Before the
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Washington, DC 20559

Study on the Right of Making Available; Comments and Public Roundtable	))))	Docket No. 2014-2

COMMENTS

OF

PUBLIC KNOWLEDGE AND

ELECTRONIC FRONTIER FOUNDATION

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Introduction and Summary

Public Knowledge and the Electronic Frontier Foundation ("Commenters") respectfully submit these comments in response to the Copyright Office's Request for Comments dated February 25, 2014.[1] Commenters urge the Copyright Office not to recommend that Congress create a new making available and/or communication to the public right. The United States has always intended to use the existing exclusive rights as enumerated under § 106 of the Copyright Act to satisfy WIPO treaty obligations, and those existing rights do indeed satisfy WIPO obligations. This remains the case even if United States courts determine that merely offering to upload a file does not implicate any of a rightsholder's exclusive rights. Not only is an explicit making available right unnecessary under the WIPO treaties, it would have unintended negative effects on the public.

If, however, the Copyright Office elects to recommend, or Congress elects to adopt, a new explicit making available right, Commenters recommend that Congress consider eliminating or modifying a number of existing exclusive rights, and updating or creating limitations and exclusions. These changes may be necessary to limit the negative effects such a right could have on the public, as well as to streamline and clarify the law.

I. Existing United States Law Fulfills Making Available and Communication to the Public Treaty Obligations

From even before the WIPO treaties were signed, United States authorities have consistently concluded that obligations with respect to these rights are fulfilled by existing United States law. And Courts have found violations of existing laws in the situations that these rights were intended to address. To the extent that there is disagreement among the courts regarding existing copyright law, the courts are equipped to resolve that disagreement. Finally, obligations under the WIPO

[1] Request for Comments and Notice of Public Roundtable, *Study on the Right of Making Available; Comments and Public Roundtable,* 79 FR 10571 (Feb. 25, 2014), *available at* https://www.federalregister.gov/articles/2014/02/25/2014-04104/study-on-the-right-of-making-available-comments-and-public-roundtable.

treaties will be fulfilled even if United States courts conclude that in some situations, merely offering to upload a file does not implicate an exclusive right.

A. United States Authorities Have Consistently Found that Existing Law Fulfills Making Available and Communication to the Public Treaty Obligations

United States law is already in compliance with the WIPO treaties. Following the adoption of the WIPO treaties, Congress conducted a full review of existing United States copyright law in 1998. Congress concluded that "[t]he treaties do not require any change in the substance of copyright rights or exceptions in U.S. law."[2] Former Register of Copyrights Marybeth Peters agreed, explaining:

> While Section 106 of the US Copyright Act does not specifically include anything called a "making available" right, the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance set out in Section 106.[3]

Indeed, at the time of signing the treaties, the United States explicitly clarified that it could fulfill its obligation with respect to these rights through other exclusive rights. At the Diplomatic Conference to conclude the two treaties, Mr. Kushan, delegate for the United States,

> stressed the understanding—which had never been questioned during the preparatory work and would

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[2] H.R. Rep. No. 105-551(I), at 9 (1998). Congress also concluded that the treaties required the U.S. to "make it unlawful to defeat technological protections used by copyright owners to protect their works." *Id.* at 10. This determination gave rise to the Digital Millennium Copyright Act.

[3] *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 114 (2002) (letter from Marybeth Peters, Register of Copyrights, United States Copyright Office).

> certainly not be questioned by any Delegation participating in the Diplomatic Conference—that those rights might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles [11 and 18 of Draft Treaty No. 2] were covered by such rights.[4]

Thus it is clear that the United States always intended to fulfill WIPO treaty obligations through existing exclusive rights, and there is no reason to believe that this approach is no longer sufficient to satisfy those obligations.

B. Courts Have Found Violations of United States Copyright Law in Those Situations the Making Available and Communication to the Public Rights Were Intended to Address

The making available and communication to the public rights, as contained in the WIPO treaties, were intended to address the unauthorized streaming and distribution of copyrighted works over the internet, and Congress has recognized and courts have found that existing United States law protects against both. For example, when Congress amended the Copyright Act in 1999 it noted, "copyright piracy of intellectual property flourishes, assisted in large part by today's world of advanced technologies," and "the potential for this problem to worsen is great."[5] In 2001, the Ninth Circuit found that Napster users violated rightsholders' exclusive rights when they distribute or download copyrighted files without rightsholders'

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[4] Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, CRNR/DC/102, ¶ 301, Geneva, December 2 to 20, 1996 [hereinafter Kushan Statement].

