LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2014-2]

Study on the Right of Making Available; Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Request for additional comments.

SUMMARY: The U.S. Copyright Office seeks further comments on the state of U.S. law recognizing and protecting "making available" and "communication to the public" rights for copyright holders. This request provides an opportunity for interested parties to address issues raised in prior written comments and during the public roundtable held on May 5, 2014, as well as express their views on recent legal developments.

DATES: Comments must be received no later than 5:00 p.m. EDT on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESS: All comments should be submitted electronically. To submit comments, please visit http://www.copyright.gov/docs/making_available/. The website interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes ("MB") in one of the following formats: a Portable Document File ("PDF") format that contains searchable,

accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format ("RTF"); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post all comments publicly on the Office's website exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202-707-1027 for special instructions.

FOR FURTHER INFORMATION CONTACT: Maria Strong, Senior Counsel for Policy and International Affairs, by telephone at 202-707-1027 or by email at mstrong@loc.gov, or Kevin Amer, Counsel for Policy and International Affairs, by telephone at 202-707-1027 or by email at kamer@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Office is undertaking a study at the request of Congress to assess the state of U.S. law recognizing and protecting "making available" and "communication to the public" rights for copyright holders, particularly in the digital age. As part of its review, the Office issued a Notice of Inquiry (the "Notice") on February 25, 2014,[1] seeking comments from the public on the following general issues: (1) how the existing bundle of exclusive rights under Title 17 covers the making available and communication to the public rights in the context of digital on-demand transmissions such as peer-to-peer networks, streaming services, and music downloads, as well as more broadly in the digital environment; (2) how foreign laws have interpreted and implemented the relevant provisions of the WIPO Internet Treaties;[2] and (3) the

[1] Study on the Right of Making Available; Comments and Public Roundtable, 79 FR 10571 (Feb. 25, 2014).

[2] WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, 36 I.L.M. 76.

feasibility and necessity of amending U.S. law to strengthen or clarify our law in this area. The Office also posed additional questions on each of these topics.

The Office received twenty-seven written comments from various interested parties in response to the Notice. On May 5, 2014, the Office held a public roundtable in Washington, D.C. to hear stakeholder views on these issues. Commenters and participants in the roundtable expressed a variety of views on a broad range of topics. The Notice, public comments, the agenda for the public roundtable, and the transcript of the roundtable proceedings are posted on the Copyright Office website.[3] A video recording of the roundtable will be posted on the website when it becomes available.

Commenters and roundtable participants generally agreed that current U.S. law, properly interpreted, provides rights that are equivalent to the making available and communication to the public rights required by the WIPO Internet Treaties. There was disagreement, however, over whether and how particular provisions of Title 17 may apply to various activities in the digital context. For example, several stakeholders argued that the unauthorized uploading of a copyrighted work to a shared network folder that is accessible to the public constitutes a violation of the exclusive right of distribution under 17 U.S.C. 106(3). Others disagreed, arguing that direct or circumstantial evidence that another user has downloaded a copy of that file is necessary to establish an infringement of the distribution right by the uploader. The roundtable discussion and initial written comments also highlighted issues such as whether a digital file is a "material object[]" for purposes of the statutory definitions of "copies" and "phonorecords";[4] the relevance of legislative history to the construction of the distribution right; the role of secondary

[3] *See Making Available Study*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/making_available/.

[4] *See* 17 U.S.C. 101.

liability theories in assessing the United States' implementation of the relevant treaty provisions; and the use of evidence provided by a copyright owner's investigator in digital filesharing cases.

Following the Office's roundtable discussions, on June 25, 2014, the Supreme Court decided *American Broadcasting Cos., Inc. v. Aereo, Inc.*[5] The case involved a service, Aereo, that used thousands of dime-sized antennas to allow subscribers to capture and watch television programs over the Internet as the programs were being broadcast over the air. When a subscriber selected a program to watch on Aereo's website, the system would create a subscriber-specific copy of the program that would then be streamed to the subscriber's computer or Internet-connected device. The Court held that this activity infringed the exclusive right of the owners of the copyrights in the programs to perform those works publicly.[6]

A critical aspect of the Court's decision was its interpretation of Title 17's "Transmit Clause." That clause provides that the public performance right afforded to copyright owners under Section 106 includes the exclusive right "to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."[7] Finding Aereo's activities "substantially similar to those of the [cable television] companies" that Congress intended to reach when it updated the public performance right in 1976, the Court held that "Aereo, and not just its subscribers, 'perform[ed]' (or 'transmit[ted]')" within the meaning of the statute.[8] The

[5] 573 U.S. ___, No. 13-461, 2014 U.S. LEXIS 4496 (June 25, 2014).

[6] *See* 17 U.S.C. 106(4).

[7] *Id.* section 101 (definition of "To perform . . . a work 'publicly'").

[8] *Aereo*, 2014 U.S. LEXIS 4496, at *19 (alterations added). *See* 17 U.S.C. 101 ("To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.").

Court further concluded that Aereo performed copyrighted works "publicly," notwithstanding that each transmission was made to a single subscriber from a personal copy, holding that "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."[9]

Justice Scalia, joined by Justices Thomas and Alito, dissented, concluding that Aereo did not "perform" within the meaning of Section 106(4). The dissenting Justices reasoned that, because Aereo's subscribers, not the company itself, selected the programs to be streamed, the resulting performances were not "the product of Aereo's volitional conduct," and therefore Aereo could not be held directly liable for infringement.[10]

II. Request for Comment

The Office invites further written comments on the issues raised in the Notice, including from parties who did not previously address those subjects, or those who wish to amplify or clarify their earlier comments or respond to issues raised during the public roundtable. In addition, the Office is interested in commenters' views regarding the Supreme Court's opinion in *Aereo* and how that opinion may affect the scope of the rights of making available and communication to the public in the United States. Specifically, commenters may wish to address the following questions:

1. 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?

[9] *Aereo*, 2014 U.S. LEXIS 4496, at *28.

[10] *Id.* at *42 (Scalia, J., dissenting).

2. 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*?
3. 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?
4. 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?
5. 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?
6. Please provide any additional comments or suggestions regarding recommendations or proposals the Copyright Office might wish to consider as it concludes its study.

A party choosing to respond to this request need not address all of these topics, but the Office requests that responding parties clearly identify and separately address those subjects for which a response is submitted. Commenters also may address any other issues pertinent to the Office's review.

Dated: July 10, 2014.

Karyn A. Temple Claggett,
Associate Register of Copyrights.

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