Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

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| In the Matter of | ) | |
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| Study on the Right of Making Available | ) | Docket No. 2014-2 |
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**COMMENTS OF**
**THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**
**AND THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.**

The Motion Picture Association of America, Inc., and the Recording Industry Association of America, Inc., submit the following comments in response to the Copyright Office's ("Office") notice published at 79 Fed. Reg. 10,571 (Feb. 25, 2014) ("Notice"). The Notice explains that Representative Watt has requested the Office to "'assess the state of U.S. law recognizing and protecting 'making available' and 'communication to the public' rights'" in the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"). Notice at 10,572. Accordingly, the Office seeks public comment on "how the existing bundle of rights under Title 17 covers the making available and communication to the public rights, how foreign laws have addressed such rights, and the feasibility and necessity of amending U.S. law to strengthen or clarify our law in this area." *Id.* at 10,571.

## SUMMARY

When Congress enacted the Copyright Act of 1976, it accorded copyright owner "broad" exclusive rights in Section 106 of the Act, 17 U.S.C. § 106. *See* H.R. Rep. No. 94-1476 at 61 (1976) ("1976 Report"). In doing so, Congress followed the advice of the Copyright Office. *See Staff of the H. Comm. on the Judiciary, 89th Cong., Copyright Law Revision, Part 6:*

*Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill* at 13–14 (Comm. Print 1965) ("[W]e believe the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest"). The Section 106 rights are broad enough to include the rights of making available and communication to the public that were intended by Congress and that the WCT, WPPT, and other international treaties obligate the United States to provide. Thus, MPAA and RIAA agree with the Executive and Legislative Branches of the Government: Existing U.S. laws fully implement the making available and public communication rights within the framework of the reproduction, distribution, performance and display rights of Section 106 of the Copyright Act. While there are some exceptions, courts generally have interpreted U.S. copyright laws to afford copyright owners the rights of making available and communication to the public, consistent with Congressional intent and in conformity with U.S. obligations. The Copyright Office should continue to monitor judicial developments in this area, and it should provide clear and appropriate guidance where necessary to ensure that the United States complies with Congressional intent and with its international treaty obligations. If courts do not afford the protection required by the WCT and WPPT or other international commitments of the United States, the need for legislative action will need to be revisited.

The Copyright Office notes that courts, in the context of peer-to-peer ("P2P") file-sharing litigation, have offered somewhat different views on whether the Section 106(3) distribution right encompasses the WCT and WPPT right of making available. *See* Notice at 10,572. In responding to Representative Watt's request for an assessment of U.S. law in this area, the Copyright Office should make clear that the Section 106(3) distribution right plainly includes the

right of making available, as later recognized in the WCT and WPPT; thus, there is no need to prove that anyone actually received copies or phonorecords offered for distribution over the Internet. The text, structure, and history of the Act—as well as applicable Supreme Court precedent, well-established rules of statutory interpretation, and sound policy considerations—compel this sensible conclusion.

The Office also should make clear, in response to Representative Watt, that the rights of making available and communication to the public encompass a broad range of activities beyond simply making works available over P2P networks. Streaming services, as well as P2P and download services, all implicate the rights of making available and communication to the public. Where a party provides the public access to copyrighted works via the Internet without authorization—as a download, a stream, a link or otherwise—that party infringes one or more of the affected copyright owner's exclusive rights under Section 106 of the Act. It is not necessary to prove that any user actually availed herself of such access. The Copyright Act, as well as U.S. obligations under the WCT, WPPT, and other international norms of copyright protection, mandate that result.

## BACKGROUND

1. In December 1996, a Diplomatic Conference of the World Intellectual Property Organization ("WIPO") adopted the WCT and WPPT by consensus of 160 countries including the United States. S. Rep. No. 105-190, at 5 & 9 (1998). A primary purpose of WCT and WPPT, known as the "Internet Treaties," was to provide adequate protection of copyrighted works against unauthorized exploitation over the Internet. *See id.* at 10; H.R. Rep. No. 105-551(II), at 21 (1998). To help achieve that objective, WCT and WPPT required signatory nations to provide

within a copyright owner's exclusive rights the act of communicating a work to the public and making that work available to the public.

