LIBRARY OF CONGRESS

United States Copyright Office

[Docket No. 2014–2]

Study on the Right of Making Available; Comments and Public Roundtable

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Request for comments and notice of public roundtable.

SUMMARY: The United States Copyright Office is undertaking a 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 holders. The Office is requesting public comments on how the existing bundle of rights under Title 17 covers the making available and communication to the public rights, how foreign laws have addressed such rights, and the feasibility and necessity of amending U.S. law to strengthen or clarify our law in this area. The Copyright Office also will hold a public roundtable to discuss these topics and to provide a forum for interested parties to address the issues raised by the comments received.

DATES: Comments are due on or before April 4, 2014. The public roundtable will be held on May 5, 2014, from 9:00 a.m. to 5:00 p.m. EDT.

ADDRESSES: All comments should be submitted electronically. To submit comments, please visit *http://www.copyright.gov/docs/making_available/*. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (''MB'') in one of the following formats: The Portable Document File (''PDF'') format that contains searchable,accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (''RTF''); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post all comments publicly on the Office's Web site exactly as they are received, along with names and organizations.

The public roundtable will take place in the Copyright Office Hearing Room, LM–408 of the Madison Building of the Library of Congress, 101 Independence Avenue SE., Washington, DC 20559. The Copyright Office strongly prefers that requests for participation be submitted electronically. A participation request form will be posted on the Copyright Office Web site at *http://www.copyright.gov/docs/making_available/* on or about April 7, 2014. If electronic submission of comments or requests for participation is not feasible, please contact the Office at 202–707–1027 for special instructions.

FOR FURTHER INFORMATION CONTACT: Maria Strong, Senior Counsel for Policy and International Affairs, by telephone at 202–707–1027 or by email at *mstrong@loc.gov*, or Kevin Amer, Counsel for Policy and International Affairs, by telephone at 202–707–1027 or by email at *kamer@loc.gov*.

SUPPLEMENTARY INFORMATION:

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 obligate 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]

The United States implemented the WIPO Internet Treaties through the Digital Millennium Copyright Act (''DMCA'') in 1998.[4] 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.[5] 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]

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[1] WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 (''Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, 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 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.''

[2] 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 remuneration, and is not the same ''communication to the public'' right found in the Berne Convention and WCT Article 8.

[3] This 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'').

[4] Public Law 105–304, 112 Stat. 2860 (1998).

[5] *See* H.R. Rep. No. 105–551, at 9 (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. 2281 & H.R. 2180 Before the H.R. Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary,* 105th Cong. 43 (1997) (Register of Copyrights advised 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).

[6] *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 107th Cong. 114 (2002) (letter from Marybeth Peters, Register of Copyrights, United States Copyright Office).

[7] *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/copyrightgreenpaper.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.[8] 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.[9] 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.[10] The library did not keep records of public use, and therefore there was no evidence of the copy being loaned to the public.[11] The court found that making a work available 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.'' [12]

A recent Tenth Circuit decision, *Diversey* v. *Schmidly,*[13] followed *Hotaling*'s conclusion that making a work available to the public constitutes distribution under Section 106(3). *Diversey* involved a similar situation to *Hotaling* and addressed a library lending an unauthorized copy of a work to the public. The Tenth Circuit noted, however, that there has not been consensus on *Hotaling*'s applicability to Internet file-sharing cases, and the court avoided extending its holding to those digital situations.[14]

Other courts have addressed the scope of the distribution right in the online context and have reached similarly conflicting results. The Ninth Circuit in *A&M Records* v. *Napster, Inc.* concluded that distribution encompasses ''making available,'' observing that ''Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights.'' [15] Other courts have disagreed and required actual distribution. Thus, the court in *London-Sire Records, Inc.* v. *Doe 1,* which considered infringement of the distribution right through peer-to-peer file sharing, cast doubt on *Hotaling,* asserting that ''[m]erely because the defendant has 'completed all the steps necessary for distribution' does not necessarily mean that a distribution has actually occurred.'' [16] Notably, however, while the *London-Sire* court required actual distribution, it did not require direct evidence of dissemination over peer-to-peer networks, holding instead that a reasonable fact-finder may infer that distribution actually took place where the defendant has completed all necessary steps for a public distribution.[17] Other courts have also relied on the language of Section 106(3) to require actual distribution in order to find a violation of that right.[18]

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.[19]

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.[20] 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

recent academic scholarship'' on ''previously unanalyzed legislative history'').

