

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

In the Matter of )  
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Study on the Right of Making Available ) Docket No. 2014-2  
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**ADDITIONAL 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 additional comments in response to the Copyright Office’s (“Office”) Request for Additional Comments (“Additional Request”), published at 79 Fed. Reg. 41,309 (July 15, 2014), in connection with the Office’s forthcoming Study on the Right of Making Available.

**ADDITIONAL BACKGROUND**

The Office announced in its Original Request for Comments (“Original Request”), published at 79 Fed. Reg. 10,571 (Feb. 25, 2014), that it is undertaking a study at the request of Congress to assess the state of U.S. law recognizing and protecting the rights of “making available” and “communication to the public” in the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). The Office initially sought 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.” Original Request at 10,571.

As noted in the Additional Request, the Office received twenty-seven written comments in response to the Original Request; these included comments submitted on April 4, 2014 by the MPAA and RIAA (“Original Comments”). On May 5, 2014, the Office held a public roundtable (“Roundtable”) in Washington, DC “to hear stakeholder views on these issues” and later posted a transcript. Additional Request at 41,309 & n.3. Noting certain issues raised in comments and at the Roundtable, and the intervening U.S. Supreme Court decision in *American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. \_\_\_, 134 S. Ct. 2498 (June 25, 2014), the Office announced in the Additional Request that it was seeking additional public comment on five specific questions relating to U.S. implementation of the rights of making available and communication to the public. The Office also invited the public to submit any other comments or suggestions. See Additional Request at 41,310.

These Additional Comments, which supplement the MPAA and RIAA’s Original Comments and incorporate them by reference, address each of the Office’s five specific questions in turn.

## DISCUSSION

### **I. Question One: The Supreme Court’s *Aereo* Decision Further Supports the Conclusion That U.S. Copyright Law Fully Implements the WCT and WPPT Rights of Making Available and Communication to the Public.**

The Office’s first question asks: “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?”

The Supreme Court’s ruling regarding the right of public performance in *Aereo* does not affect the scope of the United States’ implementation of the rights of making available and communication to the public. In reaffirming that under the Copyright Act copyright owners retain the right to control the public performance of their works regardless of the “behind-the-

scenes” technical details by which performances to the public are accomplished, 134 S. Ct. at 2508, *Aereo* provides further support to the MPAA and RIAA’s view that “[e]xisting 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.” Original Comments at 2.

**II. Question Two: The *Aereo* Court Recognized No Volitional Conduct Requirement in Assessing Direct Liability for the Section 106(4) Public Performance Right, and It Is Error To Proceed on the Basis that Such a Requirement Exists for Direct Copyright Infringement.**

The Office’s second question asks: “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*?”

To the extent that this question suggests that a “volitional conduct” requirement for direct liability exists in certain circumstances under U.S. copyright law, we respectfully disagree with such a premise. Under U.S. copyright law as properly interpreted, proof of “volitional conduct” is not required to establish a defendant’s liability for direct infringement in the context of interactive transmissions of content over the Internet.

Section 106(4) of Title 17 of the U.S. Code grants to a copyright owner “the exclusive rights to do and to authorize any of the following: . . . in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly.” The defendant in *Aereo* expressly asked the Supreme Court to impose a volitional conduct requirement as an element of direct liability for infringement of this right. *See* Br. for Resp. at 19, 40-43, *American Broadcasting Cos. v. Aereo, Inc.*, No. 13-461 (S. Ct. Mar. 26, 2014). But the Court declined to do so. The Court instead proceeded by posing the question, “[d]oes Aereo ‘perform’ . . . ?”, 134

S. Ct. at 2504, and, based on a careful analysis of the Copyright Act’s text and legislative history, concluded that it does.

The Court observed that in 1976 Congress amended the Copyright Act “in large part to reject the Court’s holdings” in two cases, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), which had held that cable companies providing remote antennas and other infrastructure did not “perform” copyrighted works because their role more closely resembled that of viewers than broadcasters. 134 S. Ct. at 2504-05. Specifically, “Congress enacted new language that erased the Court’s line between broadcaster and viewer, in respect to ‘perform[ing]’ a work. The amended statute clarifies that to ‘perform’ an audiovisual work means ‘to show its images in any sequence or to make the sounds accompanying it audible.’” *Id.* at 2505-06 (quoting 17 U.S.C. § 101). The Act’s new language made clear that “*both* the broadcaster *and* the viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds.” *Id.* at 2506 (emphasis in original). The Court further supported its analysis with examination of the text and legislative history of the Transmit Clause, 17 U.S.C. § 101. *See id.*

In light of the Act’s text and legislative history, it was “clear” to the Court “that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, ‘perform[s].’” 134 S. Ct. at 2506; *see also id.* at 2504 (“[T]he Act is unmistakable: An entity that engages in activities like Aereo’s performs.”). The Court’s majority opinion acknowledged—and rejected—the dissent’s call for imposition of a volitional conduct requirement. *See* 134 S. Ct. at 2507 (concluding that evidence that Aereo’s system transmits requested programs “[o]nly . . . in

automatic response to the subscriber’s request” was “not critical” to the public performance question); *id.* at 2512-14, 2516 (Scalia, J., dissenting).

