The United States implemented the WIPO Internet Treaties through the Digital Millennium Copyright Act ("DMCA") in 1998. Based on advice received from the Copyright Office, among many other experts, Congress did not amend U.S. law to include explicit references to "making available" and "communication to the public," concluding that Title 17 already provided those rights. As former Register of Copyrights Marybeth Peters observed:

While Section 106 of the U.S. Copyright Act does not specifically include anything called a "making available" right, the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance. . . . Which of these rights are invoked in any given context will depend on the nature of the "making available" activity.6

Indeed, both Congress and the Executive Branch have continued to support this view since the enactment of the DMCA.7

### I. Background

The WIPO Internet Treaties—the WIPO Copyright Treaty ("WCT")1 and the WIPO Performances and Phonograms Treaty ("WPPT")2—require member states to recognize the rights of "making available" and "communication to the public" in their national laws. The treaties oblige member states to give authors of works, producers of sound recordings, and performers whose performances are fixed in sound recordings the exclusive right to authorize the transmission of their works and sound recordings, including through interactive platforms, such as the Internet, where the public can choose where and when to access them. In the specific context of interactive, on-demand situations, WCT Article 8 and WPPT Articles 10 and 14 provide treaty members with flexibility in the manner in which they implement this right.3

WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 ("Without prejudice to the provisions of Articles 11([i][i], 11b(1)(i) and (ii), 11r(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorization 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 members of the public may access these works from a place and at a time individually chosen by them.").) (text of Agreed Statement omitted). WCT Article 8 is entitled "Right of Communication to the Public."4

WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, 36 I.L.M. 76. Articles 10 and 14 provide the making available right to performers whose performances are fixed in sound recordings (phonograms) and to producers of sound recordings. The separate "communication to the public" provision in the WPPT (Article 15) involves a right of reproduction, and is not the same "communication to the public" right found in the Berne Convention and WCT Article 8.5

5WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 ("Without prejudice to the provisions of Articles 11([i][i], 11b(1)(i) and (ii), 11r(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorization 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 members of the public may access these works from a place and at a time individually chosen by them.").) (text of Agreed Statement omitted). WCT Article 8 is entitled "Right of Communication to the Public."

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3This flexible approach is known as the “umbrella solution.” See Mihály Ficsor, World Intellectual Property Organization, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms 209 (2003) (WCT Article 8’s umbrella solution allows treaty members to implement the making available right through “a right other than the right of communication to the public or through the combination of different rights”); id. at 247–48 (WPPT Articles 10 and 14 apply umbrella solution “in a fully fledged manner incorporating the neutral description of interactive digital transmissions directly”).


7See H.R. Rep. No. 105–507, 105th Cong. 3d Sess. 3 (1998) ("The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law."); see also WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2261 & H.R. 2180 Before the H.R. Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 106th Cong. 43 (1999) (Register of Copyrights advising Congress that there was “no need to alter the nature and scope of the copyrights and exceptions, or change the substantive balance of rights embodied in the Copyright Act”). More recent research into the legislative history of U.S. law by Professor David Nimmer and Professor Peter Menell has provided additional textual support regarding Congress’s views on the breadth of existing U.S. law and the broad scope of the making available right. See Melville B. Nimmer & David Nimmer, 2 Nimmer On Copyright § 8.11 (2012); Peter S. Menell, In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. Copyright Soc’y U.S.A. 1, 50–51 (2011).


9 See Internet Policy Task Force, U.S. Dep’t of Commerce, Copyright Policy, Creativity, and Innovation in the Digital Economy 15–16 (2013), available at http://www.uspto.gov/news/publications/copyrightgreen.pdf (noting that Copyright Act’s distribution right was intended to include “the mere offering of copies to the public” and that contrary judicial decisions “predate . . . Continued
The lack of explicit references to these rights in U.S. law, however, has led some courts and commentators to express uncertainty over how the existing rights in Title 17 may apply to various methods of making of copyrighted works available to the public, including in the digital environment. Especially in the Internet era, in any given case several of these rights (reproduction, distribution, public performance, and public display) may be at issue, depending on the facts involved. Courts, academics, and practitioners particularly have focused on the scope of the distribution right under Section 106 and have debated whether it fully encompasses the making available of a copyrighted work without proof of an actual distribution. For example, two early Eighth and Fourth Circuit cases discussing making available yielded conflicting results. The Eighth Circuit in National Car Rental System, Inc. v. Computer Associates International, Inc. rejected the notion that making a work available without more violated the distribution right. The principal authority to the contrary is the Fourth Circuit’s decision in Hotaling v. Church of Jesus Christ of Latter-Day Saints, in which the defendants made several unauthorized microfiche copies of genealogical research materials, one of which ended up in a library collection. The library did not keep records of public use, and therefore there was no evidence of the copy being loaned to the public. The court found that making unavailable to the public constituted distribution because “[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”

A recent Tenth Circuit decision, Diversey v. Schmidly, followed Hotaling’s conclusion that making a work available to the public constitutes distribution under Section 106(3). Diversey involved a similar situation to recent academic scholarship on “previously unanalyzed legislative history”.

