Before the
UNITED STATES COPYRIGHT OFFICE

Library of Congress	)	
United States Copyright Office	)	
Request for Comment	)	
Study on the Right of Making Available	)	**Docket Number: 2014–2**

REQUEST TO PARTICIPATE AND COMMENTS OF THE INTERNET COMMERCE COALITION

I. Introduction

The Internet Commerce Coalition ("ICC") appreciates the opportunity to respond to the Request for Comment on the Study on the Right of Making Available, and requests the opportunity to present at the public roundtable. The ICC is comprised of leading Internet and e-commerce companies and trade associations, including Amazon, AOL, AT&T, Comcast, eBay, Google, Monster.com, Verizon, Tech America and US Telecomm Association. We work to promote policies that support the growth of lawful communication and commerce on the Internet through reasonable and workable rules governing liability.

Many ICC members and the Coalition's counsel were involved in the negotiations and development of the Digital Millennium Copyright Act. The ICC's membership has a strong commitment to the growth of licensed content distribution on the Internet and a key stake in the success of these models. Our members include leading Internet marketplaces for the distribution of lawful content, and all our coalition's ISP members participate in the Copyright Alert System to deter peer-to-peer infringement.

500 8th Street N.W., Washington, D.C. 20004
tel: 202.799.4000 fax: 202.799.5000

II. THE COPYRIGHT OFFICE SHOULD NOT RECOMMEND CREATION OF A RIGHT TO MAKE AVAILABLE

This study addresses an issue that the Copyright Office has twice addressed in the negative. Nothing has changed since then, either legally or technologically, that would warrant an amendment to the exclusive rights set forth in the Copyright Act.

Indeed, Congress ratified the WIPO Copyright Treaties based in part upon Register of Copyrights Marybeth Peters' assurance to Congress prior to the ratification of the WIPO treaties 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" to create a making available right.[1]. Five years later, in an era of widespread concern over unauthorized uploading of copyrighted works on the Internet, she reaffirmed this position, writing to Howard Berman: "As you are aware, in implementing the new WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in the Digital Millennium Copyright Act, Congress determined that it was not necessary to add any additional rights to Section 106 of the Copyright Act in order to implement the 'making available' right under Article 8 of the WCT."

What is more, as the Background section of the request for comment notes, "both Congress and the Executive Branch have continued to support this view since the enactment of the DMCA." Indeed, this very study was requested by someone who is no longer a member of Congress.

Our comments do not address the proper interpretation of the "right of making available" in the WIPO Treaties, foreign implementation of the WIPO Treaties (which we view as irrelevant here), or the degree to which there is diversion in case law over the interpretation of existing rights under Section 106 that the Supreme Court will somehow not resolves. to merit some expansion of those rights. We do note that the Copyright Office twice decoded the existing language of Section 106 to provide sufficient protection in the digital age, and that we are unaware of any material change since then that would alter the basis for the Copyright Office's repeated statements to Congress.

We write instead to address questions set forth in Section 3 of the Request for Comment regarding whether the Copyright Act should amended to create a statutory "right to make available." In the ICC's view, this right is dangerously vague and overbroad, would threaten liability for a host of communications technologies, and would raise serious potential First Amendment concerns and fuel more litigation by copyright trolls.

Question 3b. The exclusive rights in § 106 were drafted in flexible terms to evolve over time. The reproduction right, distribution right, public performance/display right, and secondary

[1] Statement of Marybeth Peters, Register of Copyrights, WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 & H.R. 2180 Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong. 43 (1997)

500 8th Street N.W., Washington, D.C. 20004
tel: 202.799.4000 fax: 202.799.5000

liability doctrines appear to continue to cover the waterfront in addressing digital infringement. But even assuming that there were some practical gap in these rights that affected the outcome of a case and that the Supreme Court did not review and fix, a "make available right" would not be the right answer.

Question 3c. A "make available" right would be singularly out of place in § 106. First, the existing rights in § 106 are distinct. By contrast, a "right to make available" is sufficiently amorphous that it would overlap with at least the "distribution" and "public display" rights, and possibly encompass both.

Second, codifying a new "make available right" would significantly broaden the scope of copyright today. The existing rights all clearly involve some degree of activity on the part of the infringer. By contrast, the plain language of the right to make available is amorphous enough that it could potentially reach any activity that *has the effect* of making a copyrighted work available. This ambiguity is of critical importance. It would invite litigation over a host of communications technologies and services that, like the Internet itself, operate to make information available -- whether they be software, hardware, or services-based offerings. To the extent that these technologies are used by a third party infringer, there is a significant risk that the owner or user of the technology would be making infringing material available.

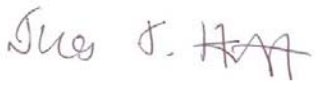
Question 3d. A make available right would raise clear First Amendment concerns. Making information available is a sufficiently passive term that it could easily be equated with failing to restrict access to information. Given the lack of precision in many content filtering technologies, the result of enshrining the broad new right into the litigious U.S. legal system would be to create a bias toward restricting access to content and to erring on the side of censorship (unless a safe harbor applied). Indeed, the amorphous "making available right" would invite challenges to use of technologies that operate in a way that makes infringement possible. For example, using software that makes copies or deploying computer servers that do not implement a content filtering technology could well be deemed violations of a new "right to make available". Even writing a journalistic article that mentions the availability of an infringing copy of a work at an online location could be targeted, because that mention would direct readers to the infringing copy and thus make it more widely available.

Questions 3e. We submit that rather than attempting to construct a broad new right and a series of new limitations on that right, the Copyright Office should abandon the idea of creating this broad new right.

500 8th Street N.W., Washington, D.C. 20004
tel: 202.799.4000 fax: 202.799.5000

Internet Commerce Coalition

Respectfully submitted,



Jim Halpert, General Counsel
500 Eighth Street, NW
Washington, D.C. 20004
(202) 799-4441

April 7, 2014

500 8th Street N.W., Washington, D.C. 20004
tel: 202.799.4000 fax: 202.799.5000