Consistent with the Court’s majority opinion, we respectfully suggest that the dissent’s assertion that a “volitional conduct” requirement exists is not a correct statement of the law. *See* 134 S. Ct. at 2512-14, 2516 (Scalia, J., dissenting). Rather, the test for direct copyright infringement is simply stated: “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (“The word ‘copying’ is shorthand for the infringing of any of the copyright owner’s . . . exclusive rights”) (quotation omitted); *see also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (“Nimmer”) § 13.08[C] (2014) (“Legions of cases, up to the Supreme Court level, have defined the elements of copyright infringement as two: plaintiff’s ownership of the copyright, and defendant’s copying of protectable elements of the copyrighted work.”).

The *Aereo* dissent pointed to two published opinions from the Fourth and Second Circuit Courts of Appeals that, in specific circumstances, applied a “volitional conduct” test for direct infringement of the Section 106(1) reproduction right. *See CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549-550 (4th Cir. 2004); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (“*Cablevision*”), 536 F.3d 121, 130-32 (2d Cir. 2008) (cited at 134 S. Ct. at 2512, 2513, 2514 (Scalia, J., dissenting)). But the dissent did not address subsequent authority limiting and questioning those rulings.<sup>1</sup>

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<sup>1</sup> The dissent also cited a third decision, *Fox Broadcasting Company v. Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2013), but in that case the Ninth Circuit did not take a position on the existence of a volitional conduct requirement. *See Oppenheimer v. Allvoices, Inc.*, 2014 WL

For example, the next time the Fourth Circuit considered a defendant's assertion that volitional conduct is a required element of direct infringement, the court rejected that assertion and ruled against the defendant. See *Quantum Sys. Integrators, Inc. v. Sprint Nextel Corp.*, 338 Fed. Appx. 329 (4th Cir. 2009) (unpublished). In *Quantum Systems*, the Fourth Circuit emphasized that the *CoStar Group* holding had been limited to the context of Internet service providers "passively storing material at the direction of users in order to make that material available to other users upon their request." *Id.* at 336 (quotation omitted). The court even chided the defendant for "overstat[ing] the 'volitional' requirement *purportedly* established by *CoStar*." *Id.* (emphasis added).

Other courts have expressed similar skepticism. See, e.g., *Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1011 n.7 (C.D. Cal. 2011) ("declin[ing] to adopt the so-called volitional conduct requirement without clear instruction from the Ninth Circuit") (emphasis added); *Blackwell Publ'g, Inc. v. Excel Research Grp., LLC*, 661 F. Supp. 2d 786, 791-92 (E.D. Mich. 2009). Reviewing the case law, the First Circuit in 2012 noted that the "'volitional act' position" had been raised in other circuits with only "varying degrees of success," and elected to refrain from determining whether such a requirement exists. *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 55 (1st Cir. 2012); see also 4 Nimmer, *supra*, § 13.08[C] ("Other cases are more wary of arguments that a defendant is only liable for infringement where it engaged in some unspecified 'volitional conduct.'") (quotation omitted).

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2604033, at \*6 (N.D. Cal. June 10, 2014) (noting that although the "requirement of 'volitional' conduct for direct liability has been adopted by the Second and Fourth Circuits . . . the Ninth Circuit has not yet addressed the issue, and courts within this Circuit are split on it").

Leading copyright scholars also have questioned or disputed the existence of a volitional conduct requirement. David Nimmer’s treatise, for instance, stated its “respectful[] disagree[ment]” with the Second Circuit’s “treatment of volitional conduct,” 4 Nimmer, *supra*, § 13.08[C], and Professor Paul Goldstein emphasized that “American copyright law has never required that liability for direct infringement be imposed only on the individual who presses the ‘record’ button,” 2 Paul Goldstein, *Goldstein on Copyright* (“Goldstein”) § 7.0.2, at 7:8.1 (3d ed. 2014 Supp.).

In the decade since the *CoStar Group* decision, the notion that volitional conduct is a requirement for direct infringement liability has faced persistent criticism, if not outright rejection, by courts and commentators. It should not be recognized as an accurate statement of the law.

