American Association of Independent Music

UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

Docket No. 2014-02

Study on the Right of Making Available: Response to Second Request for Comments by the American Association of Independent Music ("A2IM") – September 15, 2014

The American Association of Independent Music ("A2IM") thanks the Copyright Office for the opportunity to share additional comments related to the Study on the Right of "Making Available". We did not file a response to the initial NOI, and appreciate the opportunity to currently participate in the discussion.

A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 340 Independently owned U.S. music labels. *Billboard* Magazine, using Nielsen SoundScan data, identified the Independent music label sector as 34.6 percent of the music industry's U.S. recorded music sales market in 2013.[1] Independent labels release over 90 percent of all music released by music labels in the U.S.

Independent doesn't mean just small artists. For example, A2IM member labels have issued music releases by artists including Taylor Swift, Mumford & Sons, the Lumineers, Vampire Weekend, Adele, Paul McCartney and many others over the last few years. A2IM members also share the core conviction that the Independent music community plays a vital role in the continued advancement of cultural diversity and innovation in music, both at home and abroad.

In preparing our comments, the A2IM staff held discussions with the A2IM board of directors and other A2IM member companies of varying sizes with varying levels of staffing and business models, so as to properly represent our diverse community. Our views presented herein are based upon a consensus of a majority of our members.

We have elected to answer only those questions we consider most relevant to our members' core business needs and concerns.

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[1] See http://a2im.org/2014/01/15/indies-still-1-billboard-indie-label-market-share-increases-2-0-percent-to-34-6-percent-in-2013/

Question # 1: To what extent does the Supreme Court's construction of the right of public performance in *Aereo* affect the scope of the United States' implementation of the rights of making available and communication to the public?:

We are of the opinion that Section 106 of Title 17 of the *U.S. Code* has been interpreted in a majority of cases to include and uphold making available and communication to the public rights that belong to the copyright owner. The *Aereo* verdict is consistent with most past rulings, and further strengthens the protection of copyright holders' rights afforded to them under Section 106, namely that copyright holders have the exclusive rights to authorize and distribute their work. The majority correctly labeled a distinction between technology enabling the distribution of legitimate user-controlled content (e.g. cloud or locker-based services) and Aereo, a service that primarily acts as a broadcaster by actively transmitting a public performance of protected content.

The defense in the *Aereo* case argued that their service generated a one-to-one experience, not a public performance, and was therefore not in violation of the Transmit Clause under Section 101[2] nor of the exclusive rights of distribution under Section 106[3] (by labeling their broadcast a "retransmission"). That line of reasoning is dangerous; had that defense held, it is our view that the U.S. would have been in violation of our "making available" obligations under the WIPO Internet Treaties and many U.S. Free Trade Agreements.[4] The concept of "making available" (as outlined in Article 8 in the WIPO Copyright Treaty ("WCT") and Article 10 of the WIPO Performances and Phonograms Treaty ("WPPT")[5] does not hinge on whether individuals actually receive the delivery of copyrighted material through the broadcast of a public performance; rather, it stipulates that the right of distribution inherently belongs to the copyright owner who authorizes and determines how and when a protected work is accessed. Chief

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[2] The provision in § 101 enacted in the Copyright Act of 1976 states "to transmit or otherwise communicate a performance or display of the work…to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

[3] From 17 U.S. Code § 106 "the owner of copyright under this title has the exclusive rights to…(3) distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership."

[4] E.g. Article 17.1 of the Australia-United States Free Trade Agreement ("AUSFTA"), implemented on August 3, 2004, states "Each Party shall ratify or accede to the *WIPO Copyright Treaty* (1996) and the *WIPO Performances and Phonograms Treaty* (1996) by the date of entry into force of this Agreement, subject to the fulfillment of their necessary internal requirements" and Article 18.1 of the Free Trade agreement between the United States of America and the Republic of Korea ("KORUS FTA"), which took effect March 2012, states "Each Party shall ratify or accede to the following agreements by the date this Agreement enters into force…The *World Intellectual Property Organization (WIPO)* Copyright Treaty (1996); and the *WIPO Performances and Phonograms Treaty* (1996)."

[5] The WIPO Copyright Treaty ("WCT"), Article 8 states: "…authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in a such a way that members of the public may access these works from a place and at a time individually chosen by them." The WIPO Performances and Phonograms Treaty ("WPPT"), Article 10 states: "Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."

