, access is
provided to that much greater to what is
supposed to be provided, and that is exactly
the type of scenario where we need a
distribution right to cover that type of
situation.

And then, lastly, Laura had
mentioned the situation of somebody who
accidentally uploads a work onto a shared
file. It sort of reminded me of that old
Steve Martin bit, you know, "Oops, I forgot
murder was against the law."

(Laughter.)

And then, eventually, she says the
error was discovered and corrected. I mean,
we are going to get that excuse on every
single case if that were the situation.
"Oops, I didn't know. I did it accidentally."
I mean, that issue, the state of mind or the
intent will go to damages. It has not been,
should not be a role, play a role in
copyright, unless you are talking about
secondary liability, which we are not in this case.

So, in terms of the academic articles or software somebody put on a shared file, know what you're doing. Know who you are letting access to your computer and your files to. I mean, that is good practice, aside from copyright.

MS. CLAGGETT: Thank you.

And I think I am just going to go down the row in terms of order. So, Mr. Glazier, then Mr. Bridges, Mr. Barnes, Ms. Aistars, and Mr. Adler. And then, I will come back to Ms. Moy.

MR. GLAZIER: Thank you.

I think maybe "guidance" is the wrong word because it almost makes it sound like a business advisory opinion or something from the Department of Justice where you are commenting on whether it is okay for somebody to proceed with a particular business plan or whether they are or aren't going to be liable
under it.

    And I think you can't do that because you can't make that guarantee of enforcement. And I think maybe "opinion" is the better word, and I do think it is pretty necessary because the Copyright Office has issued an opinion on this in the past during the development of the legislation and beyond that. And now, you have a handful of district courts who have issued opinions that do not mesh with the stated public opinion of the expert agency during that time.

    So, I do think it is time for an updated opinion where the Copyright Office specifically addresses why it still believes what it believes, if it does, despite the handful of cases that have come out and tried to apply the umbrella approach to the particular facts of those cases.

    And I do think it is necessary to get into what the Supreme Court has said, and you have said this in the past, has said about
the link between distribution and publication
because it can be quite circular. And you
sort of brought this up, where we certainly
believe that distribution in 106(3) broadly
includes general publication, and that
publication is defined and distribution is
not. And I know they covered this this
morning, but publication really does
explicitly cover offering to distribute, but
requires some distribution.

So, the whole thing is circular.

You have addressed this before. You have
talked about why making available exists in
the umbrella approach. And I think it is
necessary to just -- I won't even use the word
"clarify" -- to update the opinion to
specifically note why that approach is still
the opinion of the expert agency today,

despite a few district court opinions that
seem to, when applied, these particular facts

go in a different direction.

MS. CLAGGETT: Thank you.
Mr. Bridges and Mr. Barnes, and then, Ms. Aistars and Mr. Adler.

MR. BRIDGES: Sure. Well, I sort of like the concept of investigation that both Ms. Lyons and Professor Menell suggested. But the question is, what should we be investigating?

I have heard earlier today statements that, well, maybe the Copyright Act is obsolete or maybe it hasn't kept up with the times or maybe the changes in technology are putting undue pressure on things, and we need to understand how to address new challenges like Bit Torrent and the like.

I think the way to do that is not to do historical research in how we got from the 1909 Act to this obsolete 1976 Act. I think that, if we are going to investigate things, let's investigate requiring fact, evidence-based criteria. What at this date promotes "the Progress of Science and the useful Arts. . . ?" Isn't that the
enterprise?

Let's understand how this discussion fits into the copyright's constitutional purpose. Let's look for evidence-based discussions, not sort of necessarily partisan predictions of how people will themselves react, if certain things happen and don't happen. But do a broader fact-based investigation of that nature, and then, there can be some guidance about whether the current conditions measured by that standard justify congressional action or not, and then, whether the conditions justify some other response.

But it seems to me, I agree an investigation is appropriate, but I think the unique virtue and competence of the Copyright Office is to measure these questions according to the constitutional purpose of copyright and to make evidence-based decisions.

MS. CLAGGETT: Thank you very much.
Mr. Barnes?

MR. BARNES: Yes, I think we should probably stay away from some of the titles just in general. So, when you call it clarification, guidance, or opinions, I think automatically you are going to get certain stakeholders that are concerned because you are going to position them as winners or losers automatically.

I think Professor Menell's framework is really valid, looking at historical background as a starting point. And the reason I think that is important is because Members of Congress -- there is a lot of turnover on the Judiciary Committee and within the Congress at large.

And so, Andrew is a good friend, and I often agree with him. But it is important to educate the Members because a lot of them don't have an historical background and that framework to understand how we got to where we are today. And I think that would be
helpful. And this is a very technical area of law, most people know. So, I think that is a good starting point.

I think what I would add to this report, which is what I would just call it, on this topic of making available is an issue-spotting area. So, we have talked about -- I think there was a back-and-forth between Andrew and Keith just about the definition of copy.

And so, we should look at certain things that would have to be decided if Congress was going to change the law, and that can be flagged for Members, so that they can look at that. But I would stay away from actually making strong recommendations. I mean, you obviously could include in this report a back-and-forth about where certain stakeholders are. So, at least that way, Members of Congress kind of get a sense of where the constituencies are at large.

But I would stop short of doing
the actual hard recommendation. And I think there are a couple of reasons you want to do that. And it is simply because technology changes, business models adapt and evolve, and where you draw the line in this report is going to be debated for years to come through litigation, and it is probably not going to suffice five years from now. And so, maybe it is better to just stop at that point in the report and, then, have Members of Congress take it up from there.

MS. CLAGGETT: Thank you.

Ms. Aistars?

MS. AISTARS: Thanks.

I guess I would start by asking the question, who is your audience when you are issuing guidance? And my answer to that would be that the courts are your audience, the courts, the clerks, and the judges writing the opinions.

And so, in issuing guidance, I guess I would begin by considering the
umbrella approach, commenting on why it still applies, why it still works, perhaps reviewing the scope of rights under each of the implied rights, the evidentiary requirements for each, and commenting on the existing case law and providing some rationale for understanding that case law under the rubric that you have provided for the courts to consider.

And maybe conclude with explaining how to, in general terms, continue to rule in a fashion that upholds our obligations internationally and that remains consistent with the congressional intent generally.

What I would not suggest is taking a very granular approach and trying to imagine all of the different scenarios that might come up and commenting on, well, this is in and this is out, and if you place a file in your share folder before you have installed software versus after, you know, no disrespect intended to Jonathan, but I just think that is a very difficult exercise to engage in.
Regardless of how you come out on the results, you are just never going to be able to imagine all the possible scenarios and factual situations.

The other comment that I would make is with regard to the cloud computing concerns that have been raised. I share some of the views that Keith Kupferschmid expressed. I guess I would say it is not clear to me why this situation is any different than any other business situation that businesses find themselves in with regards to employees behaving appropriately in the workplace.

You know, it is no different to me than making sure that they are not making hundreds of copies of an article and distributing them in analog form. It is just a different iteration of the same problem, and businesses have dealt with that over the years, you know, quite readily, either by getting CCC licenses or by issuing best
practices and educating their employees as to what is appropriate and what is not. So, I don't see it as any different of a problem.

MS. CLAGGETT: Thank you very much.

Before I move on to Mr. Adler, I will just point out that we have about 15 minutes left in this session. So, I think I am going to go back around to all the people who have their flags up now for final remarks. And then, we will open it up and see if there are any audience comments.

Mr. Adler?

MR. ADLER: Yes, I just wanted to make two points. One sort of builds on the point I made before and, then, is amplified by what Mitch suggested and what Sandra had suggested.

The legislative history that Professor Menell unearthed is very interesting. It is also very revealing about the evolution of these concepts in the
Copyright Act.

But, ultimately, I think we find ourselves in the position that we are in because the people who espouse the umbrella approach basically failed us in the sense that their approach ignored basic rules of statutory construction and, also, made a very essential etymological mistake. They simply seem to have assumed that the making available right and the terminology use was basically redundant with the idea of distribution. Of course, we now know it is not.