### **III. Question Three: The Existence of Theories of Secondary Copyright Liability Does Not Affect the Scope of the United States’ Implementation of the Rights of Making Available and Communication to the Public.**

The Office’s third question asks: “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?”

In light of the discussion of secondary liability at the May 2014 Roundtable, we understand this question to ask whether theories of secondary liability may, or should, be used to fill any perceived gaps in the United States’ implementation of its WCT and WPPT treaty obligations. This is not necessary, as U.S. law on direct copyright infringement, properly interpreted, fully implements these obligations. Nor does the existence of theories of secondary liability offer any basis to argue for narrowing the scope of liability for direct infringement.

Doctrines of secondary liability are not relevant to the analysis of United States compliance with its WCT and WPPT obligations since the treaties require parties to provide

remedies for direct infringement. *See* WCT, Articles 6(1), 8; WPPT, Articles 8(1), 10, 12(1), 14; WIPO, Standing Comm. on Copyright and Related Rights, Description of Subjects for Future Review, at 2 (Nov. 2002) (noting that the statement in Article 8 of the WCT regarding provision of physical facilities for enabling or making a communication “seems only to address the question of direct liability, not the one of contributory or vicarious liability”).

The scope of protection of copyright owners’ exclusive Section 106 rights, including those implementing the rights of making available and communication to the public, is defined by the prohibitions against direct infringement. This is significant because direct copyright infringement has long been recognized as a “strict liability” cause of action. *See Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1011 n.7 (C.D. Cal. 2011); 2 Goldstein, *supra*, § 11.4, at 11:17 n.1 (“Judicial formulation of the strict liability rule in the United States dates at least to” 1869).

“[T]he principle of strict liability in copyright law” is vital to effective enforcement of copyright owners’ rights because “[t]he protection accorded literary property would be of little value if . . . insulation from payment of damages could be secured . . . by merely refraining from making inquiry” into the infringing nature of one’s copying. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963) (quoting *De Acosta v. Brown*, 146 F.2d 408, 412 (2d Cir. 1944) (ellipses in original)). Pursuant to this bedrock principle of U.S. copyright law, it is appropriate for liability to be borne by even the innocent infringer “since he, unlike the copyright owner, . . . has an opportunity to guard against the infringement.” 316 F.2d at 308 (quotation omitted).

While theories of secondary liability do not define the scope of the rights of making available or communication to the public, they do aid enforcement of these rights. They provide

for remedies in “circumstances in which it is just to hold one individual accountable for the actions of another,” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984), such as inducement of or material contribution to another’s copyright infringement. In accordance with this purpose, the various tests for secondary infringement liability require plaintiffs to prove additional elements that focus on the particular defendants’ relationship to the infringement. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005) (elements of inducement of infringement include the “intent to bring about infringement”); *Arista Records LLC v. Doe 3*, 604 F.3d 110, 117-18 (2d Cir. 2010) (elements of contributory infringement include actual or constructive knowledge of infringing activity).

**IV. Question Four: Making Digital Files Available to the Public Online Infringes the Section 106(3) Distribution Right.**

The Office’s fourth question asks: “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?”

The text of the Copyright Act, including Section 101’s language on “material objects,” and subsequent amendment of the Act make clear that copyright owners retain the right to control the public distribution of their copyrighted works in the online environment. This conclusion is confirmed by the Act’s legislative history. It is thus unsurprising that every single court to consider the question has rejected arguments that the right of distribution does not apply in the digital realm. This result is also required for the United States’ implementation of the WCT and WPPT treaties, a primary purpose of which was protecting copyrighted works specifically against unauthorized exploitation over the Internet. *See* S. Rep. No. 105-190, at 10 (1998); H.R. Rep. No. 105-551(II), at 21 (1998).

Section 106(3) of Title 17 of the U.S. Code grants a copyright owner “the exclusive rights to do and to authorize any of the following: . . . 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.” Section 101 provides substantively identical definitions of “copies” and “phonorecords”: “‘Copies’ are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *See id.* (“‘Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

When copies or phonorecords are stored electronically—for example, on portable storage devices or computer disk drives—the devices or drives plainly count as the required “material objects” in which the works are fixed. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993). This is true both before and after a copy or a phonorecord has been distributed over the Internet from one computer to another. Courts thus “‘have not hesitated to find copyright infringement by distribution in cases of file-sharing or electronic transmission of copyrighted works.’” *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013) (quoting *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006)). Indeed, “[n]o court has held to the contrary on this issue.” 2 Nimmer, *supra*, § 8.11[D][4][a][i]; *see also Greubel*, 453 F. Supp. 2d at 968 (collecting cases). In addition, courts at the appellate and Supreme Court levels have consistently affirmed liability for public distribution that occurs only digitally. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster*,

*Ltd.*, 545 U.S. 913, 920-21 (2005); *New York Times Co. v. Tasini*, 533 U.S. 483, 498, 506 (2001); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-13, 1015 (9th Cir. 2001).