[8] The Section 106 distribution right is far broader than the new distribution right afforded under the WIPO Treaties (WCT art. 6 and WPPT arts. 8, 12).

[9] 991 F.2d 426, 430 (8th Cir. 1993) (''[W]e cannot conclude that an allegation that National 'permitted the use' necessarily amounts to an allegation of the actual distribution of a copy of the program.'').

[10] 118 F.3d 199, 202 (4th Cir. 1997).

[11] *Id.* at 203.

[12] *Id.*

[13] *Diversey* v. *Schmidly,* No. 13–2058, 2013 U.S. App. LEXIS 25506, at *12–13 (10th Cir. Dec. 23, 2013).

[14] *Id.* at *13–14 n.7.

[15] *A&M Records, Inc.* v. *Napster, Inc.,* 239 F.3d 1004, 1014 (9th Cir. 2001); *see also Universal City Studios Prods. LLLP* v. *Bigwood,* 441 F. Supp. 2d 185, 190 (D. Me. 2006) (''[B]y using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet, Defendant violated Plaintiffs' exclusive right to distribute the Motion Pictures.''); *Warner Bros. Records, Inc.* v. *Payne,* 2006 U.S. Dist. LEXIS 65765, at *8 (W.D. Tex. 2006) (''Listing unauthorized copies of sound recordings using an online file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right of distribution.'').

[16] 542 F. Supp. 2d 153, 168 (D. Mass. 2008) (quoting *Hotaling,* 118 F.3d at 203).

[17] *Id.* at 169.

[18] *See Capitol Records, Inc.* v. *Thomas,* 579 F. Supp. 2d 1210, 1218 (D. Minn. 2008) (concluding it was bound by the holding in *National Car* and stating that although ''the Copyright Act does not offer a uniform definition of 'distribution' . . . Congress's choice to not include offers to do the enumerated acts or the making available of the work indicates its intent that an actual distribution or dissemination is required in § 106(3)''); *Atlantic Recording Corp.* v. *Howell,* 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (''The statute provides copyright holders with the exclusive right to distribute 'copies' of their works to the public 'by sale or other transfer of ownership, or by rental, lease, or lending.' 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.'').

[19] As noted, in addition to the distribution right, the right of making available also implicates the rights of reproduction, public performance, and public display. The Supreme Court recently grated certiorari in a case involving the scope of the public performance right in the context of online streaming of broadcast television programs. *See Am. Broad. Cos., Inc.* v. *Aereo, Inc.,* 82 U.S.L.W. 3241 (U.S. Jan. 10, 2014) (No. 13–461). Oral argument is scheduled for April 22, 2014.

[20] *See The Scope of Copyright Protection: Hearing Before the Subcomm. on Intellectual Property, Courts, & the Internet of the H. Comm. on the Judiciary,* 113th Cong. (2014), *available at http://judiciary.house.gov/index.cfm/2014/1/the-scope-of-copyright-protection.*

be beneficial.[21] They agreed, however, that current law is properly construed to provide such protection.[22]

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.

Dated: February 20, 2014.

Maria A. Pallante,

Register of Copyrights.

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[21] *See* Statement of David Nimmer, Professor, UCLA School of Law, *The Scope of Copyright Protection, supra* note 20 (''Nimmer Statement''); Statement of Glynn S. Lunney, Jr., Professor, Tulane University School of Law, *The Scope of Copyright Protection, supra* note 20 (''Lunney Statement''). These witness statements are available at *http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101642*.

[22] *See* Nimmer Statement at 2–3; Lunney Statement at 1–4.

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@mcrmc.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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