



**copyright alliance**

Connecting creators · Protecting creative work

**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**Study on the Right of Making Available;  
Request for Additional Comments**

**Docket No. 2014-02**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance welcomes the opportunity to provide additional comments on the right of making available to the Copyright Office as per its July 10 Federal Register request. The Copyright Alliance is a non-profit public interest and educational organization that is supported by forty entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. Besides these institutional members, we represent close to 15,000 individual artists. The Copyright Alliance is committed to promoting the cultural and economic benefits of copyright, providing information and resources on the contributions of copyright, and upholding the contributions of copyright to the fiscal health of the nation and for the good of creators, owners, and consumers around the world. Among other principles, we seek to promote appropriate copyright protection and enforcement to encourage the creation and lawful distribution of works, with fair compensation to the authors of creative works. While many of the entities we represent are small businesses and individual creators, all who participate in the copyright ecosystem have an interest in effective mechanisms for registering and licensing copyrights.

Below, please find specific responses to a number of questions raised in the request for additional comments.

*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?*

The Copyright Alliance welcomes the Supreme Court's decision confirming that regardless of the device or process used to communicate a work to the public, the authors of that work deserve to be compensated. This approach has supported the creation and dissemination of works by authors for the benefit of society for hundreds of years. The Supreme Court's technologically neutral interpretation of the public performance right is consistent both with Congress' intent in passing the 1976 Copyright Act and the rights of making available and communication to the public. A decision affirming the Second Circuit, however, would have improperly narrowed the scope of these rights.

*2. How should courts consider the requirement of volitional conduct when assessing direct liability in the context of interactive transmissions of content over the Internet, especially in the wake of Aereo?*

While the dissent would have applied a volitional conduct test similar to that applied by some lower courts, the majority opinion rejected it in favor of a more practical test. Those lower courts that have addressed "volitional conduct" have approached it inconsistently,<sup>1</sup> with the risk that its adoption and application in other contexts might lead to absurd results. For example, a court might find that any degree of involvement in designing and implementing a multi-use service is volitional conduct, which would lead to the imposition of a duty to design products so they can never be used to infringe. On the other hand, a court might translate "volitional conduct" as a "robot exception" or a "who pushed the button" test, ignoring any culpable behavior on the part of a service provider so long as it is the user who triggers the making of a copy. Neither of these outcomes is desirable. It would be more helpful for courts to focus less on legal

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<sup>1</sup> Eleanor M. Lackman and Scott J. Sholder, "The Role of Volition in Evaluating Direct Copyright Infringement Claims Against Technology Providers", 22 Bright Ideas 3 [New York State Bar Association] (2013) ("A review of decisions from the time the concept [of volitional conduct] took hold in 1995 reveals that the principle of volition has been applied inconsistently and is not always well understood.").

formalities and labels and more on *who* is doing *what* to *whom*. This is essentially the approach taken by the majority in *Aereo*, and it led to the correct outcome.

*3. To what extent do, or should, secondary theories of copyright liability affect the scope of the United States' implementation of the rights of making available and communication to the public?*

The role of secondary theories of copyright liability is to help the enforcement of copyright by allowing recovery from those who contribute to or benefit from infringement. In this way, secondary liability does not so much affect the scope of the rights of making available and communication to the public as it follows their contours.

The Copyright Alliance reiterates its initial comments that the bundle of rights established in §106, when interpreted as Congress intended and in accordance with international treaty obligations, implement both these rights.

*4. How does, or should, the language on "material objects" in the Section 101 definitions of "copy" and "phonorecord" interact with the exclusive right of distribution, and/or making available and communication to the public, in the online environment?*

During the Copyright Office's public roundtables held May 5th, several participants raised issues concerning the first sale doctrine.<sup>2</sup> These issues seem beyond the scope of this study. First sale is a defense to infringement of the exclusive right of distribution, a right that is not as broad as the rights of making available and communication to the public.

However, the Copyright Alliance does want to note its agreement with a point raised by one of the panelists related to this discussion. During the roundtables, Nancy Wolff (PACA: Digital Media Licensing Association) said that some courts have unfortunately tied a copyright owner's public display right to the reproduction right:

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<sup>2</sup> For example, see Transcript of Public Roundtable at 160-161 (remarks by Jonathan Band) ("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."); and at 271 (remarks by Andrew Bridges) ("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)?").

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.<sup>3</sup>

The Copyright Alliance shares Ms. Wolff's concerns that this interpretation of the public display right may improperly narrow the rights of making available and communication to the public in certain circumstances.

*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 require evidence that another party has downloaded 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 downloaded a copy of the work?*

The Copyright Alliance reiterates its previous comments that requiring proof of an actual distribution amounts to a limitation on the author's right to communicate to the public.

Respectfully submitted,

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Copyright Alliance

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<sup>3</sup> Transcript at 108.