Rather than seeking to limit the distribution right based on the medium used, Section 101 takes pains to clarify that the “material objects” in which works are fixed should be interpreted as broadly as possible and should include works that are fixed “by any method now known or later developed.”

This broad protection of the distribution right is precisely what Congress intended. As discussed in Professor Peter S. Menell’s article, *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, 41-44 (2011), Congress replaced the terms “publish” and “vend” with “distribute” in the draft Copyright Act to ensure that the right to control the dissemination of copyrighted works was stated broadly enough to stand the test of time, no matter what technological developments ensued. Thus, the Register of Copyright’s 1965 Supplementary Report emphasized that “[a] real danger to be guarded against is that of confining the scope of an author’s rights on the basis of present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.” H. Comm. on the Judiciary, 89th Cong., Supplementary Rep. on Copyright Law Revision 14 (Comm. Print 1965). The Supplementary Report even gave a specific example of the potential future “transmission of works by . . . linked computers.” *Id.*

That a technology developed whereby people can disseminate copies and phonorecords while at the same retaining them is certainly no reason to *limit* copyright owners’ exclusive distribution right, which protects their ability to decide when, where, and how to make their works available to the public. As stated in the Nimmer treatise, because the actual or offered transactions end with distributees in possession of “material objects,” 17 U.S.C. § 101, digital

distributions implicate the exclusive right to distribute copies or phonorecords to the public “by sale or other transfer of ownership, or by rental, lease, or lending,” § 106(3); 2 Nimmer, *supra*, § 8:11[C][3][b].

The Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”), Pub. L. No. 104-39, 109 Stat. 336 (amending, *inter alia*, 17 U.S.C. §§ 114, 115), further demonstrates that the Section 106(3) distribution right includes digital distribution. The DPRA imposes on copyright owners of nondramatic musical compositions (in exchange for statutory royalties) “[a] compulsory license . . . to distribute or authorize the distribution of a phonorecord of a nondramatic musical work *by means of a digital transmission* which constitutes a digital phonorecord delivery.” 17 U.S.C. § 115(c)(3)(A) (emphasis added).

Critically, this is a provision that narrows copyright owners’ preexisting rights by imposing a compulsory license. The reference to a compulsory license for “digital phonorecord deliveries” therefore has only one possible meaning: a digital distribution right for phonorecords already exists in 17 U.S.C. § 106(3). Because, as demonstrated above, the Copyright Act gives substantively the same definition to “phonorecords” and “copies,” the Section 115(c)(3)(A) compulsory license also demonstrates the existence of a digital distribution right for copies. The DPRA’s legislative history bears this out. *See* S. Rep. No. 104-128, at 27 (1995) (“[T]he *digital transmission* of a sound recording that results in the reproduction by or for the transmission recipient of a phonorecord of that sound recording *implicates the exclusive rights to reproduce and distribute* the sound recording and the musical work embodied therein”) (emphasis added).

**V. Question Five: The Section 106(3) Distribution Right Includes the Right of Making Available and Does Not Require Proof of Actual Dissemination.**

The Office’s fifth question asks: “What evidentiary showing should be required to prove a copyright infringement claim against an individual user or third-party service engaged in

unauthorized filesharing? Should evidence that the defendant has placed a copyrighted work in a publicly accessible shared folder be sufficient to prove liability, or should courts require evidence that another party has downloaded a copy of the work? Can the latter showing be made through circumstantial evidence, or evidence that an investigator acting on the plaintiff's behalf has downloaded a copy of the work?"

As discussed fully in the MPAA and RIAA's Original Comments, the language and legislative history of the Copyright Act of 1976 and later enactments make clear that the distribution right protects copyright owners' ability to determine when, where, and how to make their works available to the public, including offers to distribute their works without proof of actual dissemination to members of the public. *See* Original Comments at 9-22.

Accordingly, evidence that someone has placed a copy or a phonorecord embodying a copyrighted work in a publicly accessible shared folder for online dissemination establishes a prima facie case of infringement of the distribution right. *See* Original Comments at 7-8. Because the infringement is complete upon the copy or phonorecord being made available, there is no need for any further evidentiary showing. An investigator who downloads the copy or phonorecord is merely gathering evidence of, not completing, the infringement.

## **CONCLUSION**

The MPAA and RIAA thank the Copyright Office for this opportunity to answer the Office's additional questions. The events since our Original Comments, including the issuance

of the *Aereo* decision, lend further support to our view that U.S. laws in their current form fully implement the WCT and WPPT rights of making available and communication to the public.

Respectfully submitted,

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