[5] H.R. Rep. No. 106-216, at 3 (1999).

permission.[6] Numerous courts, including the Supreme Court, have repeatedly referred to unauthorized online file transfers as infringements.[7]

To the extent that courts nevertheless disagree, the court system is equipped to resolve the dispute. It is normal for courts to initially disagree where novel questions concerning new technologies are concerned. But the Supreme Court has instructed courts to "[a]pply[] the copyright statute, as it now reads, to the facts as they have been developed."[8] On the question of whether or not merely offering to upload a file online without a rightsholder's authority constitutes a violation of existing United States law, the court system is equipped to resolve the disagreement.

C. WIPO Obligations Will Be Fulfilled Even If Courts Determine that Merely Offering to Upload a File Online Does Not Always Implicate an Exclusive Right

Even if courts ultimately determine that in some instances, merely offering to upload a file does not implicate an exclusive right, WIPO obligations will still be fulfilled. A definition of making available that only applies once actual filesharing has been completed will satisfy both the text and the intent of the right.

WIPO defines communication to the public as:

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[6] *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001).

[7] *See, e.g.*, *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 920 (2005) (individual "users of peer-to-peer networks . . . have prominently employed those networks in sharing copyrighted music and video files without authorization"); *In re: Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright. The swappers, who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement, are the direct infringers."); *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 500 (1st Cir. 2011).

[8] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

> [T]he right to authorize any communication to the public, by wire or wireless means, including "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them." *The quoted expression covers in particular on-demand, interactive communication through the Internet.*[9]

And the making available right is defined as:

> [T]he right to authorize the making available to the public, by wire or wireless means . . . in such a way that members of the public may access the [work] from a place and at a time individually chosen by them.[10]

As discussed in Section I.B. above, existing United States law already finds that "on-demand, interactive communication through the Internet" implicates rightsholders' exclusive rights.

Moreover, the making available act turns not on whether a work has been posted or listed, but on whether members of the public have the ability to "access [it] from a place and at a time individually chosen by them." Thus one might reasonably conclude that the right has only been implicated when at least one member of the public has indeed accessed the work.

Finally, the WIPO treaties were designed to allow Contracting Parties to differ in how they define, implement, and enforce the terms of the treaty, or even to allow any particular Contracting Party to remain an outlier in these respects as compared to other Contracting Parties. Indeed, the treaties do not specify what criteria must be met for a work to be considered "made available" or "communicated to the public." On the contrary, the treaties provide the Contracting Parties with

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[9] WIPO, *Summary of the WIPO Copyright Treaty (WCT) (1996)*, http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (emphasis added).
[10] WIPO, *Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996)*, http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html.

great flexibility to answer this question for themselves and to implement a solution "in national legislation through application of any particular exclusive right."[11]

II. The Creation of A New Making Available Right Would Have A Number of Undesirable Effects

A new making available right is not only unnecessary to satisfy WIPO obligations; it would also have undesirable effects. It would risk outlawing desirable activities that are currently lawful. It could also impede the use of important efficiency-enhancing technologies such as cloud storage and backup and intra-office file sharing. It could put internet users at risk of copyright liability for the simple and ubiquitous act of hyperlinking. Finally, it could make it easier for groups to use mass copyright litigation to suppress speech and extract settlements from individuals.

A. An Explicit Making Available Right Would Risk Making Desirable Behaviors Unlawful

The United States should not create a new making available right because doing so could risk making a number of desirable behaviors that are currently lawful, unlawful. For example, some data storage, backup, and intra-office file sharing would become possibly unlawful. In addition, the mere posting of a hyperlink to a copyrighted item could become unlawful, whether performed by an individual or a search engine.

A making available right could make it difficult or impossible for individuals and businesses to store or back up data in the cloud or on shared drives. Liability under the making available right could attach in scenarios similar to the following:

- An organization uses Dropbox for Business and all employees sync their Documents folders to the company Dropbox. While conducting research for a regulatory filing, one employee adds several (legally downloaded) PDFs of copyrighted academic articles to her Documents

[11] Kushan Statement, *supra* note 4.

folder, which then syncs to the company Dropbox and is available to other employees.

- One employee of a company prepares a PowerPoint presentation that includes a copyrighted photograph used with the permission of the author, then saves that presentation on a shared drive.
- The employee who saved the PowerPoint presentation on the shared drive deletes the presentation, but the file can still be accessed by anyone who knows it was there and restores it to its former location.

In each of these scenarios, the activity at issue is something that would not be considered a copyright violation under existing United States law.

Uploading a copyrighted work so that the public could access it in this way could happen accidentally. For example, a user of a cloud storage and sharing service like Dropbox could accidentally sync his or her entire hard drive, not cognizant of the fact that the contents included copyrighted works. Even if the error were discovered and corrected before anyone else downloaded one of the works, the user could possibly still be liable for having made the works available at all.