There is an overlap, to be sure, as there is an overlap with public performance and display. But, clearly, generally speaking, when a legislature uses different words, one doesn't assume that they are merely asserting the same idea and using different words to do it.

The idea that the WIPO Treaties established making available as a new right, but merely that it was redundant of the
existing right of distribution, makes no sense in the international context and it makes even less sense with respect to the way in which the U.S. would treat the question of whether or not that right already existed in U.S. law.

And I see the error here as one that very recently occurred by the Supreme Court in the Kirtsaeng case, and was pointed out, interestingly, by one-third of the majority in that decision, indicating that really, as far as the makeup of the Court was concerned, that majority opinion was wrong.

Justice Kagan, with Justice Alito in agreement, pointed out that they were stuck with the Supreme Court's Quality King decision in which the Court simply assumed that importation is a form of distribution, nothing more. And because distribution is subject to the first sale doctrine as a limitation, so must importation right in the same way.

But, as she pointed out, if they had recognized that importation differs from
distribution in key ways, and certainly would
differ with respect to the way it might
interplay with the first sale doctrine, if
there is an interplay at all, you would come
out with a very different result that actually
would have made very sensible law and sensible
policy.

And I think the same thing is true
here. And this is, again, the burden I think
initially of the United States government in
terms of taking positions as to what its
advocacy of the umbrella approach to
codification or the lack of need of
codification of a making available right
means, to be able to articulate to the courts
how making available differs from and is not
merely redundant of distribution or
publication, for that matter.

And I think if that were done, it
would open the door to being able to make the
appropriate distinctions between the way
making available interacts with distribution,
the way it interacts with public performance, the way it interacts with display. If you were to pick any 20 people off the street and ask them if they knew what it meant to make something available, they probably would give you a very reasonable and fairly consistent answer to that question. We have kind of tortured this because it is a legal concept and it has far-reaching applications when applied by the courts.

And then, the other point I was going to make goes back to, again, my friend Jonathan's dogged insistence that the reproduction right resolves all of these issues. Again, it loses sight -- and I think, Jacqueline, your question this morning pointed that out -- it loses sight of the fact that, when we began looking at the question of how existing copyright law would work or wouldn't work in the digital era -- remember the quaintly-named Information Superhighway studies that were done in 1995 led by Vice
President Gore after he discovered the
internet?

Basically, when they were doing
that, the thing that they understood more than
anything else as the central concept that made
their need to study those questions so
important was the realization that the same
act violating the same rights that had existed
in the analog world, but now occurring in the
digital environment would have exponentially
greater harm.

And so, there was a need to
consider their application in different
contexts, but also in different terms. And
so, for example, when Jonathan says that this
all could be treated very simply if we just
focused on the fact that reproduction is
involved, so let's forget about making
available, let's even forget about
distribution, and just call it a violation of
the reproduction right. So, essentially,
everything gets reduced to the making of a
single copy, and that is the scope of the violation, regardless of the exponential level of harm that could result when that happens online.

And it seems to me that we have talked a great deal about this in terms of its relation to statutory damages, but, remember, there is another whole area of remedies to consider here. And that is the area of injunctive relief. Because injunctive relief is an equitable doctrine, it is perfectly legitimate for judges in those cases to be able to consider that, when somebody places copyrighted work into a shared folder online, are they doing so in reckless disregard of a reasonably foreseeable harm that is likely to occur? That is something that is perfectly within the right of a federal judge to consider in shaping injunctive relief.

And I think we need to think more about that aspect of this issue when we think about the importance of why making available
was established as a separate right, and not
merely something that was repetitive or
redundant of existing rights.

MS. CLAGGETT: Thank you very
much.

And I guess we have a few more
flags. As I said, we are going to try to see
if we have a few moments for audience
participation. But I think I had said Ms. Moy
next, and then, I will go back and start with
Ms. Wolff, Professor Menell, Ms. Lyons, and
then, end with Mr. Band.

MS. MOY: I am just trying to
bring us back to thinking about the situations
where perhaps no distribution has actually
occurred, and we are just looking at offering
something to the public.

And as Public Knowledge explained
in our comments, we don't think that there
should be an exclusive right to cover that
situation. But, that aside, if we are going
to decide to cover that, I do think that we
need to take into consideration the average user. And other members of this panel have said that they don't think that the average user would accidentally index something that is a copyrighted work on a shared drive or that they should just have company best practices or just best practices generally to prevent copyrighted works from ending up on shared drives.

But I think it is the situation where someone, for example, puts together a PowerPoint presentation that includes a copyrighted image and saves it on a networked drive. It is something that is going to occur all the time. It occurs all the time now. And I think if you think that that doesn't occur, then you are out of touch with the average user. You are greatly overestimating the sophistication of the average user.

And if we think that every one of those instances is a copyright violation, I
think that that is at odds with copyright's intent to promote the progress of science and useful arts, and it is also at odds with the treaty.

MS. CLAGGETT: Thank you very much.

Ms. Wolff?

MS. WOLFF: Well, I will give you a very easy broad license for that image, and you will have no problem.

(Laughter.)

You can do that within your company. I mean, to me, that is just licensing, and you take care of it when you start and you think about your uses.

But I just want to sort of go back to the original question. Do we think the umbrella approach still works today? And I think it only does if the courts correctly understand and interpret the six exclusive rights that we have.

And I think in some areas we do
fail, and I go back to the display right. I think we do fail there, and how we try to give either guidance, opinion, or wait for the courts. And I think we have to remember that the Constitution does talk about authors, and authors can be a general user and they can be individual artists. They can be visual artists. They can be songwriters. And they can't always afford to go to the Supreme Court and wait to make law change.

And I think if there is any way to have clarity or have any type of whatever you call it, opinions, to make it clear that we have each of these six exclusive rights, and that they are separate and you can violate the public right to display without having a reproduction, I mean all those things I think would be very helpful because judges are generalists and they don't always get things right. And they only look at the papers they do have in front of them.

So, if it means having the
government present briefs, like they did in the recent Alaska Stock v. HMH case, it is just helpful for going back to Copyright Office practices and what people expect their rights are. I mean, people, visual artists do expect that they do have the right to public display their work and to control those rights.

MS. CLAGGETT: Thank you very much.

Professor Menell?

PROFESSOR MENELL: The Copyright Office has historically played some essential roles in our entire cultural history. So, I look at this question and I say, well, there isn't one hat; there are multiple hats that you need to be focused on. And one is fidelity to law, that the Copyright Office is part of the knowledge that guides courts and the public.

And so, I believe that being much more open about how judges can access the law
-- it is very hard for lawyers to make some of
the arguments that I, as a scholar, can make.
Part of the reason I file briefs in the courts
is because the courts are going to be
suspicious when something gets pulled out of
a legislative history. I try to be very
thorough in the work that I do. I never want
someone to say, "You missed something."

And I think the Copyright Office
is a place that can do that with a high degree
of fidelity. It has those records. It can
and should maintain an institutional memory.

And I will point out something
that no one has picked up on, but it was in
this research I found. The Geneva Phonogram
Convention, it was a very interesting part of
the history that led to specific language in
the Sound Recording Amendments Act of 1971
having to do with making available.

And so, I don't go to the more
recent treaties. I go all the way back there,
and the U.S. took a pretty aggressive position
in order to establish serious protection for phonograms. And so, that is part of our history, and I think it does inform these issues. And some of the language that wound up in the 1976 Act grew out of that whole little sideshow, but it is a really interesting sideshow. That is one hat.

The other hat is as a legislative counselor, and the entire 1976 Act grew out of the Copyright Office as really the drafter, the drafting institution doing events like this. And I think that that ought to be sketched out.

And I realize you have principals that you respond to in Congress, but I think that they could perhaps benefit from hearing sort of a more systematic approach to how we are going to get at perhaps the evidence-based decision making that Andrew referred to.

But I will say, as someone who was in a recent NAS study about evidence-based decision making, I am skeptical, even as a
social scientist, that we are going to get the answers to all the questions that we want through empirical studies. The data is very hard to get at, and the data can't deal with a whole bunch of hypothetical scenarios.

