GIPC Additional Comments on
The Rights of Making Available and Communication to the Public
to the U.S. Copyright Office
September 15, 2014

The U.S. Chamber of Commerce appreciates the opportunity to provide our comments on these important issues. We also appreciate the leadership of the U.S. Copyright Office in its thoughtful consideration of copyright policy issues and we support its efforts and desires for modernization so as to better serve businesses that produce valuable copyrighted works, businesses that help deliver those works to the public, and consumers who benefit from both.

The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations.

The Global Intellectual Property Center (GIPC) was established in 2007 as an affiliate of the U.S. Chamber of Commerce. Today, the GIPC is leading a worldwide effort to champion intellectual property rights and safeguard U.S. leadership in cutting-edge technologies as vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges.

GIPC appreciates the opportunity to respond to the additional questions posed by the Copyright Office on the important issue of United States' compliance with its international obligations to provide rights of making available and communication to the public.

I. 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?

In holding that the public performance right was implicated by the activities of Aereo, the Supreme Court affirmed U.S. fulfillment of the making available and communication to the public rights, which is accomplished through the application of the reproduction, distribution, public performance, and public display rights, respectively.

The U. S. Copyright Office can conclude that the United States complies with the making available and communication to the public rights without anticipating every imaginable factual scenario.

The precise implementation of the WIPO Internet Treaties is left up to each member country, which may do so in accordance with the meaning of the rights in the treaties themselves and informed by the treaties' negotiating history. This leaves a degree of flexibility in their interpretation and application to the discretion of the Parties' and their national law. Further, those Treaties apply the globally accepted three-step test standard for exceptions and limitations to exclusive rights.[1]

Thus, the Copyright Office need not now define the full scope of application of the public performance right (or any other exclusive right), nor does it need to purport to decide the universe of application of exceptions to those rights in order to conclude that the United States complies with its international obligations.

Of course, the term "making available to the public" must at least obligate compliance with the plain meaning of those words, if it is to have any meaning at all. GIPC reiterates its view that the Copyright Office, as well as successive Congresses and Presidential Administrations, were correct in concluding that the distribution right is implicated by the unauthorized making available of works to the public.[2] No legislation is needed to restate that fact, as the legislative history is also clear on the

[1] WIPO Copyright Treaty, Art. 10; WIPO Performances and Phonograms Treaty Art. 16.2.
[2] *See* 79 F.R. 10571 (Feb. 25, 2014).

point.[3] So, GIPC again urges the Copyright Office to use this proceeding to restate its view, in the hope and expectation that it will provide further clarity on this point.

II. 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*?

This question appears to go beyond the issue of United States' compliance with the making available and communication to the public rights. For the purpose of this comment, it is assumed that the Copyright Office's intent was that this inquiry be limited to the subject of this proceeding.

The issue of volitional conduct is not directly implicated in the analysis of United States' compliance with the making available and communication to the public rights. The implementation of those rights is left to national law. Whatever role volitional conduct might play in assessing direct liability for infringement of the existing exclusive rights enumerated in §106, it would also play even if the United States were to have explicitly adopted making available and communication to the public rights. Thus, the Copyright Office need not address this issue here.

III. 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?

Some commenters at the May 5 Copyright Office Roundtable expressed the view that while making available to the public of a copyright work should not, in their view, implicate the distribution right, that the United States could still be in compliance with the right of making available to the public through doctrines of secondary liability. This approach is flawed both on its premise and its proposed alternative.

[3] *See* 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 (2011).

As noted above and in the initial GIPC submission, the Copyright Office was correct when it concluded previously that the making available to the public of a copyrighted work implicates the distribution right. If one accepts the policy preference of commenters who proffer the contrary view, secondary liability offers no aid. It is well established that in order for secondary liability to arise, there must be an underlying direct infringement. Thus, secondary liability adds nothing to the analysis, which remains properly focused on the issue of direct liability.

IV. 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?

A commenter at the May 5 Copyright Office Roundtable made the argument that digital files resulting from Internet transmissions did not qualify as "material objects" under the Copyright Act. This is simply not a correct statement of law. The case law is clear that computer memory is a "material object."[4] Therefore, as is settled law, a transmission that results in a copy of a copyrightable work being created on the recipient's computer implicates the distribution right of §106.[5]

In any event, again, the correct interpretation of the statute is that making a work available implicates the distribution right.

V. What evidentiary showing should be required to prove a copyright infringement claim against an individual user or third-party service engaged in unauthorized filesharing?

Unauthorized file sharing may implicate at least one of several different exclusive rights. It is not necessary for this proceeding for the Copyright Office to enumerate the evidentiary showing for every such circumstance. The commenters to this proceeding have presented only one question in this regard; whether a copyright owner must show literal distribution in order to make a prima facie case of

[4] Nimmer & Nimmer, *Nimmer on Copyright*, §8.11[C][3][b](1).
[5] *Id*.

infringement of the distribution right? As noted in this and our prior comments, the statute, properly interpreted, does not require this.

Conclusion

GIPC appreciates this opportunity for further comment on these important issues. Many of the questions raised by the Copyright Office in this additional notice could, at their broadest, involve answers that touch on controversial and/or unsettled areas of the law. However, as this comment has attempted to demonstrate, those areas are not necessary to address in order for the Copyright Office to reaffirm the United States' full compliance with the making available and communication to the public rights. GIPC urges this approach, and stands ready to assist the Copyright Office in any way it can.