In sum, while Congress and the Copyright Office have agreed that U.S. law covers the making available right of the WCT, courts have encountered difficulties in evaluating the scope of this interactive right, and the level of evidence needed to establish liability, in the specific cases before them. In a letter dated December 19, 2013, Representative Melvin L. Watt requested that the Copyright Office “assess the state of U.S. law recognizing and protecting ‘making available’ and ‘communicating to the public’ rights for copyright holders. . . . In light of the rapidly changing technology and inconsistency in the various court discussions of these rights . . . it is important that the Copyright Office study the current state of the law in the United States.” Specifically, Representative Watt asked the Office to review and assess: “(1) How the existing bundle of exclusive rights under Title 17 covers 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; (2) how foreign laws have interpreted and implemented the relevant provisions of the WIPO Internet Treaties; and (3) the feasibility and necessity of amending U.S. law to strengthen or clarify our law in this area.”

On January 14, 2014, the House Judiciary Committee’s Subcommittee on Intellectual Property, Competition, and the Internet held a hearing during which two witnesses were asked to address the issue of the making available right. These witnesses expressed a variety of views on whether current U.S. copyright law provides sufficient clarity on this issue and whether adding an explicit making available right to Title 17 would lend. Unless a copy of the work changes hands in one of the designated ways, a ‘distribution’ under §106(3) has not taken place. Merely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder’s exclusive right of distribution.”.
be beneficial. They agreed, however, that current law is properly construed to provide such protection.

II. Request for Comment

In light of uncertainty among some courts regarding the nature and scope of the making available and communication to the public rights, and to facilitate the study requested by Representative Watt, the Copyright Office seeks public comments on the three main issues listed above. The Office poses additional questions on these three topics below, and requests that commenters identify the questions they are answering in their responses.

1. Existing Exclusive Rights Under Title 17

a. How does the existing bundle of exclusive rights currently 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 downloads of copyrighted content, as well as more broadly in the digital environment?

b. Do judicial opinions interpreting Section 106 and the making available right in the framework of tangible works provide sufficient guidance for the digital realm?

2. Foreign Implementation and Interpretation of the WIPO Internet Treaties

a. How have foreign laws implemented the making available right (as found in WCT Article 8 and WPPT Articles 10 and 14)? Has such implementation provided more or less legal clarity in those countries in the context of digital distribution of copyrighted works?

b. How have courts in foreign countries evaluated their national implementation of the making available right in these two WIPO treaties? Are there any specific case results or related legislative components that might present attractive options for possible congressional consideration?

3. Possible Changes to U.S. Law

a. If Congress continues to determine that the Section 106 exclusive rights provide a making available right in the digital environment, is there a need for Congress to take any additional steps to clarify the law to avoid potential conflicting outcomes in future litigation? Why or why not?

b. If Congress concludes that Section 106 requires further clarification of the scope of the making available right in the digital environment, how should the law be amended to incorporate this right more explicitly?

c. Would adding an explicit “making available” right significantly broaden the scope of copyright protection beyond what it is today? Why or why not? Would existing rights in Section 106 also have to be recalibrated?

d. Would any amendment to the “making available” right in Title 17 raise any First Amendment concerns? If so, how can any potential issues in this area be avoided?

e. If an explicit right is added, what, if any, corresponding exceptions or limitations should be considered for addition to the copyright law?

If there are any pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments.

III. Public Roundtable

On May 5, 2014, the Copyright Office will hold a public roundtable to hear stakeholder views and to initiate discussion of the three topics identified above. The agenda and the process for submitting requests to participate in the public roundtable will be available on the Copyright Office Web site on or about April 7, 2014.

IV. Requests To Participate

Requests to participate in the public roundtable should be submitted online at http://www.copyright.gov/docs/making_available/. Nonparticipants who wish to attend and observe the discussion should note that seating is limited and, for nonparticipants, will be available on a first come, first served basis.


Maria A. Pallante,
Register of Copyrights.

[FR Doc. 2014–04104 Filed 2–24–14; 8:45 am]

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MILITARY COMPENSATION AND RETIREMENT MODERNIZATION COMMISSION

Cancellation of a Meeting of the Military Compensation and Retirement Modernization Commission

AGENCY: Military Compensation and Retirement Modernization Commission.

ACTION: Notice of cancellation of public meetings and town hall meeting.

SUMMARY: This notice cancels the hearings and town hall that were to be held on Tuesday, February 25, 2014.

DATES: The public hearings and town hall originally scheduled for Tuesday, February 25, 2014, are cancelled.

ADDRESSES: The hearings and town hall were to be held Tuesday, February 25, 2014 at the Embassy Suites Fayetteville Fort Bragg, 4760 Lake Valley Drive, Fayetteville, North Carolina 28303.

FOR FURTHER INFORMATION CONTACT: Christopher Nuneviller, Associate Director, Military Compensation and Retirement Modernization Commission, P.O. Box 13170, Arlington VA 22209, telephone 703–692–2080, fax 703–697–8330, email christopher.nuneviller@mcrcm.gov.

SUPPLEMENTARY INFORMATION: A notice of public hearings and town hall meeting that appeared in the Federal Register on February 18, 2014 (79 FR 9285) announced that the Military Compensation and Retirement Modernization Commission (Commission) was to hold public hearings and a town hall meeting on Tuesday, February 25, 2014, to seek the views of service members, retirees, their beneficiaries and other interested parties regarding pay, retirement, health benefits and quality of life programs of the Uniformed Services. The Commission was to also hear from senior commanders of local military commands and their senior enlisted advisors, unit commanders and their family support groups, local medical and education community representatives, and other quality of life organizations.

The public hearings and town hall meeting will be rescheduled for a later date.

Christopher Nuneviller,
Associate Director, Administration and Operations.

[FR Doc. 2014–04126 Filed 2–24–14; 8:45 am]

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