The problem, when I look out into the content world today, is that I worry increasingly about how advertising is now the dominant modality for paying for our culture. And Madison Avenue shouldn't be the way in which art comes about. It should come about through markets with the consumers, people who value those works.

And so, it is not hard to put together an empirical study showing, look, these industries are doing better than they used to do. But, when artists are being told, "You need to have these product placements, and we need to do this and that," that I think corrupts the entire system.

So, I do think empirical evidence is going to be very important, but I think it
is really important not to just accept traditional measures. We have to go back to what copyright was about, which was creating a marketplace for the creativity that would come up through a true marketplace, and not this I think much limited marketplace that is driven by media.

MS. CLAGGETT: Thank you very much.

I think we have three people remaining, but only a few minutes. So, if I could ask everyone to just be very brief?

Yes, please, Ms. Lyons.

MS. LYONS: Just a backup thought, since 1976, the Act was adopted, there have been important developments in the computational capabilities and networking, and I think we will all recognize that that is the case. And oftentimes, people talk about a copyright work as if it is a music work rather than the representation of that work in some digital form.
And we have been working with the copyright industries for many years now to develop ways of structuring the data, so that it would be identifiable and you can manage the licensing rights in the network environment.

And in this context, I have been giving some consideration to, if copy is found to just be the tangible, which I suspect may be where it comes out, that there might be alternate bases for exploring, if you have a digital object or other similar data structure that is uniquely and persistently identifiable, and there is some way in the registry system to keep hash of that, that it could be a logical equivalent of a copy.

And this comes into play particularly when you are in a volatile processing environment, because if you are playing a video game that has preexisting works that are incorporated in that, there may be new works that are generated on the fly,
just as is happening. So, you might want to
consider that.

And in conjunction with that, how
to identify that it is protected? So, the
notice of copyright really truly needs to be
reevaluated. In its current form, it doesn't
perform that useful function at all.

And some sort of agreed standard
in the metadata, which would be acceptable
under the Berne Convention -- they have a
provision that would allow standardization of
certain identification information -- may be
a helpful start on that.

Now, for evaluation, just a quick,
practical suggestion.

MS. CLAGGETT: Very quickly,
because I am going to have to push on.

MS. LYONS: I am going to do it.

You have use cases. I mean, I
have been to many standards groups, and they
have use cases. Well, instead of taking a
live litigation where people are at each
other, if you take a use case, the scenario of things that are going on out there in the real internet environment and invite comment on the different aspects, and start developing a record of where people find things don't quite fit properly, that is one you might think about.

MS. CLAGGETT: Thank you very much.

And then, I think in the last two minutes we will have the final comments from the participants, Mr. Glazier and, then, Mr. Band.

MR. GLAZIER: One thing more that I thought was pretty concerning, and that was that somehow the distribution right, right now, only covers when there is an actual transfer of a copy. And if you are offering for distribution, somehow that is not covered, and that making available would be a stretch. And we would be expanding rights if we covered something in a search folder or how people use
the internet today.

For enforcement purposes, if you had to have a snapshot picture of an actual transfer of a copy in order to enforce your rights, you would have no remedy at all. And so, the idea that putting something into a place on a computer network that is accessible to members of the public, as it states in Section 506, and offering it for distribution, under the definition of publication, which is at least equated, if not encompassed, within distribution, to say that that is not covered by the current distribution right I think is a big stretch. I would hate for that to be implied.

The constitutional mandate is to protect the exclusive -- we always forget that word -- the exclusive rights of authors, which as a consequence promotes science and the useful arts.

And so, I don't think people should get confused about offering for
distribution. It is definitely part of the copyright law, and it is not a stretch or an amendment to make it so.

MS. CLAGGETT: Thank you. We will conclude the panelists with Mr. Band.

MR. BAND: So, I might not agree with all of Mitch's interpretations, but putting that aside, just very quickly, The Washington Post yesterday had this big story about all these reports that are issued that no one reads.

MS. CLAGGETT: Don't say that about the Copyright Office, please.

(Laughter.)

MR. BAND: And the truth, in my view, the wrong conclusion, it said, well, these are all useless and no reason-- I think the problem is not that they are not read, but that they are read, but they are read and they are misused or taken out of context many years later. And I think that that is something
that we really need to -- or not "me" -- you need to think about when you consider doing a study, report, analysis, whatever, in this area. How is it likely to be used, not only in the next five years, but how is it likely to be used in 25 years?

And I am just thinking about the report that the Copyright Office, I think it came out with it in 1983 about interpreting 108. And I think that it was -- interpretation was completely wrong.

But, putting that aside, I mean, that report, a 25-year-old, or whatever, however many years that is, a 30-year-old report, is an issue in ongoing litigation, you know, in a completely different factual context.

And so, I think that there is a danger to having these reports that, then, many, many years later, you know, again when the world changes, but still someone is going to say, "Oh, look at what the Copyright Office
or the expert agency said then."

So, I think that that is a danger that you need to be aware of, especially in this context, why a report here as opposed to any one of the other 20 issues that you could easily be doing reports on?

And then, the final remark, just getting back to where we started, is that it is true that it is always important to know how we got to where we are and the roots and the legislative history and all the back-and-forth. But, at the end of the day, a judge has to decide. You know, it is up to the judge to make the decision how to apply the law to the fact.

And sort of all the legislative history is interesting, but at the end of the day it is their job, and I think we need to trust them and understand that we can't sort of micromanage what courts are going to do through reports, interpretations, legislation, you know, whatever. Judges are going to have
to apply the law to facts, and the facts are always going to be changing. The technology is always going to be evolving. And so, we have to, at least some level, have trust that they are going to do the right thing.

MS. CLAGGETT: Thank you very much.

Thank you to all of the panelists.

I am going to open it up and see if there is anybody from the audience.

Professor Ginsburg?

PROFESSOR GINSBURG: Hi.

I don't want to weigh-in on the institutional competence question. I just want to react to particularly Ms. Moy's comments because I think they take the making available right, or whatever we have, out of context, to the extent that we still have the fair use doctrine, we still have Section 512. And I thought that a number of Ms. Moy's examples were actually very good illustrations of how in a making available right, digital
distribution, whatever you want to call it, they can play together with the fair use doctrine.

So, the example of lots of scientists, let's say, are working together in a peer-to-peer network or they are all uploading and downloading their files to a shared Dropbox folder. Well, that might be a terrific example of fair use. That might. It may be that any third-party copyrighted content is being made available to too large a number of people to constitute a non-public. But if it is non-commercial research, that is probably fair use.

And if it is commercial research, this is Texaco. So, how is it different whether the content is being distributed by photocopies to the R&D department of a for-profit enterprise or that same content is being made available through a shared storage locker in the cloud? So, I still think that, regardless, the fair use doctrine is very much
part of it.

And I think the photo in the PowerPoint example, in addition to Nancy's response, if you are showing that PowerPoint to a large number of persons, such that it is a public performance and Section 110(1) doesn't apply, well, that is already a violation of the public performance right.

So, I am not sure that every scenario which might look problematic if we said, "Oh, my goodness, that's a making available to the public, and it is a new violation," whether or not it is a prima facie violation, it is not necessarily an infringement because of the fair use doctrine and other exceptions.

MS. CLAGGETT: Thank you very much.

I want to thank all the panelists.

We are going to quickly set up for Session 4, which will be a discussion of foreign implementation and interpretation of
the WIPO Internet Treaties.

Thanks.

(Whereupon, the foregoing matter went off the record at 3:22 p.m. and went back on the record at 3:26 p.m.)

MS. CLAGGETT: Okay. Since I think we ended a little bit late, we are going to our seats to try to get this last panel, this last formal panel with participants. And then, we will have an audience participation session.

MS. STRONG: So, good afternoon, everybody. Thank you for attending the fourth session of this afternoon's roundtable. This one is on Foreign Implementation and Interpretation of the WIPO Treaties. We have eight distinguished panelists.

And as in the prior sessions, we will just go around the dais, and if you can introduce yourself by name and affiliation? And we will get started after that.
MS. CASTILLO: My name is Sofia Castillo, and I am a Legal Fellow of the Copyright Alliance.