Article 8 of WCT, entitled "Right of Communication to the Public," states in relevant part:

> [Copyright owners] shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.*

(emphasis added). Article 14 of the WPPT ("Right of Making Available Phonograms") provides: "Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them." *See also* WPPT, art. 10 (according performers the exclusive right to make publicly available "performances fixed in phonograms"); WCT, Article 6(1) (according copyright owners the exclusive right of authorizing the "making available to the public of original and copies of their works through sale or other transfer of ownership"); WPPT, Article 12(1) (according same right to producers of phonograms); WPPT, Article 15(1) (according performers and producers of phonograms a right of equitable remuneration for any communication to the public of those phonograms). Thus, as these provisions demonstrate, the WCT and WPPT intended the rights of making available and communication to the public to have broad application.[1]

[1] It should be noted that the WPPT contained the following "agreed statement:" "It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution."

The WCT and WPPT do not require proof that anyone actually transferred copies or phonorecords to particular individuals or that anyone actually received the work made available. The essence of the making available right is that the copyright owner determines the manner and means for offering her work to the public; it is the accessibility of the work—the potential for it to be received by members of the public—that is the decisive factor. *See* WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* at 208 (2003) (the treaties cover those acts "which only consist of making the work accessible to the public"); Brigitte Linder, *The WIPO Treaties, in* COPYRIGHT IN THE INFORMATION SOCIETY 19 (B. Lindner & T. Shapiro eds. 2011) ("[T]he offer of the content is sufficient for the making available right to come into play whether the user ultimately requests the transmission or not.") (footnote omitted)); Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, REVUE INTERNATIONALE DU DROIT D'AUTEUR (October 2008), p. 37, http://lsr.nellco.org/columbia_pllt/08158 ("[T]he [making available] right is triggered when the public is invited to access, rather than when any member of the public in fact *has* accessed.") (footnote omitted)).

2. The WIPO delegates understood the critical importance of affording copyright owners the rights of making available and communication to the public. Once a work is offered over the Internet to countless users around the world without authorization, the value of the copyright in that work is immediately and irreparably compromised, regardless of who actually accesses that work. Moreover, the ability of a copyright owner to determine whether, when, and how to offer her work over the Internet is critical to the development of new and legitimate business models, which are obviously compromised by the offering of the same works over the Internet without authorization. Thus, the principal issue before the WIPO delegates was not

whether to include in the WCT and WPPT the rights of making available and communication to the public, but how those rights should be implemented by the signatory countries: whether through existing rights (such as distribution, performance, or communication), a combination of rights, or a new right.

The drafters of the WIPO treaties agreed to a solution that affords each signatory nation the freedom to choose the particular method of implementing the rights of making available and communication to the public. MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 249 (2002) (referring to a U.S. delegation statement that the making available right, which is "key to the ability of owners of rights to protect themselves in the digital environment," could be "implemented in national legislation through application of any particular exclusive right") (citation omitted); *see* Lindner, *supra*, at 18 ("Under the umbrella solution, Contracting Parties are free to characterize the [making available] right legally in a way which fits in their regional or national legal system."). That approach, which the United States supported, permitted the U.S. to implement the making available right through, among other sources, its distribution right in Section 106(3) of the Copyright Act, as well as other Section 106 rights. *See* Linder, *supra*; Ginsburg, *supra* at 38. Other countries have implemented the rights of making available and communication to the public through various rights. *See, e.g.*, WIPO, *Understanding Copyright and Related Rights* at 10, http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf ("Most national laws implement [making available] as a part of the right of communication to the public, although some do so as part of the right of distribution.").

3. Congress enacted the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (1998), to implement the WIPO Internet Treaties. Drafting the DMCA

required Congress to consider the extent to which the 1976 Copyright Act already encompassed the rights required by those treaties, including the rights of making available and communication to the public. Various government officials, including the Copyright Office, unanimously advised Congress that no changes in existing copyright laws were necessary to implement these rights because the Copyright Act already accorded such rights; consistent with that advice, Congress concluded there was no need to make such changes. *See infra* pages 15–18. Thus, while the Copyright Act does not expressly refer to the "making available" right or "right of communication to the public," the Executive and Legislative Branches have properly concluded that the exclusive rights in Section 106 of the Copyright Act include the rights of making available and communication to the public.