Justice Roberts observed: *"there's no technological reason for [Aereo] to have 10,000 dime-sized antenna, other than to get around copyright laws."*[6]

Aereo not only denied copyright holders the right of designating how their protected material was to be distributed, in contrast to *Cablevision*[7], it also failed to secure the necessary licenses to broadcast the content. The majority correctly labeled Aereo's "retransmission" as a bona fide public performance by recognizing that they were operating in a substantially similar manner to that of a cable company.[8]

The *Aereo* ruling re-enforces the needed strategy employed by the recording labels and the music industry at large of working in cooperation with the Internet Service Providers ("ISPs") and other content distributors/broadcasters to enact the proper safeguards to prevent unlawful infringement as opposed to actively pursuing small-scale individual infringers. Proper application of the "making available" doctrine allows copyright owners to defend their intellectual interests without relying solely on the arduous "whack-a-mole" process of endless DMCA take-down notices. This is crucial given the limited resources that our Small and Medium Enterprises (SMEs) possess.

Most of our independent labels cannot afford to maintain offices around the world and find it difficult, if not impossible, to participate in far-flung enforcement of their protected content against technology companies that hide under an erroneous interpretation of the "safe harbor" provisions of the DMCA. The *Aereo* case ruling affirms that the "making available" standard should be utilized in protecting copyrighted content against infringement, rendering the question of whether content is actually transferred to specific user(s) irrelevant. This is a useful clarification in how our recording label community is positioned to defend our protected content in the Internet age.

Question # 5: What evidentiary showing should be required to prove a copyright infringement claim against an individual user or third-party service engaged in unauthorized filesharing? Should evidence that the defendant has placed a copyrighted work in a publicly accessible shared folder be sufficient to prove liability, or should courts required evidence that another party has download a copy of the work? Can the latter showing be made through circumstantial evidence, or evidence that an investigator acting on the plaintiff's behalf has download a copy of the work?

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[6] *American Broadcasting Companies, Inc., et al., v. Aereo, Inc., f/k/a Bamboom Labs, Inc.* oral arguments before the Supreme Court of the United States on April 22, 2014. http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-461_o7jp.pdf

[7] In 2008's *Cablevision* verdict (*Cartoon Network, LP LLLP v. CSC Holdings, Inc.,* 536 F.3d 121, the Second Circuit ruled that Cablevision's RS-DVR (Remote-Storage Digital Video Recorder) did not infringe on protected rights as it merely provided the means to record television programs, just like a VCR, the only difference being the remote location where the content was stored. The verdict held that since the person that made the recording was the same person that also played the content, the RS-DVR technology could not be considered a public performance. In addition, Cablevision, unlike Aereo, obtained the proper broadcast licenses for their transmissions.

[8] The *Aereo* opinion from the Supreme Court concluded "For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast. Much of this programming is made up of copyrighted works. Aereo neither owns the copyright in those works nor holds a license from the copyright owners to perform these works publicly."

As referenced in our response to question #1, Section 106 and the WIPO Internet Treaties compel the U.S. to provide content owners with the exclusive right to authorize how content is released to the public, regardless of how the material is accessed (e.g. downloaded from a shared folder, streamed from a website, etc.). The "making available" standard does not require evidence that a user has downloaded a copy from another user; the simple act of publically "making available" is enough to indicate infringement.

As Small and Medium Enterprises (SMEs) with finite resources we believe faithful adherence to this standard is a reasonable basis in proving willful infringement. Necessitating additional evidence in seeking damages, such as completed distributions between a user and a recipient, is not necessary and requires an extraordinary burden of proof to identify where, when, and how often these unauthorized transactions are occurring. By their very nature, Peer-to-Peer networks hide interactions between users. "Making available," as a domestic and international standard, protects SMEs that depend on the legitimate exploitation of copyright ownership to create jobs and exports that improve the U.S.'s balance of trade. Our members' businesses, via the investment in and creation of musical intellectual property, are actively fueling commerce here and abroad. Intellectual property rights are a significant part of our culture and heritage, and are a powerful engine fueling growth in the U.S. economy.

We once again thank the U.S. Copyright Office for the opportunity to express our views.

Respectfully,

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