MR. DiMONA: Joe DiMona, Vice President, Legal Affairs, with BMI in New York.

MR. GENETSKI: Christian Genetski, General Counsel, Entertainment Software Association.


PROFESSOR LUNNEY: Glynn Lunney, Tulane.

MR. ROSENTHAL: Jay Rosenthal, Senior Vice President and General Counsel at the National Music Publishers' Association.

PROFESSOR GINSBURG: Jane Ginsburg, Columbia Law School.

MR. TEPP: Steve Tepp, on behalf of the Global Intellectual Property Center of the U.S. Chamber of Commerce.
MS. STRONG: Thank you all very much.

As in prior sessions, we are going to start with a general question or two, and then, dive down into some specifics. So, I would like to start off with the question of, basically, how do foreign laws implement the making available right? And I am going to be very specific here. I am talking about WCT Article 8 and WPPT Articles 10 and 14. And how has such implementation provided, in your view, either more or less clarity in these countries in the context of digital distribution? So, we are looking for experience abroad on implementation of these particular articles.

And if you can just tip your card?

And we will call on Professor Lunney.

PROFESSOR LUNNEY: So, just to start, to me, the process of sort of amending the U.S. copyright law in order to comply with
this international treaty strikes me as just a bit disingenuous. I don't see any of my friends from the European Union here. I haven't heard of any trade arbitrations seeking to change our law in this respect. So, I am not really sure it is the international treaty that is driving this particular examination of the making available right.

That being said, I think that the European Union and the other countries that have adopted the making available right have gone through the same process with respect to internet uses that we have gone through under our public performance and distribution right. They have used a different linguistic framework. They have come to different answers in particular situations. They have come to the same answer in some situations.

So, on the Cablevision case, for example, where the Second Circuit held that to be not copyright infringement, we have the
court in Singapore saying it is not copyright infringement. The court in Germany initially saying it is not copyright infringement, and then, coming back and saying, at least with respect to the first retransmission from the antenna to the subscriber's individual service space, that is a retransmission, and courts in Australia initially saying it is not, and then, changing their mind as well.

So, they have come to some different outcomes in some areas, but, on the whole, it is hard to see where their law is in any sense preferable on these issues or clearer on these issues than ours. And we would have to go through the same sort of 10-to-15-year process of litigation to sort out what a making available right would like in the United States, were we to adopt it.

MS. STRONG: Professor Ginsburg?

PROFESSOR GINSBURG: Thank you.

Okay. I guess we might start with the text of the WCT before turning to how it
has been implemented. And the language of the WCT treats the making available right as an instance of the right of communication to the public.

So, "without prejudice" to a whole bunch of provisions of the Berne Convention, where the right of communication to the public is specified, "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that the members of the public may access these works from a place and at a time individually chosen by them." That language is verbatim in Article 3 of the 2001 European Information Society Directive.

And I think that the "may access" makes clear that this covers not only a completed communication, but the prospect of a communication, the offer of a communication.
I think there is a legitimate
question whether Article 8 adds something to
the Berne Convention. This is relevant to the
extent that if the making available right is
not implicitly in the Berne Convention, is
something new with the WIPO Copyright Treaty,
then failing to implement the WIPO Copyright
Treaty would not subject us to trade sanctions
under the TRIPS, which incorporates Berne, but
the WIPO Treaties are post-Berne.

But if one thinks that Article 8
is a clarification of what the meaning of
right of communication to the public is, then
the making available right is also subsumed
within not only an international obligation,
but an enforceable international obligation.
So, that is a threshold question.

Then, as to how it has been
implemented or understood, Singapore is the
only country that has found that a
Cablevision/Aereo-type situation engages no
right under copyright. Every other
jurisdiction has either, under the rubric of making available or other pieces of things, such as the Shift TV case in Germany that Glynn Lunney referred to, have found that there has been a violation of an exclusive right under copyright.

As for the European Union, the European Court of Justice in the Svensson case has now made totally clear that the offering of a work, not merely the completed transmission of a work, is a making available to the public. The issue in Svensson ended up turning on whether there was, for there to be a communication to the public, whether there was a "new public" when the content was initially made available with authorization from Website No. 1 and subsequent websites linked to that content.

But on the front issue of whether or not making that content available via a link was a making available, that is now clear. And that position was also reiterated
more recently in the website-blocking case, in
the Telekabel Wien case that the ECJ decided
just about a month ago.

So, I think in terms of
international implementation, it is clear that
the offer, as well as the actual transmission
of content, is what the making available right
is all about.

One last comment, because I agree
with Glynn on this. In the United States our
approach, to put some things called
"distribution," including digital, and other
things in a box called "public performance,"
is something of an outlier. In most other
countries, the concept of communication to the
public covers digital communications, whether
as a stream or as a download.

MS. STRONG: Thank you very much.

Mr. Tepp?

MR. TEPP: Thank you.

So, on the previous two panels
ago, there was some discussion of room for
interpretation of what making available means. I think Professor Ginsburg has just quite articulately pointed out that, insofar as the question of making a work available, as within the scope of the making available right, it surely must be.

That is bolstered further by the text of the Guide to the Copyright and Related Rights Treaties Administered by WIPO, which is published by WIPO and which the Copyright Office referenced in its Notice of Inquiry for this process.

To the extent that commenters are offering the view that making available does not include making available, it seems to tax credulity. Or even more extremely, at least one commenter suggested that, if making available does include making available, it is, quote, "unprecedented." That seems hard to swallow.

To the extent that foreign laws, and we get into the particular question that
was posed, implement this right, it seems consistent with the interpretation that making available includes making available.

I did a brief survey using the WIPO Lex Database of Laws in preparation and tried to look at laws across geographic diversity and diversity of level of development, as well as diversity of whether or not they have actually ratified the WIPO Internet Treaties.

Albania, Australia, Brazil, Canada, China, Ecuador, Egypt, the European Union, Ghana, Japan, Nicaragua, and Pakistan, the ones I looked at, and every one of those has implemented a making available right. I can't speak to every jot and tittle of their implementation of that international law in their national courts. Of course, there is some room for national law and national interpretation, but the fundamental question of whether or not offering a work, making it available to the public, is within the scope
of the making available right and should be implicated under that right in order to comply with the treaties, seems to be fairly clear, both as a matter of the text of the treaty as well as looking at how other countries have implemented it.

Thank you.

MS. STRONG: Thank you.

Mr. DiMona?

MR. DI MONA: Okay. Thanks.

I think there are two areas where the public performance right in the United States falls short of what is happening in Europe. One has to do with the remote DVR-type situation that was addressed by the Cablevision case, and the other has to do with the exemption for downloading from the public performance right.

Taking the first one, we did in our paper, I think we put in evidence from various countries' laws that clearly show that making available right in England and
Australia and Japan has been recognized on the communications side to include the mere offering as well as the actual performance.

And there is a case called the TVCatchup case in the European Union which dealt, I believe, with a very similar situation of the Cablevision case, and came out that it was a violation of the making available right.

And parenthetically, there have been a few district courts who agreed with that in the United States as well. So, I think that that is a problem with the Cablevision decision. Hinging the existence of the public performing right in the United States on whether or not a copy of a certain kind was made or whether a putatively individual copy was made, I think is just a bad law, a bad outcome.

With a server, the cost of memory getting cheaper and cheaper and cheaper, anybody can architect a system that creates
individual copies in order to avoid copyright. And that is exactly what Aereo did. Having received the invitation, they said, okay, this is great; we will start providing subscription television with individual antennas. So, I think we are falling short there.

On the download issue, I think that the court again, a Second Circuit decision here, is wrong I think on the law, also wrong on the technology. The Copyright Act says, "public performance by any means, process now known, or hereafter invented." And the court came out with, well, it's a transmission, but only if it is an audible transmission, which is a special kind of process. And I think that is inconsistent. In Europe, as Professor Ginsburg was saying, it has been recognized to be a public performance, and collective societies there can license both mechanical and performance, and have been doing so for quite a few years now. They treat both streams and
transmissions to be both rights. And so, you know, I think that we are a little bit out of step there.