Given the absence of express "making available" language in the Copyright Act, courts in P2P file-sharing litigation have reached somewhat different conclusions as to whether the distribution right requires proof of actual dissemination. *See* Notice at 10,572. Most courts have correctly held that defendants infringe the distribution right by making files available on a file-sharing network without such proof. *See A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (confirming *Napster* holding); *Sony BMG Music Entm't v. Doe*, No. 5:08-CV-109-H, 2009 WL 5252606, at *4 (E.D.N.C. Oct. 21, 2009) ("[A] complaint adequately states a claim for infringement by distribution if it contains proper allegations that defendant made the subject songs available to the public."); *UMG Recordings, Inc. v. Alburger*, No. 07-3705, 2009 WL 3152153, at *3 n.41 (E.D. Pa. Sept. 29, 2009) ("There is no requirement that plaintiffs show that the files were actually downloaded by other users from Defendant, only that files were

*available* for downloading."); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190 (D. Me. 2006) ("[B]y using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet, Defendant violated Plaintiffs' exclusive right to distribute the Motion Pictures.").

Some courts, however, have improperly concluded that a distribution under Section 106(3) does not occur in the absence of actual dissemination. *See Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1218–19 (D. Minn. 2008) ("[T]he plain meaning of the term 'distribution' does not include making available and, instead, requires actual dissemination."), *rev'd on other grounds*, 692 F.3d 899 (8th Cir. 2012); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) ("[Section] 106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public."); *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 244–45 (S.D.N.Y. 2008) (holding that alleging the making available of copyrighted works does not state a claim for violation of the distribution right). The courts in *Barker* and *Thomas* recognized that the WIPO Internet Treaties require the United States to afford a right of making available. Neither court, however, properly considered the importance of interpreting U.S. law in conformity with U.S. international obligations, as required by well-established principles of statutory construction; nor did they consider the full scope of legislative history underlying Congress' adoption of the distribution right in the 1976 Act. *See* Notice at 10,571–72 n.7 (citing Internet Policy Task Force, U.S. Dep't of Commerce, *Copyright Policy, Creativity, and Innovation in the Digital Economy* 15–16 (2013)).

## DISCUSSION

### I. The Section 106(3) Distribution Right Includes the Right of Making Available and Does Not Require Proof of Actual Dissemination.

Long before the advent of P2P networks, copyright owners enjoyed the right to determine when, where and how to make their works available to the public. Courts and commentators alike have recognized that making a work available to the public is at the heart of the publication right that comes within the broad Section 106(3) distribution right. Section 106(3) of the Copyright Act, 17 U.S.C. § 106(3), accords copyright owners the exclusive rights "to do" and "to authorize," among other things, the following: "(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

#### A. The Language and History of the 1976 Act

The Copyright Act does not define the term "distribution." As one court has correctly concluded, however, the "ordinary meaning" of the term includes the placing of material (in that case, child pornography) in a shared folder of a P2P network. *See United States v. Shaffer*, 472 F.3d 1219, 1223–24 (10th Cir. 2007) (defendant engaged in distribution because he allowed other P2P network members "access to his computerized stash of images and videos and openly invited them to take, or download, those items"); *id.* at 1224–25 (collecting cases that define the ordinary meaning of the term "distribution"). Consistent with this "ordinary meaning," Congress has explicitly recognized in other provisions of the Copyright Act that "distribution" of a work includes making the work available to the public. *See* 17 U.S.C. § 506(a)(1)(C) (2006) (imposing criminal penalties for "the *distribution* of a work being prepared for commercial distribution, by *making it available* on a computer network accessible to members of the public") (emphasis

added); *id.* § 901(a)(4) ("[T]o distribute means to sell, lend, bail or otherwise transfer, or to offer to sell, lend, bail or otherwise transfer.").

The Office has noted that Professors Menell and Nimmer recently concluded an exhaustive analysis of the legislative history of the distribution right in the 1976 Copyright Act — an analysis that postdates the judicial decisions in file-sharing litigation that considered whether that right includes a right of making available. *See* Notice at 10,571 n.5 (citing 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, 59 (2011)); 2 NIMMER ON COPYRIGHT § 8.11 (2012). As Professors Menell and Nimmer explain, the history of the 1976 Act demonstrates that Congress intended the distribution right to incorporate, and to broaden, the historic right to publish, which includes the offering to distribute a work.

The 1909 Act provided an exclusive right of publication, as it had since the very first copyright statute. *See* 1909 Act § 1(a) (recognizing the "exclusive right . . . [t]o print, reprint, *publish*, copy, and vend the copyrighted work" (emphasis added)); 1790 Act § 1 (protecting the "sole right and liberty of printing and reprinting, publishing, and vending" a copyrighted work). Although Congress intended the publication right to be construed broadly, concern arose that courts had construed the term "publish" "in such a narrow sense that there might be forms of distribution not covered." Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§ 5–8, 109–10, *contained in* PRELIMINARY DRAFT FOR REVISED COPYRIGHT LAW DISCUSSIONS AND COMMENTS ON THE DRAFT (H. Comm. on the Judiciary Print 1964).

