BEFORE THE U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

STUDY ON THE RIGHT OF MAKING AVAILABLE

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. In these comments, LCA explains its concerns about the impact of the adoption of a making available right on the statute of limitations in copyright cases.

As the Copyright Office studies the making available right, LCA wishes to draw its attention to the negative impact such a right would have on the three year statute of limitations in 17 U.S.C. § 507(a). LCA's perspective is based on its experience with the adverse consequences of the misapplication of the distribution right.

In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), and earlier this year in *Diversey v. Schmidly*, 2013 WL 6727517 C.A. 10 (D. N.M. Mar. 1, 2013), courts distorted the plain meaning of the distribution right for the purpose of circumventing the three year limitation period. In both cases, an unauthorized copy was made and included in a library's collection. In both cases, the complaint was filed more than three years after the making of the infringing copy. In both cases, no one ever

borrowed the infringing copy. Nonetheless, in both cases the courts found that the library had infringed the distribution right within the three-year limitation period by "making 'the work available to the borrowing or browsing public.'" *Diversey*, *4, n.7, *quoting Hotaling*, 118 F.3d at 203. Because "a patron could 'visit the library and use the work,'" *Diversey*, *4, n. 7, *quoting Hotaling*, 118 F.3d at 203, the court found that the distribution right had been infringed, even though no patron had actually used the work. For these courts, "the essence of distribution in the library lending context is the work's availability 'to the borrowing or browsing public.'" *Diversey*, *5, quoting *Hotaling,* 118 F.3d at 203.

However, there is no special provision in the Copyright Act for the distribution right in the library lending context. There just is the distribution right in 17 U.S.C. § 106(3), which grants the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public … by rental, lease, or lending." The plain language of the statute refers to the distribution of copies to the public by lending, *not* the mere offering to distribute copies to the public by lending. The *Hotaling* and *Diversey* court stretched the meaning of the distribution right so as to avoid the three-year limitation period.

This is a potential danger of a making available right. A work could be posted somewhere on the vast Web, and never be downloaded. Software employed by a rights-holder's agent could discover this obscure copy more than three years later, and at that point the person who uploaded or hosted the content could be liable for significant statutory damages for infringing the making available right. Although much of the litigation involving the concept of making available has involved the file sharing of popular music, a making available right would ensnare the wide range of works covered by copyright. The example above could involve an image included in a PowerPoint

presentation that was archived on the website of a library association after the presentation was delivered. The image could be detected more than three years later by a company that crawls the web for an image-licensing firm such as Getty or Corbis. If the image had not been downloaded by anyone other than the licensing firm's agent within the previous three years, why should the copyright law allow the licensing firm to collect statutory damages simply merely because the image *could* have been downloaded? There is no policy justification for imposing strict liability for statutory damages simply because the potential existed during the three year limitation period for a person to have viewed the image, just as there is no policy justification for a library to be liable for infringing the distribution right with respect to a copy that was never borrowed.

A making available right has the potential to eviscerate the statute of limitations in copyright cases in the digital age. Accordingly, the Copyright Office should recommend that Congress proceed in this area with great caution.

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