On the technology, I think also Professor Ginsburg this morning said that it is not helpful to think of streams and downloads as being radically poles apart. You can architect a download so that you can hear it right while it is going, while it is downloading. You can, similarly, make copies of streams. And there are a lot of variations in the middle. So, I think we fall short here on that issue as well.

MS. CLAGGETT: Thank you.

Mr. Rosenthal?

MR. ROSENTHAL: First of all, I want to address Joe's comments about that there is a real similarity, at least a growing similarity, between the two types of rights we are talking about here, the public performance, the distribution, reproduction; and that in Europe there certainly is a
different licensing format and a different
process that they use to license these rights
than we do over here.

Now the Copyright Office is
addressing these issues in your study on
licensing. You know, should we be bringing
some of these rights together, and all of
that? And that is fine, and that is for that
particular procedure.

But, essentially, we shouldn't be
looking at the fact that we are a little bit
different over here, and all the debate we had
this morning, as really being that significant
in the overall points by Steve and made by
Professor Ginsburg, that this does cover the
right and we should move forward in trying to
deal with it, whether through legislation
eventually or not.

I'm not sure, looking at Europe
and what they have done, because they have
done it in many different ways, is that
instructive to us. I think it is good that we
can look at the results over there and see
that they have come to some different results
than some over here.

Just one other point about
international law and the issue of the free
trade agreements. The free trade agreements
did not really concern me that much in terms
of us being really in violation of them until
the situation has arisen with Antigua. And I
think that we do have to and I think you have
to take into context that now we have a
situation where a country has brought an
action against the United States for a
violation of international law under WTO.

And now, they are engaging in a
process where they are effectively giving away
U.S. copyrighted works, not much, and it is
Antigua, yes, you know. But the point is
that, all of a sudden, the seriousness of our,
let's say, looking at the free trade
agreements and adhering to them in a way that
would not get us into trouble with the WTO I
think is much more important now because of that and should be taken into consideration, as you guys are reviewing these topics.

MS. STRONG: Thank you.

Mr. Schruers?

MR. SCHRUERS: So, Professor Lunney started by pointing out that he wasn't aware of any of our European colleagues sort of wringing their hands about the state of U.S. law. And as he said that, I was thinking that at least recently the shoe has been on the other foot. Many here in the U.S. were wringing hands about whether or not the European Court of Justice Svensson opinion was going to render a result whereby all hyperlinks on the internet needed to be licensed.

And I think that would have been an unfortunate and absurd result, which didn't occur only because of a somewhat convoluted opinion, which Professor Ginsburg alluded to, which seemingly suggests that if the new
audience is coterminous with the original audience, then -- anyway, there are logical readings of the opinion; there are also very illogical readings of the opinion.

Had there been an illogical result, that would have come out of an implementation in communications to the public. And so, having seen us just narrowly dodge a bullet, I think -- I mean, we don't actually know how that is going to play out over time -- but assuming we have dodged the bullet, it seems a uniquely inopportune time to sort of revisit that issue here and sort of take on the same risk.

Certainly, it would do no favors for the credibility of copyright law to say that every link needs a license. And I don't think anybody wants that result to occur in U.S. copyright law. So, that is, I hope, a less probable outcome here.

But, again, in the sort of European example, in our preparations for the
European consultation that recently occurred, one of the things that I heard extensively was concerns about multiple demands for one exploitation of the work. I mean, we have that now in Europe. We have that to some degree here in the United States.

Any interpretation that appears to expand distribution, so that one exploitation of the work means that perhaps not only the reproduction and public performance rights are triggered, but, also, the making available right for a use of the work, as we are seeing in Europe.

That seems to me to be a very real risk, and it would be unfortunate if some report or statement from the Copyright Office were to be the impetus for a lot of rightsholders to say, "Ah, well, now these works have already been given to the public in some licensed manner, but perhaps my newfound making available rights means that I am entitled to take a cut for actions that people
thought were adequately licensed." And I think that is a very real outcome and one that I am concerned about.

MS. STRONG: Thank you.

Next, Mr. Genetski, then Professor Ginsburg. And then, I am going to have a follow-up question about the structure of various copyright laws.

MR. GENETSKI: Thank you.

So, building on the point that Matthew closed there with, and going back to a specific example that Joe and Jay both raised as well, and coming at it from a slightly different perspective, which is the big question in front of us is whether there is some action the Copyright Office should take to recommend or as an impetus towards legislative action on a making available right here to be consistent with the WIPO Treaties.

And the perspective that I bring on behalf of the video game industry is just the practical business implication that might
result from including a making available
notion or right, whether it is layered on as
another item under 106 or it is incorporated
into existing rights.

I think that looking at the
foreign implementations, the different
approaches that have been taken by different
countries around the world, is instructive for
us in thinking about what the consequences of
any action here, other than sort of holding to
what has seemed to be the overwhelming
consensus point all day that we are in an okay
spot now for the most part with the umbrella
approach we have taken.

I would look at Canada, and
looking specifically at the issue that Joe
raised about, under the U.S. law, the
distinction between a download and a stream,
and a download being covered under
distribution right; stream being covered under
the public performance right. And the EU
taking a much different approach, which has
real implications for collection societies and licensing regimes.

Canada has, under a case that my trade association was the main plaintiff in, ESA v. SOCAN, took the same approach as U.S. law: it is a communication right, not public performance in Canada, but again split stream and download, had strong language about not stacking royalties, not layering the rights, collecting twice for the same act, as Matthew mentioned.

And in the wake of that decision and an overlap of just a few months, Canada passed its amendments to its Copyright Act, including incorporating a making available provision. Whether it is a separate right or not is the subject of a lot of debate now, but into its communication right, and solely within its communication right.

What that has spawned is, you know, within a year of a case that was litigated from the Copyright Board through
every intermediate court in Canada and, ultimately, decided by the Canadian Supreme Court, we are back to square one in the Copyright Board again, starting over, having arguments from very smart people on both sides about what the implication of that making available language being put into the communication right is.

And I don't want to re-litigate the issue here today, but the point is we are going to go down that same road again to reach a resolution, and you have got very different interpretations about whether that upset the apple cart. There are a lot of existing licensing practices that the companies that I represent have built into their ability to incorporate music into their works. They thought they had clarity. So, a well-intentioned action has now meant we have got several more years of confusion on that issue.

MR. DiMONA: Admit it, you enjoyed the first SOCAN case so much that you really
are looking forward to doing it a second time.

MS. STRONG: Thank you very much.

I would like to follow up on one or two issues you raised, but, first,

Professor Ginsburg.

PROFESSOR GINSBURG: Yes, well, it will be interesting to see what the Copyright Board of Canada does, which I think it should be doing shortly at this point, in determining whether the enactment of a making available right in Canada, whether that, in effect, replaces the ESA/SOCAN case or incorporates the ESA/SOCAN case.

Much of the debate in that case is also about whether a making available right includes prospective or the offering to download -- of a download. So, that will be another country's implementation to watch.

I just wanted to say something more about Svensson. In Svensson, the "new public" concept, which is not free of controversy, came to the rescue because,
otherwise, it would have been extremely
problematic. And I think it was for Europe a
more elegant solution than implied license,
which I think is perhaps the way we would go.

But it should also be recognized
that in taking that route, the European Court
of Justice ruled that it is a making
available, but there is no new public if the
initial communication from Website No. 1 was
authorized. But, if that initial
communication from Website No. 1 wasn't
authorized, then it is a making available. It
is a communication to the public, and it is a
direct violation. It is not a theory of
secondary liability.

In the first panel, we talked a
little bit about whether these sorts of
situations should be adjudicated as a matter
of secondary liability. I think in the EU,
one upshot of Svensson is that, if that
initial communication was not an authorized
communication, you have a direct violation,
and it is not based on secondary liability.

MS. STRONG: Thank you very much.

I actually was hoping to turn to another question, but I see that there are two flags up. So, Mr. Schruers?