Notwithstanding this concern, "[n]one of [the] earlier court decisions [preceding the 1976 amendments] imposed a requirement of actual distribution. Rather, they focused on the concept

of general publication and making a work available to the general public. But the law was well established that publication entailed making a work available to the public, not actual receipt by members of the public." Menell, *supra*, at 59; *see, e.g.*, *Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Publ'g Co.*, 155 N.Y. 241, 251 (Ct. App. 1898) ("It is not necessary that [a] book be actually sold; it is sufficient if it be offered to the public."); Eaton S. Drone, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 291 (1879) ("[It is not] essential that a single copy shall be disposed of before the work can be said to be published. The requirements of the law are met when the book is publicly offered for sale.").

To clarify its intent, Congress substituted the more expansive term "distribute" to ensure that the publication right would have its intended broad construction. *See* 1976 Report at 62 (reiterating that § 106(3) of the 1976 Act "establishes the exclusive right of publications: The right 'to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending'"); H. Comm. on the Judiciary, 87th Cong., *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 21–22 (Comm. Print 1961) (indicating that the distribution right was intended to replace the rights to "vend" and "publish" in the 1909 Copyright Act and explaining that these terms were "redundant" since "vending is a mode of publishing"); Menell, *supra*, at 45 ("[T]he drafters of the final House Report referred repeatedly to the 'right of publication' and 'publishing,' notwithstanding that the term 'distribute' had been substituted into the actual statutory text.").

The 1976 Act defines "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101. It further provides that "[t]he *offering* to distribute copies or phonographs to a group of persons for purposes of further distribution, public performance, or public display,

constitutes publication." *Id.* (emphasis added). Consistent with the history discussed above, the Supreme Court recognized that Section 106(3) "established the exclusive right of publications." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985). In sum, the distribution right, properly read, encompasses publication, which includes offering to distribute and does not require proof of actual dissemination. *See* Menell, *supra*, at 45–46 ("Congress intended: (1) for the right to distribute to fully encompass the right to publish; [and] (2) for distribute to be understood by reference to established understanding of publish and publication."); *id*. at 67 ("[Congress] expressed unequivocally its intention to retain and broaden the prior rights to publish and vend.").

**B. Precedent Outside File-Sharing Litigation.**

The Supreme Court's decision in *New York Times Co. v. Tasini*, 553 U.S. 483, 487 (2001), also strongly supports the common-sense conclusion that the distribution right includes the right of making available. There, the Court considered whether the placement of authors' articles on electronic databases by publishers without the authors' consent constituted infringement. There was no allegation or proof in that case that any database users actually viewed or purchased any of the articles. Nevertheless, the Court held that the defendant Print Publishers had directly infringed the copyrights "by authorizing the Electronic Publishers to place the Articles in the Databases and by aiding the Electronic Publishers in that endeavor." *Id.* at 506; *see also id.* at 498 ("[T]he Print Publishers, through contracts licensing the production of copies in the Databases, 'authorize' reproduction *and distribution* of the Articles." (footnote omitted) (emphasis added)); *id.* at 506 ("[Electronic Publishers] infringed the Authors' copyrights by reproducing *and distributing* the Articles" and the Print Publishers infringed the Authors' rights by "authorizing" the Electronic Publishers to do so) (emphasis added)). *Tasini*

makes clear that existing copyright law imposes direct liability on those who authorize the placement of works in an electronic database without proof that others actually accessed those works. *See* 17 U.S.C. § 106 (according copyright owners exclusive rights "to do" and "*to authorize*" (emphasis added); David O. Carson, *Making the Available Right Available,* 33 COLUM. J.L. & ARTS 135, 158–59 (2010) (discussing *Tasini*).

As the Office has observed, other courts also have addressed the making available concept outside the file-sharing context. *See* Notice at 10,572 (discussing *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013), and *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997)). Both of these decisions, which involved library lending of an unauthorized copy of a work, demonstrate that a straightforward reading of the Copyright Act does not compel a showing of actual distribution. *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993), does not alter this conclusion.

