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Response to Request for Additional Comments on the Study of the [so-called] Right of Making Available

I write briefly to supplement my earlier comments on this topic as well as my testimony at the earlier roundtable. This comment particularly addresses questions 1, 4, and 5 of the Request for Additional Comments.

I find it puzzling that the Request for Additional Comments described the main area of disagreement by commenters and speakers incompletely. The request noted:

There was disagreement, however, over whether and how particular provisions of Title 17 may apply to various activities in the digital context. For example, several stakeholders argued that the unauthorized uploading of a copyrighted work to a shared network folder that is accessible to the public constitutes a violation of the exclusive right of distribution under 17 U.S.C. 106(3). Others disagreed, arguing that direct or circumstantial evidence that another user has downloaded a copy of that file is necessary to establish an infringement of the distribution right by the uploader. The roundtable discussion and initial written comments also highlighted issues such as whether a digital file is a “material object[]” for purposes of the statutory definitions of “copies” and “phonorecords”; the relevance of legislative history to the construction of the distribution right; the role of secondary liability theories in assessing the United States’ implementation of the relevant treaty provisions; and the use of evidence provided by a copyright owner’s investigator in digital filesharing cases.

By omitting the context of the debate as to whether “copies” and “phonorecords” are material objects, the discussion in the Request buried an extremely important disagreement, namely whether section 106(3) applies to Internet transmissions at all or to any other context in which there is no “sale or other transfer of ownership, or rental, lease, or lending” (to quote another important limitation of section 106(3) of a “material object.” Given the importance of this issue, and the clarity of the statutory language of section 106(3) and its definitions, the obfuscation of the relevance of the “material object” requirement and the “sale or other transfer of ownership, . . . rental, lease or lending” provision in the Request for Additional Comments impairs the debate.

I add three more points. First, Professor Menell, in his comments at the roundtable and in an article he published after it, criticized me for criticizing his resort to legislative history. He misunderstood my point. I criticize him not for studying legislative history but for his disregard of the fact that both the “material object” requirement of “copies” and “phonorecords” that section 101 contains, and the “by sale or other transfer of ownership, or by rental, lease, or lending” limitation on the section 106(3) right, are clear statutory provisions that govern analysis of the issue.

Second, the Supreme Court’s decision in the *Aereo* case specifically quoted the “material object” definition of “copy” and analyzed the question of a transmission solely in the context of the public performance right of section 106(4) and not in the context of the section 106(3) right pertaining to distribution of copies or phonorecords by sale or other transfer of ownership, or by rental, lease, or lending. That decision shows that copyright law is fully able to address questions of transmissions through the lens of the public performance right and that no one needs to distort section 106(3) for results-oriented purposes.

Third, the question in the Request for Additional Comments of what proof is necessary to support a claim against “unauthorized filesharing” muddles the issue by avoiding the question of *what violation* is involved. Most unauthorized filesharing, where an uploader transmits a file to a downloader, consists of violation of the reproduction right by either the sender or the recipient or both. Direct and secondary liability theories with respect to the reproduction right are the appropriate approach for illegal reproductions. There is no need to distort other copyright rights to accommodate this fact pattern. A plaintiff should have to prove its case completely. In a world of presumptions arising from copyright registration and of massive statutory damages without any need to prove the least bit of harm, and with courts placing the burden of establishing fair use on defendants, plaintiffs should have to earn their awards through formal and substantive proof.

Respectfully submitted,

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