MR. SCHRUERS: Yes, I will be really quick. I think I agree with everything Professor Ginsburg said about the interpretation of Svensson. And I was sort of thinking about how that would play -- right now, we are sort of seeing a similar fact pattern. I am a few days behind on the news, but I have seen that Quentin Tarantino has been litigating about a script that was made available that was leaked.

Sort of applying this sort of Svensson fact pattern, where you have got the initial communication was not authorized, and then, somebody linking to something that is newsworthy, you know, I sort of see a situation where you have people linking to something of public note, that may well, under
making available, be a direct violation, where
we wouldn't want it to be.

And I find it very troubling to
think that we, at a time when we, as I said,
just dodged a bullet I think in Europe, that
we want to sort of revisit and reintroduce
that same uncertainty here, is troubling.

MS. STRONG: Thank you.

Professor Lunney?

PROFESSOR LUNNEY: I will try to
be equally brief.

And so, my point would be that,
instead of looking at what they have and what
we have and saying, "Oh, they have this. That
would be nice. Let's take it on," we need to
look at the real-world consequences of
adopting their approach. It may be more
elegant, as Professor Ginsburg has said, but
do we really want strict liability if you link
to a site that is originally unauthorized?
That puts the burden on the linker to know
whether that original site is authorized or
unauthorized, as opposed to our current
secondary liability approach, which puts the
burden on the copyright owner to provide
notice, and then, follow with a takedown.
That procedure is not perfect, but
neither procedure is perfect, and we need to
compare their relative cost and benefits.
Just saying they have one and we have the
other doesn't advance the ball very far.

MS. STRONG: I think Professor
Ginsburg wants the last word.

PROFESSOR GINSBURG: 512(d), which
we have and they don't, the equivalent of
512(d) is a matter of interpretation so far,
and some national courts have come up with a
512(d) equivalent, but it is not yet
Europeanized.

And I should have mentioned in
that landscape that we also have 512(d) as a
part of the consideration of whether linking,
deep-linking or framing a website would be a
making available (or whatever we are calling
the patchwork of rights that we claim end up being the equivalent of making available).

MS. STRONG: Thank you.

There are two big trains of thought that I would like to come back to.
And so, just to place a marker, one, I would like to go back to a question that kind of takes up on what Mr. Genetski was saying about real-world consequences with respect to statutory design and how laws look.

And then, I would like to come back to this question about linking and, more importantly, the question of not all countries have secondary liability principles, and then, how does that work in their implementation of the making available rights?

So, putting a pause on the second, to go back to the first question I have -- and I will take Professor Lunney's admonition that we are not all international lawyers, so we are going to focus the question here just on their statutory language, not necessarily case
law.

There are countries around the world that have very explicit ways in which they break out the communications for public right, especially in the area of works. So, I have seen laws that will start with an overarching chapeau of: here's the communication to the public, and then, they will list about anywhere between 10 to 15 rights. Sometimes it will include the express making available right, if it has been more recently amended. In other cases it won't. So, this is not a new structure of listing very descriptive rights. So, they will have broadcasting, rebroadcasting, public performance, loudspeaker. You will have a very long list.

So, my question to the panel is, what is your experience in terms of real-world licensing issues in these foreign countries and real-world perhaps enforcement issues with respect to those countries that have these
very detailed communications to the public structures in their law that obviously have a making available component? I was wondering if you have any views on that.

Professor Lunney?

PROFESSOR LUNNEY: Well, it is a question of all what you're used to, right? So, if that is what you have grown up with, then it seems right and just and the only sensible way of doing it in the world. And you adjust your contract language appropriately.

I think the concern that my two commenters on the right raised is, if you already have the contracts or licenses in place, and then, you come along and change the right structure, do you grandfather-in those preexisting license arrangements?

MS. STRONG: Well, to follow up, I think that is my exact question, because some countries do have, and have had, these very detailed right structures, and then, the way
in which they amended their law, as they
perhaps implemented their treaty obligations
when they joined the WCT, is to add,
basically, the last including phrase from WCT
Article 8. And so, that would upset
potentially the new and old contracts.

I was just wondering if anyone on
the panel had any additional specific
information on perhaps cases in which they
were involved happened.

MR. SCHRUERS: So, I will
apologize that I can't answer that question.
I mean, there are international scholars here
far more studied on the subject than I am.

But I will make, I hope, the
obvious point that, sort of the more circles
there are in the Venn diagram, the more
concerns there are about things falling
between the circles, one.

And then, the sort of problem that
Christian's example with SOCAN illustrates so
well. It is that multiple circles overlapping
and to do one exercise you have got to check multiple boxes. And then, as soon as you add another one to the equation, right, you get that many more times the number of potential conflicts, right? It is sort of "N" times "N" minus 1. And so, the larger entity, the more complex we have. We already have six enumerated rights and this will cause that much more complexity, should we undertake the issue, the change.

MS. STRONG: Thank you.

Ms. Castillo?

MS. CASTILLO: Yes. I also don't have international law expertise. So, I can't answer the exact question that you are asking. But I think in terms of things that could be helpful for the Copyright Office to take into account in terms of issuing some kind of guidance support, and referring back to the Charming Betsy Doctrine that was mentioned several times this morning where courts, where possible, should interpret statutes in
accordance with the text and the spirit of international treaties.

There are two things in the WCT that could be helpful. One is one that Professor Ginsburg has already referred to, and it is the use of the permissive language where they say, "by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

So, basically, I think telling the courts that the use of that permissive language indicates that the offer of a work triggers the right, and that there is no international requirement for proof of actual access to the work. That might be helpful.

The other thing that might be helpful, looking in terms of determining the spirit of the treaty, is looking at the preamble. And sort of the first paragraph explains that the treaty seeks to develop and
maintain protection in a manner as effective
and uniform as possible to copyright owners.

And so, I think those two things
might be helpful for the Copyright Office to
take on any guidance that would be helpful to
the courts.

Thank you.

MS. STRONG: Thank you.

Mr. Rosenthal?

MR. ROSENTHAL: We haven't been
involved directly in any proceedings over
there. But, if you are asking how things are
licensed, the process, almost all the
countries have societies that engage in the
licensing of making available. And some of
them break it down between their two different
societies, one like in France SACEM [Société
des Auteurs, Compositeurs et Editeurs de
Musique], and then, SDRM does the mechanicals,
SACEM doing the representation rights that
they speak of over there.

In Germany, GEMA does them both.
And I believe in the United Kingdom, I think they are done both, but they have also merged recently. We can find out for you the exact nature, if that is what you are asking.

We could also supplement your record here by getting some information from the international societies who represent music publishers, ICMP [International Confederation of Music Publishers], maybe CISAC [Confédération Internationale des Sociétés d Auteurs et Compositeurs, also known in English as the International Confederation of Societies of Authors and Composers], about this particular issue of how are they licensed through the societies, if that would help.

MS. STRONG: Thank you.

Mr. Genetski?

MR. GENETSKI: I will start by echoing the I am not the international law scholar disclaimer. But I think I can address your question at a high level from the perspective of the industry I represent.
Because we look at this issue broadly and kind of from two different perspectives. So, our members, they create a lot of intellectual property. Strong copyright regimes are very important to us instinctively and practically.

When we go around the world to enforce those rights, typically, the analysis you will conduct, you won't start with the specific lists and the rights and how they are protected. You will start with, what's the problem that we are dealing with? How is the value of our intellectual property being compromised by a certain service or individual or group of individuals?

You know, instinctively, most of the members come from the U.S. trade associations. Our member companies will approach that through their own lens and think of our own Copyright Act first and sort of intuitively understand what would be infringing about the conduct here. And then,
you go to that list, and you go through the rights, and then, you go through the precedents in that country and the way those rights have been interpreted. And you try to match the activity to what makes it unlawful in a specific jurisdiction.

We really follow the same approach when we are sitting on the opposite side, which is we want to incorporate other copyrighted works into the audiovisual works, into a downloadable game. We want to have music.

So, there what we will do is figure out what rights do we need to clear and how do we clear them under certain jurisdictions. And so, it is the same practical approach, which goes back, again, to the larger point of any change for the sake of clarification, well-intentioned change, where there is already fairly well-established practices under current things can be upsetting.
MS. STRONG: Thank you.