*National Car* involved a breach of contract claim against a party who contracted for a license to use computer software solely for its own use but then used the software for the benefit of third parties. *See id.* at 429. Only the defendant utilized the software; there was no allegation that additional copies were made for third parties. *See id.* In determining whether the claim was preempted by the Copyright Act, the court analyzed whether unauthorized use of copyrighted software to benefit a third party violates the Section 106(3) distribution right. *See id.* at 430. Explaining that the copyright owner "did not allege use *by* [third parties], but instead alleged use for their benefit," the court concluded that nothing had been distributed, and therefore held the claim was not preempted. *Id.*

As is clear from that context, *National Car* did not address whether making a copy available to third parties for their potential use constitutes distribution because those were not the facts of the case. Instead the court considered the distinct question whether making something other than a copy (there, "the 'functionality' of the [copyrighted] program," *id.* at 434) available to a third party constitutes distribution. In other words, *National Car* addressed what must be distributed, not what constitutes distribution. Thus, *National Car* does not address one way or another the making available issue.

In dictum, the court stated that "[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.'" *Id.* at 434 (alterations in original) (quoting 2 NIMMER ON COPYRIGHT § 8.11[A], at 8-124.1). But that statement is not accompanied by any analysis of the language or history of the Copyright Act. It simply quotes the Nimmer treatise which, in turn, cited no authority for the proposition and provided no analysis. Examination of the entire passage from which the quotation is taken shows that Professor Nimmer made the statement simply to distinguish the rights of public performance and distribution — not to delineate the contours of the distribution right or to explain whether that right includes a making available right.

Furthermore, Professor Nimmer has since explained that his treatise was never intended to "impose an 'actual receipt' requirement on the exercise of the distribution right. To the contrary, the general legislative history reveals that Congress drafted the Copyright Act's exclusive rights in broad terms so that authors' rights would not lose their value because of unforeseen technical advances." *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3 (2014) (statement of David Nimmer, Professor from Practice, UCLA School of

Law, Of Counsel, Irell & Manella LLP, Los Angeles) (select internal quotation marks omitted). To the extent that his treatise stated differently, he noted that the "revised treatise now reflects the conclusion—as a matter of statutory interpretation—that a prima facie case of infringing a copyright owner's distribution right does not require proof of actual distribution, namely someone downloading a concrete file that another previously uploaded." *Id.* (internal quotation marks omitted).

### C. The Views of the Executive and Legislative Branches

During the debates over the DMCA, Congress considered whether it was necessary to amend the copyright laws in order to fully implement the WIPO Internet Treaties. Congress concluded that there was no need to alter any of the exclusive rights in Section 106 because those rights included the rights that the United States must provide under the WCT and WPPT. *See* H.R. Rep. No. 105-551(I) at 9 (1998) ("The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law."). In reaching that conclusion, Congress relied upon the advice provided by several government officials, including the Register of Copyrights:

- **The President.** The Senate required the President to "sign[] into law a bill that implements the [WIPO] Treaties" as a precondition to depositing the instruments of ratification for those treaties. *Resolution of Ratification, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (1996)*, Supplement to Treaty Doc. 105-17 (Oct. 21, 1998). Thus, when President Clinton ratified the WIPO treaties, he certified that U.S. law was in full compliance with the treaties, including their making available provisions.
- **Register of Copyrights.** The Register of Copyrights informed Congress 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" in order to comply with the WIPO treaties. *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 & H.R. 2180 Before the H. Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 43 (1997) (statement of Marybeth Peters, Register of Copyrights). Following enactment of the WIPO implementing legislation, the Register advised Congress that "the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance . . . . Which of these rights are invoked in any given context will depend on the nature of the "making available" activity. . . . [Making a work available] for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right . . . ." Letter from Marybeth Peters to Rep. Howard L. Berman 1 (Sept. 25, 2002), *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 107th Cong. 114–15 (2002). *See also id.* ("[I]n implementing the [WCT and WPPT], 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 . . ."); Jesse Feder, *Keynote Address: Fair Use, Public Domain, or Piracy . . . Should the Digital Exchange of Copyrighted Works Be Permitted or Prevented*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 265, 269 (Winter 2001) (Copyright Office official discussing the WIPO treaties and stating "[w]e concluded that the . . . exclusive right of communication to the public[] was already covered in U.S. law . . . under existing exclusive rights in the Copyright Act, so no change was made in that area").