Because it could create new liabilities, a making available right could unwittingly chill adoption of technologies such as those referenced above. But these technologies often make day-to-day operations within companies, organizations, and other groups more efficient. And not only do cloud storage, backup, and intra-office filesharing enhance efficiency, but they also support a number of businesses that provide these services.

Perhaps even more troubling, a making available right could be implicated any time a copyrighted work is linked to on the internet, whether deliberately—as in the case of an individual constructing a website, or automatically—as in the case of a search engine indexing and linking to a copyrighted work posted on publicly accessible webspace. Indeed, the question of whether mere hyperlinking can

constitute making available is an issue of much debate in regimes that include a making available right.[12]

B. A Making Available Right Could Make It Easier for Groups to Use Mass Copyright Litigation to Suppress Speech and Extract Settlements from Individuals

An explicit making available right could also invite greater activity from groups that use mass copyright litigation to suppress speech and extract settlements from individuals. For the reasons explained *supra* in Section II.A., a new making available right would likely set a much lower threshold for copyright liability than existing law. And a lower liability threshold would no doubt give rise to both increased DMCA takedown notices, and litigation.

Research has already established that a broad making available right can generate numerous DMCA takedown notices, which generally suppress speech on the internet. In 2008, researchers at the University of Washington released a study called *Why My Printer Received a DMCA Takedown Notice*.[13] Using specially designed BitTorrent clients to monitor BitTorrent traffic, the researchers documented receipt of over 400 takedown requests accusing them of copyright infringement, even though they had not uploaded or downloaded a single file. The RIAA at one time admitted that it based takedown notices on identifying files as

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[12] *See, e.g.*, *Svensson v. Retriever* (2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=395; Michael Czerniawski, Responsibility of Bittorrent Search Engines for Copyright Infringements (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540913; Georg Philip Krog, *Case Note: The Norwegian "Napster case" – Do hyperlinks constitute the "making available to the public" as a main or accessory act?*, 22 Comp. L. & Sec. Rev. 73 (2005);

[13] Michael Piatek, Tadayoshi Kohno, & Arvind Krishnamurthy, *Challenges and Directions for Monitoring P2P File Sharing Networks – or – Why My Printer Received a DMCA Takedown Notice*, University of Washington Technical Report, UW-CSE-08-06-01 (2008), *available at* http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf

"available" for sharing.[14] Widespread takedown notices of this sort would become even more common if Congress were to create an explicit making available right.

An explicit making available right could also provide the legal foundation to support innumerable new lawsuits against individual internet users, even in situations in which no transfer of files from one user to another ever occurred. Many individuals would be forced to surrender and settle, rather than finance an expensive lawsuit.

III. In the Event that Congress Nevertheless Decides to Create An Explicit Making Available Right, Congress May Need to Change Other Parts of the Copyright Act Accordingly

The creation of an explicit making available right could require several other changes to the Copyright Act. Several currently existing exclusive rights might need to be adapted to streamline and clarify the law. Also, existing exceptions might need to be updated and new exceptions created.

An explicit making available right would most likely overlap extensively with currently existing exclusive rights, and thus Congress may have to consider eliminating some of those rights in the event it elects to create a making available right. For example, because the public display, public performance, and distribution rights are all concerned with making a work available to the public, those rights might be subsumed into the new making available right. Congress may also have to consider eliminating the reproduction right, which could have the added benefit of resolving the ongoing debate about how unauthorized reproductions created purely for personal and private use should be treated under the law.[15]

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[14] *See* Electronic Frontier Foundation, *RIAA v. The People: Five Years Later* 7 (2008), *available at* https://www.eff.org/files/eff-riaa-whitepaper.pdf.

[15] Such reproductions are arguably protected under the fair use doctrine, but much confusion remains. *See* Sherwin Siy, Public Knowledge, *Consumer Expectations, Private Copies, and Digital Ownership*, Nov. 19, 2013, http://www.publicknowledge.org/news-blog/blogs/consumerexpectationsprivatecopiesanddigi.

Existing limitations and exceptions, as well, may need to be updated and new ones created. For example, if the distribution right were subsumed into a making available right, Congress may have to consider revising first sale to clarify that the owner of a copy of a work may transfer ownership to someone else without incurring liability for unauthorized making available. And to protect private noncommercial desirable uses of works that could be construed as making available, such as cloud storage or hyperlinking, Congress may have to consider an explicit exception for all private and noncommercial uses.

IV. Conclusion

The United States should not create a new explicit making available right. Existing United States law already satisfies obligations under the WIPO treaties. A making available right could have negative unintended consequences and necessitate extensive additional changes to United States copyright law.

Respectfully submitted,

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