Let me turn back to a little bit of what we were talking about with Svensson and the whole issue of how the secondary liability might relate to the effect of enforcement or of the availability of the making available right itself.

So, I mentioned earlier, not all countries have a secondary liability concept. I know it sounds shocking, but they don't.

And I guess a couple of questions. Are you aware of any cases or practices in those countries that do not have a secondary liability concept and there has been making available litigation, or perhaps the converse? I am trying to figure out, and I would be interested in getting more information from the experts on that. I think we have had a little bit of an example of Svensson, but I was wondering if there are any other examples you might be able to provide.

Professor Ginsburg?
PROFESSOR GINSBURG: I don't have the citation, but I believe Spain does not have the concept of secondary liability for copyright infringement. And Spain has a very, very high level of what is called "unauthorized activity." They may even be on our watch list. But they are kind of a notorious example of an EU country that does not recognize the doctrine.

MS. STRONG: So, I guess I will take advantage of your knowledge there. How do you think in a future case Spain might respect the recent Svensson case?

PROFESSOR GINSBURG: Well, since it is not a theory of secondary liability, that's not a problem. The problem is what happens if you are providing instrumentalities, but it doesn't come within the ambit of the making available right.

So, if you are providing instrumentalities for copying, but outside of a making available context, that seems to be
a big hole.

MS. STRONG: Yes. And there is probably some more experience here on the experience in Spain, but Spain does have, as you mentioned, a challenge problem with piracy in the online environment, and especially involving linking sites.

And so, I am curious to know how -- I am going to take that back. I guess let me go back to perhaps another region. There are other countries in Latin America that also don't have a concept of secondary liability in the copyright context. I think there has been some struggle in some nations to try to extend just regular tort to that, but they have been unsuccessful. I was wondering if maybe in Latin America or in Asia whether anyone has any other ideas or information to provide to the record on how those countries are implementing making available.

Mr. Tepp?

MR. TEPP: I think, by and large,
making available gets implemented as a matter of direct liability. That seems more likely the circumstance under which it will come up. Obviously, there are some countries that don't have secondary liability at all. There are many countries that have secondary liability in forms that are significantly different than in the United States, through tort law, through aiding-and-abetting-type statutes on the criminal side.

But, of course, I think what I would urge you to keep in mind is that what you are being urged by some commenters is that making a work available should not and does not, some are arguing, implicate any exclusive right under U.S. law. Well, if there is no direct infringer, the secondary liability analysis is extremely brief. There is none.

So, I think the focus I would urge you to maintain is on the direct liability question and whether or not the United States is providing a making available right in a way
that complies with any plain meaning of that
term, if making a work available does not
implicate any exclusive right under U.S. law.
I don't see how it could.

MS. STRONG: Thank you.

Maybe if we can go back to some
higher-level questions on linking, are you
aware of any other countries' laws or
practices that make the distinction between
linking to legitimate materials and linking to
infringing materials? I mean, we have had
some discussion of Svensson, but I know this
probably will raise, again, the question or
the observation that Mr. Tepp on what could
possibly be direct liability, what would be
secondary liability.

So, in the area of linking to
different kinds of materials, do you have any
comments or observations?

(No response.)

MS. CLAGGETT: I was going to
actually say I don't have any further
questions, but that it is just 4:08. So, we actually only have a few more minutes left in this panel anyway.

Normally, we would say we would want to use those last couple of minutes for audience participation, but we have an audience participation session next. So, we probably don't need to do that. So, maybe just one or two final questions, and then, we will turn it over to the audience participation.

MS. STRONG: I guess I will toss out sort of another higher-level question. Since the implementation of the treaties in 2002, we have reached the magic number of 90, if that is a magic number, but that is quite a large number of member states for a relatively young treaty.

Do you have any observations or general trends, either at the rate of implementation or the regions of implementation or the issues related to
implementation, given the recent decade of success, I would say, and the widespread adherence to the treaties?

MS. CLAGGETT: I think Mr. Rosenthal looks like he wants to answer that question.

(Laughter.)

MR. ROSENTHAL: Well, I really don't. Actually, no.

On all of these points, these are very, obviously, important questions. And I think that maybe if we were given some guidance beforehand on some of these questions, we might have been able to come to you with answers.

If this is important to your deliberations, we will work on getting you some of the answers to this, and we can supplement, again, your record on these points. I mean, as you raise these questions, I am like, boy, this is something I would like to know more about.
So, we are open to working with you on that and getting you this from the organizations in Europe and in Latin America that can give you some good answers on it.

MS. CLAGGETT: Thank you. We appreciate that.

Mr. Tepp?

MR. TEPP: It is a very broad question, essentially asking about implementation both in national law and in national courts in 90 different countries. I am not prepared to speak categorically in absolute terms as to 90 countries.

I can tell you that the work I have done indicates that, overwhelmingly, the implementation is consistent with the view that offering a work, making it available, is and does implicate an exclusive right under national law, in compliance with the WIPO Internet Treaties.

As I mentioned earlier, I also found some countries that have not yet
officially ratified those treaties, but appear to have at least implemented the making available right, consistent, again, with that interpretation of the treaties.

And I agree with the observation that to have in such a short time so many countries adopt the treaties speaks to their importance.

And just sort of two points that I will make in the vein of closing remarks. One is there was a question raised earlier about whether any of our trading partners or other governments really care much about what U.S. law is on this point. I can speak from personal experience that the government of Japan has inquired about our compliance with the making available right, in particular, for years, and that it was important to them, and they are not entirely convinced that we are complying with it. And I understand why, although I, of course, when I was a representative of the U.S. government, always
maintained that we were pristine.

My final point is that in this overall atmosphere of global challenges to copyright protection and enforcement, where we have 90 countries that have implemented/ratified the treaties, and the United States having to ask itself whether we actually fully comply with it, it is not a helpful situation for us to be in.

The United States is looked to as a global leader in intellectual property generally and in copyright, in particular. And I think that it is important that we provide the best possible example of implementation and enforcement of obligations that we ask other countries to undertake to provide that sort of fair compensation to creative authors and industries.

Thank you.

MS. STRONG: Thank you.

Professor Ginsburg?

PROFESSOR GINSBURG: Japan did
decide a Cablevision-like case and found that it was a violation of their rights.

Two further thoughts, one inspired by Steve Tepp, which also gets back to the Charming Betsy Doctrine. Because there seems to be some disagreement about whether the Charming Betsy Doctrine actually matters because we have sometimes had a tendency to go it our own way and not make every effort to interpret our copyright law in light of international obligations, assuming that we agree about what those international obligations are.

And we do have a somewhat inglorious record when it comes to the Berne Convention and, notably, moral rights. I think Steve has a point that it doesn't make us look good to take a truculent attitude towards our international obligations.

And also, the Supreme Court attributed to Congress, when it came to the Uruguay Round Amendments Act and the
restoration of copyright in foreign works prematurely in the public domain in the United States, that Congress had intention of "unstinting adherence to Berne."

And I suppose that one might try to argue that, when the position was taken that we didn't need to amend our Copyright Act because we had, through bits and pieces, we had the equivalent of a making available right, that we should be "unstinting" about that as well.

The last comment, which might open a hornet's nest, is, one, there is a private international law problem with the making available right, which is: where does the act which gives rise to liability occur? Does it occur in the country from which the work is made available? Does it occur in the country to which the work is made available? Does it occur in both?

The ECJ in the Football Dataco case determined that, where a particular
country has been targeted for the
communication, the work was certainly made
available to that country, but, also,
 preserved the possibility that the country
from which the work is made available might
also be a locus of the making available right.

This is an important issue because
of the question of enforceability. Because if
you have any transnational making available,
which you almost certainly do, you wouldn't
want to conceive of the right in a way that
would allow opportunistic restructuring of the
offering of content.