- **Department of State.** The Assistant Secretary of State for Economic and Business Affairs advised Congress that the provisions in the WCT and WPPT reflected "the internalization of *American* standards on copyright protection." *WIPO Copyright Treaty (1996) and WIPO Performances and Phonograms Treaty (1996) Before the Comm. on Foreign Relations*, Sen. Exec. Rpt. 105-25, 105th Cong. 2d Sess. 34 (Oct. 14, 1998) (testimony of Alan P. Larson) (emphasis added). The State Department also advised the World Trade Organization ("WTO") that the unauthorized making available of copyrighted works constitutes infringement under U.S. copyright law. *See, e.g.,* U.S. Submission to WTO Trade Policy Review Body, WT/TPR/M/126/Add.3, at 140 (Nov. 22, 2004); U.S. Submission to WTO Trade Policy Review Body, WT/TPR/M/88/Add.1, at 136 (Jan. 8, 2002) (citations omitted).
- **Department of Commerce**. The Assistant Secretary of Commerce and Director of the Patent and Trademark Office advised Congress that "nothing in these [WIPO] Treaties or the implementing legislation affects the issue of liability for particular acts of copyright infringement . . . ." DMCA Hearings at 37 (Sept. 16, 1997) (statement of Bruce Lehman).

Consistent with the above advice, the United States entered into numerous free trade agreements (FTAs) that, like WCT and WPPT, obligate the United States to afford a making available right. For example, article 17.4.2 of the United States-Australia FTA, which came into effect in 2005, states: "Each Party shall provide to authors, performers, and producers of phonograms the right to authorise or prohibit the making available to the public of the original and copies of their works, performances, and phonograms through sale or other transfer of ownership." U.S.-Australia FTA art. 17.4.2 (footnotes omitted); *see also id.* arts. 17.5 & 17.6.3;

U.S.-Bahrain FTA, arts. 14.4.2 & 14.5 (2006); Dominican Republic-Central America-U.S. FTA, arts. 15.5.2 & 15.6 (2007); U.S.-Chile FTA, arts. 17.5.2, 17.5.3, & 17.6.2 (2004).

In ratifying these FTAs, Congress explicitly recognized that the agreements obligate the United States to provide a right of making available. *See, e.g.*, S. Rep. No. 109-364, at 27–28 (2006) (Oman FTA); S. Rep. No. 109-199, at 24 (2005) (Bahrain FTA); S. Rep. No. 109-128, at 31 (2005) (Dominican Republic-Central America FTA); S. Rep. No. 108-117, at 17 (2003) (Singapore FTA); H.R. Rep. No. 108-224, pt. 2, at 4 (2003) (Chile FTA). "[W]ith respect to each Trade Agreement containing provisions regarding the 'making available' right, the President has informed Congress that no change to existing U.S. law was required to implement those provisions." Statement of Interest of the United States at 6–7, 2006 WL 5721794 (Apr. 21, 2006) in *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008). *See, e.g.*, United States-Australia Free Trade Agreement Implementation Act: Statement of Administrative Action at 1 & 24-25 (July 6, 2004).

**D. *Charming Betsy***

"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* canon remains an accepted "maxim of statutory construction," *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); its continuing relevance is "beyond debate." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). *See* Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008) ("[*Charming Betsy*] has become deeply embedded in American jurisprudence"); Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86

GEO. L.J. 479, 483 (1998) ("[C]ourts regularly rely on the *Charming Betsy* canon in interpreting domestic law."); Restatement (Third) of Foreign Relations § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

*Charming Betsy* reflects the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government . . . ." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *see* U.S. Const. art. II, § 2, cl. 2 (granting treaty power to the President "by and with the Advice and Consent of the Senate"). Thus, *Charming Betsy* provides a "means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government." Bradley, 86 GEO. L.J. at 525. It ensures that courts do not interpret statutes in a manner that undermines the foreign policy decisions of the political branches to enter into binding international agreements.

The district court in *Thomas* acknowledged that "given multiple reasonable constructions of U.S. law, the *Charming Betsy* doctrine directs the Court to adopt the reasonable construction that is consistent with the United States' international obligations." *Thomas*, 579 F. Supp. 2d at 1226. The court, however, proclaiming that it is "simply not reasonable" to construe the Copyright Act as including a right of making available. *Id.* And the court dismissed "concern for U.S. compliance with the WIPO treaties and the FTAs" by declaring that such concern "cannot override the clear congressional intent in § 106(3)." *Id.*

As discussed above, no "clear congressional intent" favors the district court's reading. To the contrary, as Professor Nimmer has explained in criticizing the *Thomas* decision, a

construction of Section 106(3) that includes a making available right (and that is compatible with U.S. international commitments) is not at all unreasonable, but instead "is actually the [construction] to be preferred." NIMMER ON COPYRIGHT § 8.11[E][1] (Matthew Bender & Co., Inc. 2011); *see id.* § 8.11[D][4][c] ("the intent of Congress was to incorporate a 'make available' right into the copyright owner's arsenal" without requiring copyright owners "to show consummated acts of actual distribution"). Indeed, a statutory interpretation that protects a making available right is the only proper construction that accords with the views of the Legislative and Executive branches that ratified and implemented the relevant treaties. Under these circumstances, it is simply wrong to say, as the *Thomas* court did, that a reading of the Copyright Act that comports with U.S. international obligations is not reasonable.

The court in *Thomas* also noted that the WIPO Internet Treaties are not "self-executing and lack any binding legal authority separate from their implementation through the Copyright Act." *Thomas*, 579 F. Supp. 2d at 1226 (citations omitted). Copyright owners, however, have never suggested that the WIPO Internet treaties are self-executing or that they must be followed simply because the U.S. has ratified those treaties. Rather, as discussed above, *Charming Betsy* mandates that U.S. laws should be construed, if at all possible, as consistent with U.S. international obligations. *Charming Betsy* applies regardless of whether the treaties at issue are self-executing. *See generally* Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784 (2011) (collecting authority). Indeed, if a treaty were self-executing, there would be no need to construe a separate federal statute under *Charming Betsy*.

Moreover, Congress intended to implement fully the treaties at issue: on the advice of the President, the Register of Copyrights, the Commerce Department, and the State Department,

Congress believed it could do so by relying upon existing provisions of the Copyright Act. rightly concluded that "previously enacted legislation . . . [is] fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." Restatement (Third) of Foreign Relations § 111 cmt. h (1987). "[T]he total combination of what Congress did and did not do" in enacting the DMCA to implement the WIPO treaties reflects Congress's understanding that the non-amended portions of the Copyright Act reflect "treaty norms." Ginsburg, *supra*, at 39.

**E. Policy Considerations**

Sound policy considerations also support the conclusion that U.S. copyright laws should be interpreted consistently with U.S international obligations. The making available right is an international norm of copyright protection. More than 90 countries, including the United States, have committed to affording copyright owners that right by becoming signatories to the WIPO treaties or bilateral trade agreements with the United States. Placing U.S. law outside international copyright norms would seriously undermine legislative policy underlying the Copyright Act itself. As the *en banc* Ninth Circuit observed, Congress drafted the Copyright Act with the "objective of achieving 'effective and harmonious' copyright laws among all nations," "to secure a more stable international intellectual property regime," and to "'strengthen[] the credibility of the U.S. position in trade negotiations with countries where piracy is not uncommon' . . . ." *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1097–98 (9th Cir. 1994) (*en banc*) (quoting H.R. Rep. No. 100-609, at 20 (1988), and S. Rep. No. 100-352, at 4–5 (1988); *see* 1976 Report at 130 ("In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations . . . assume[s] ever greater importance."). These policies are best served by "ensuring

exemplary compliance with our international obligations." *Golan v. Holder*, 132 S. Ct. 873, 894 (2012).

As the Supreme Court also has admonished: "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995). That admonition has particular relevance in the copyright context. If other countries believe that the United States — as the world's leading exporter of copyrighted works and one of the world's most vocal proponents for strong copyright protection—fails to comply with its own international copyright commitments, copyright owners will have little hope of securing such protection abroad. Consistent with *Vimar* and *Charming Betsy,* the Copyright Act should not be interpreted in a way that undermines the credibility of the United States and makes it more difficult and costly for copyright owners to obtain effective copyright protection worldwide.

## II. The Rights of Making Available and Communication to the Public Have Applicability to a Wide Range of Activities Beyond the File-Sharing Context.

While the Office's Notice and the discussion above focus on file-sharing, the significance of the rights of making available and communication to the public is not limited to distributing copies of works over the Internet. Those rights are particularly important given the emergence of a variety of services, including Internet streaming services, that make copyrighted works available to large numbers of users and otherwise communicate those works to the public.