So, it goes back to something that
we referred to earlier this morning with
respect to the reproduction right. If the
copies are being made on a server offshore,
does that elude effective copyright
enforcement or enjoyment of rights in the
United States? So, the "from/to" question is
one that I think also needs to be thought
about in the context of a making available
right or its equivalence in U.S. law.

            MS. STRONG: Thank you.
            
            Our final two, now three, we will
            
            just go down the row this way. So, Mr.
            
            DiMona, Mr. Schruers, and Professor Lunney.
            
            MR. DiMONA: Thanks, Maria.
            
            I just want to conclude my
            
            participation by saying that we are in a world
            
            that is awash in piracy today. And we have
            
            creators who are struggling. I want to echo
            
            a word that my colleague John Beiter said this
            
            morning. Some writers, authors, and creators,
            
            they need strong protection.
            
            And as far as I am aware,
            
            entertainment products are one of the only
            
            positive balance of trade that the United
            
            States has nowadays where we are actually
            
            making more money from foreign sources than we
            
            are spending. We need to protect our culture
            
            in the future. We need to protect creators.
            
            And my own personal view is that
            
            we need very robust copyright rights in the
digital age to help with this problem and narrow exemptions. You know, I am in favor of exemptions as much as the next guy if there is a meritorious argument to be made. The copyright law is filled with exemptions where Congress looked at a particular situation and said, "You know, if you are paying this right, you don't have to pay that right." But that should be thought of and the case should be made for those.

A final comment I will make, to go back to your question, Maria, about how would you fix the law: should you write a very, very detailed public communication right with a bunch of subparts or should you just have a broad statement?

My sense is a broad statement is better, but really there is a fine line there. Because if Congress tries to write down every single possibility of a scenario, they are not going to be able to do it. And technology evolves so quickly that they will just miss a
few. Things happen no one can understand.
So, that is a risk there.

If, on the other hand, you go with
a broad statement and say it should cover
everything, then you run the risk, like the
court did in Cablevision, where they just made
one misinterpretation, and, all of a sudden,
you have got this loophole that you just can't
remedy.

So, I don't know exactly what to
do with that, but I think broadly-enunciated
principles with particular narrow exemptions
is probably my feeling, and I think the law
needs to be made more robust, not less. And
that's it. That is all I want to say on that.

MS. STRONG: Thank you.

Just for the record, I was asking
for examples outside the U.S. I wasn't saying
that the Congress was going to write a very
detailed list.

Mr. Schruers?

MR. SCHRUERS: So, one of the
other areas where the U.S. has a very strong, positive balance of trade is the export of digital services. It is one of our fastest-growing exports. And certainly, we wouldn't want to do anything to endanger that.

And indeed, other countries have noticed that, the fact that Spain, Germany, well, in the order of France, Germany, and Spain have all now implemented or are considering implementing ancillary right-like proposals which they can assign to domestic stakeholders to tax internet services. They are exercising the quotation right in the Berne Convention. It shows that there is great interest in finding new sources of revenue from existing services. And we wouldn't want to see a making available right here in the United States do something similar.

And here we are at the end of the day, and I sort of figured at some point I would find what I was thinking of as the
iCraveTV case. So, in WIPO we have been
fighting for years now about the WIPO
Broadcast Treaty, which is sort of a perennial
issue.

And the one case that was the
problem that we need to fix, right -- there
was always the iCraveTV case. That was held
up to say this is why we need a WIPO Broadcast
Treaty. Now that is either a good example or
a bad example. It doesn't really matter.

Here I haven't even heard that
example yet. So, I sort of came in today
thinking like I am going to hear what the case
is that is the problem, and then, I can go and
read the case. And I am not sure where it is
that a plaintiff brought a case, and then,
could not recover because there was no making
available right.

And when Jon Band pointed out on
previous panels that there seem to be in many,
if not all, of these case the reproduction
right applying, I expected somebody to say,
"Well, ah, that wasn't the case in this case, and that's why we need it." And I haven't heard that.

So, I feel like we are largely responding to hypotheticals until I hear what that case is. And if someone wants to email me the citation, I would be happy to read it.

MS. STRONG: Professor Lunney?

PROFESSOR LUNNEY: Just a final thought. Piracy, depending on how you define it, certainly some people think it is rampant. But when we look around the world at all the different legal regimes that different countries have adopted, no one has found the silver bullet. No one has found the magical language you can stick into your Copyright Act that will shut down file sharing, whether peer-to-peer or otherwise.

Europe has it. They still have 1350 petabytes a month of file sharing traffic on their internet backbone. So, it doesn't appear that this is really going to help
significantly, and I am concerned that it is
going to open the doors to some really
ambiguous -- if we add a broad making
available right, it is going to be very
unclear what exactly that means in the U.S.

MS. CLAGGETT: Thank you very
much.

We are going to close it, but I
think Professor Ginsburg will have the last
word.

I will just note that we haven't
actually had any audience members sign up so
far to make any final remarks. So, audience
members, if you do want to make any final
remarks, please come to the podium.
Otherwise, we will close with Professor
Ginsburg and any other participants who have
final words.

PROFESSOR GINSBURG: I would like
to take the focus off of file sharing and
piracy because I think that one of the very
important features of a making available right
or an interpretation of the digital
distribution right as covering offers and
public performances, covering offers, is the
affirmative side, which is licensing; that
there shouldn't be gaps in the panoply of
rights that get licensed.

And I think that we may have an
issue about overlapping rights, and that needs
to be worked out. But I think that, given the
way copyrighted works are enjoyed by the
public, there are increasingly variations on
access models. And the WIPO Treaty says "may
access." It is all about access.

So, I think we should think about
this not simply in the enforcement context,
but in the positive context of what set of
rights do we need in order effectively to
grant rights, so that people may enjoy
copyrighted works without the threat of being
labeled infringers.

MS. CLAGGETT: Thank you very
much.
I want to thank the panelists for this session. Thank you very much.

And as the panelists depart, if anyone, as I said, would like to make comments from the audience, please step up to the podium, and we will start with our audience participation session.

MR. BAND: So, I just wanted to respond to some of the comments that were made in this last panel.

One is that there would be no surer way to sort of mobilize public opposition to the Copyright Act than to have a direct infringement liability for linking. I mean, that would be an absolutely horrible idea and would completely discredit the Copyright Act.

I mean, the only thing that I can imagine that would discredit the Copyright Act more or the copyright system more than direct infringement for linking would be to try to extend copyright term again beyond life plus
70. So, you know, that would probably be the only thing that would be a worse idea than having direct infringement for linking.

The second point is that, in terms of looking to foreign law for models, you know, yes, it is always good to look to foreign law for interesting approaches, but we should, again, be somewhat consistent to not only look to foreign examples for expansion of rights, but also for interesting exceptions and limitations.

And so, I note that the UK now is considering -- and I don't understand their parliamentary system -- but I understand that they very soon will now have in their copyright law all kinds of exceptions on contracting-out. In other words, that contractual limitations on a variety of exceptions will be null and avoid. I mean, they already have that in the EU Software Directive and some other places, but this would be in UK law with respect to libraries
and educational institutions, for a variety of exceptions.

So, I think that that is something I would recommend, looking at countries contracting out.

Or, like in Canada, with statutory damages, they have a limit on the total amount of statutory damages per transaction for non-commercial use. So, that I think is like 5,000 Canadian dollars. So, that would significantly reduce the statutory damages available in a non-commercial use situation.

MS. CLAGGETT: Thank you very much.

Do we have any other participants -- not participants -- audience members who would like to provide any final remarks?

(No response.)

Okay. We definitely want to thank all of the participants today. This has been very, very helpful to us in terms of exploration in further detail some of the
issues that were raised in the comments. As I mentioned before, there is a possibility that we might ask for further written comments and, if so, we will issue an NOI that asks some additional questions based on some of the conversation that we received here today.

We expect to be able to post the transcript of our proceedings in the next several weeks, as well as a videotape of the proceedings as well.

So, thank you, and we look forward to working with everyone as we explore this issue in further detail. Thank you very much.

(Whereupon, at 4:28 p.m., the meeting was adjourned.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Public Roundtable on the Right of Making Available


Date: 05-05-14

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]
Court Reporter