Courts outside the United States have correctly recognized that the streaming of copyrighted works over the Internet implicates the right of communication to the public. They have concluded that any transmission of a work to the public comes within this right regardless

of the technical means or process utilized. *See ITV Broadcasting Ltd. v. TVCatchup Ltd.*, Case C-607/11 (Court of Justice of the European Union 2013) (streaming of broadcast programming); *Rogers Commc'ns Inc. v. Soc'y of Composers, Authors and Music Publishers of Can.*, No. 33922 (Canada 2012) ("A stream of a musical work from the Internet is not a private transaction outside the scope of the right to communicate to the public. It matters little for the purposes of copyright protection whether the members of the public receive the communication in the same or different places, at the same or at different times, or at their own or the sender's initiative."); *cf. National Rugby League Invests. Pty Ltd. v. Singtel Optus Pty Ltd.* (Australia 2012) (relying upon reproduction right to restrain unauthorized streaming of telecasts of sporting events).

Likewise, several U.S. courts have properly concluded that streaming services engage in public performances requiring licenses from copyright owners. *See, e.g.*, *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2013) (noting that it was "undisputed" that defendant publicly performed plaintiffs' works by streaming them on the Internet without authorization); *United States v. Am. Soc. of Composers Authors, Publishers*, 627 F.3d 64, 74 (2d Cir. 2010) (recognizing that "all parties agree" that Internet streaming services "constitute public performances"); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003) (recognizing without addressing district court's determination that plaintiff established prima facie case that website streaming unauthorized clips infringed its public performance rights); *Cmty. Television of Utah, LLC v. Aereo, Inc.*, - F. Supp. 2d - , 2014 WL 642828, at * 8 (D. Utah 2014) (finding that defendant infringed plaintiffs' public performance right by unauthorized streaming of television programs over the Internet); *Fox Television Stations, Inc. v. FilmOn X LLC*, - F. Supp. 2d - , 2013 WL 4763414 (D.D.C. 2013) (same); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal.

2012) (same); *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ. A. 00-121, 2000 WL 255989 (W.D. Penn. Feb. 8, 2000) (same); *see also Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1009 (C.D. Cal. 2011) (finding that Zediva on-demand video service infringed plaintiffs' public performance rights by unauthorized transmission of works over the Internet). Thus, these courts have provided the protection contemplated by the right of communication to the public.

No proof should be required that anyone requested a stream of a particular work to establish infringement of the exclusive right to publicly perform that work (or to obtain damages for that infringement). As in the file-sharing context, offering to stream a work over the Internet to multiple users is sufficient. *See* Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L REV. 577, 609 n.1 (2008) ("Disseminating or offering works online for end-user access via streaming or downloading comes within the author's exclusive right of 'making available' . . . ."); *Svensson v. Retriever Sverige AB*, Case C-466/12 (Court of Justice of the European Union 2014) (holding that an "act of communication" occurs when "a work is made available to the public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity"). The Transmit Clause, located in the definition of public performance, supports such a reading of the Copyright Act in that it contemplates only those members of the public who are "*capable* of receiving the performance." 17 U.S.C. § 101 (emphasis added); *see also* 1976 Report at 64–65 (explaining that the public performance right is implicated even if those capable of receiving the performance do not turn on their receiving equipment); 17 U.S.C. § 106 (affording right to

authorize); 17 U.S.C. § 501 (allowing court to enter injunction to "prevent" and "restrain" violation of rights).

## CONCLUSION

For the reasons stated above, the MPAA and RIAA do not believe it is necessary, at this time, to change U.S. laws to implement U.S. obligations under the WCT and WPPT, including the obligations to provide rights of making available and communication to the public. In responding to Representative Watt, the Office should clarify that the distribution right does include the making available right and does not require a showing of actual dissemination. The Office also should make clear that the rights of making available and communication to the public encompass a broad range of activities beyond merely P2P file-sharing. Where a service provides access to copyrighted works via the Internet without authorization—as a download, a stream, a link or otherwise—it infringes one or more of the affected copyright owner's exclusive rights under Section 106 of the Copyright Act, without the need for proof that any user actually availed herself of that access. The Office and Congress should closely monitor developments in this area and if other courts adopt the flawed analysis requiring proof of actual dissemination or otherwise impose additional requirements inconsistent with the Copyright Act and U.S. international obligations, action should be taken to remedy any such misinterpretation of United States law.

Respectfully submitted,

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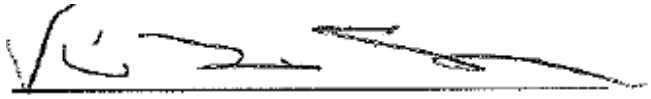

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