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THE SCOPE OF COPYRIGHT PROTECTION

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JANUARY 14, 2014

Serial No. 113–81

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

86–344 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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THE SCOPE OF COPYRIGHT PROTECTION

TUESDAY, JANUARY 14, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:04 a.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Conyers, Marino, Smith of Texas, Chabot, Issa, Poe, Farenthold, Holding, Collins, DeSantis, Johnson, Chu, Deutch, Bass, DelBene, Jeffries, Nadler, Lofgren, and Jackson Lee.

Staff present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; (Minority) Stephanie Moore, Minority Counsel; and Jason Everett, Counsel.

Mr. COBLE. Good morning ladies and gentlemen.

The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection the Chair is authorized to declare recess of the Subcommittee at any time.

We welcome all our witnesses today.

We will now have our opening statements.

This morning the Subcommittee will continue its review of our Nation's copyright laws by hearing testimony concerning what is within the scope of copyright protection. Our witnesses will present contrasting views on three important copyright issues: the making available right, A; should broadcasters—should broadcasts be protected with additional laws, B; and, C, how laws, codes and standards be protected under the copyright law.

I and others have worked to bolster our copyright laws and protect local broadcasters whenever possible. And I have also advocated that these efforts be generously laced with common sense. Common sense, it seems, is an ingredient that is sorely missing sometimes on Capitol Hill. And I guess all of us are guilty of that. Maintaining these philosophies has become complicated by evolving technology. And hopefully our witnesses today will highlight the most important issues confronting our copyright laws.

Piracy and online infringement are an enormous concern and we have repeatedly heard testimony, over the past decade, about the

harms caused by file sharing. It was disturbing to hear that judges were uncertain at that time of how to respond to this crisis.

I am pleased to learn that one of our witnesses, Mr. Nimmer, has updated his copyright treatise and made it perfectly clear that making available copyrighted works for others is infringement. That being said, I do not want to steal the thunder from this morning's testimony. And I encourage all Members, especially those who have not focused on these issues in the past, to carefully consider today's testimony.

In closing, I thank our esteemed panel of witnesses for participating in the hearing today. And I look forward to your remarks.

I am now pleased to recognize the distinguished gentleman from Michigan.

By the way, John, this is our first meeting since Mr. Watt left us.

So, for the first time in years, there will not be a North Carolinian on this side of the Judiciary aisle. But, I hope we will survive.

Good to have you, John.

Mr. CONYERS. Thank you and good morning to the Chairman and the Members of the Committee and the very small number of witnesses that we have before us this morning for a very important subject.

The hearing today provides an important opportunity for us to consider various provisions of copyright law and to examine whether the laws continue to adequately protect creators and promote innovation, in light of developing technologies that were not contemplated when these provisions were originally enacted.

And, to that end, there are several factors that we should keep in mind. For example, the making available right, which gives copyright owners the exclusive right to authorize the manner and terms to make their content available to the public. I favor strong copyright protection because it benefits creators and promotes innovation and economic growth. Strong copyright protection laws also help create a marketplace for content that viewers will enjoy as well as the latest technology that can be used to watch the content.

The making available right is especially important today where one copy of a work over the Internet, without authorization, could provide access to millions of users around the world. The making available right helps prevent infringing conduct.

For those reasons, we do not need to change copyright law for the making available right. Existing law already includes a making available right. I don't believe that there is any ambiguity in the law and some Federal appellate courts have recognized the making available right. In addition, the United States is a party to various international agreements that require signatories to implement the making available right. Congress has repeatedly demonstrated, by ratifying these agreements, that the United States law already includes this right and no change is necessary.

In any case, as we study this issue, we should consider guidance from the Copyright Office. And, to that end, our former colleague and Ranking Member of this Subcommittee, Mel Watt, sent a letter to that agency last month asking it to study the current state of the making available right and to make recommendations. In par-

ticular, we need to know how American consumers fair under current law in the context of digital, on-demand transmissions such as peer-to-peer networks, streaming services, and music downloads. Additionally, we need to know how the competitiveness of U.S. technologies can be strengthened in the global marketplace, under international treaties, to preserve robust protection for creators. In conjunction with the testimony we receive today, this report should provide us with valuable guidance.

Second, the evolution of technology has had a major impact on the debate about copyright protection for broadcasts and has generated many unresolved legal issues. Just last Friday, the Supreme Court granted certiorari in a case where the Nation's largest television broadcasters had brought suit against Aereo, a streaming video service. This decision could have a wide ranging impact on Internet streaming, cloud computing and the television industry. Whatever the outcome of this case, I believe the law must avoid any anti-consumer ramifications, including higher fees and restricted access.

To be clear, moving forward in this copyright review, we must ensure that creators are protected. Strong protection for creators will ensure that consumers continue to enjoy the works that define our culture and enrich our lives.

And, accordingly, I thank the Chair for his leadership on these issues and look forward to further collaboration on them.

I thank you.

Mr. COBLE. I thank the gentleman.

I now recognize the distinguished gentleman from Virginia, the Chairman of the full Committee, Mr. Goodlatte, for an opening statement.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. I appreciate your holding this hearing.

And I want to welcome all of our witnesses and this capacity crowd in the audience to a hearing on a topic that goes to the heart of copyright law: What is the scope of copyright protection? The Committee will hear testimony on three related issues.

The first issue, concerning a making available right, seemed to be settled by the U.S. accession to two separate WIPO Treaties in 1988. However, uncertainty has arisen in several file sharing cases and most recently in a library case, in the Tenth Circuit, in which the opinion was released only 3 weeks ago. I look forward to the thoughts of Professors Nimmer and Lunney on prior jurisprudence and whether Congress should bring greater clarity to this fundamental issue of copyright law.

The second issue concerns the scope of copyright protection for broadcasts. Although the U.S. is not a party to the Rome Convention, ongoing discussions in Geneva could result in additional copyright or other protection for broadcasters in an effort to deter signal theft. Broadcasting has changed significantly since the Rome Convention was signed in 1961. Smartphones with an always-on Internet connection now make everyone in this room a broadcaster in ways that were unimaginable 50 years ago. I look forward to hearing from Professor Schultz and Mr. Love on this topic.

Finally, we will hear about an issue that has received less public attention than the other two, but is one that does go to the heart

of how citizens interact with their government. It was also the subject of the very first copyright case heard by the Supreme Court in 1834. Copyright protection for laws, codes and standards appears to clash with the fundamental ability of our citizens to know what laws and regulations they must live by. It is fortunate that the number of States seeking to claim copyright protection on their laws and regulations, despite longstanding Copyright Office and Administration views to the contrary, has sharply declined. However, the issue of copyright protection for codes and standards, incorporated with them, is more nuanced. Recognizing that codes and standards are developed at some expense by private-sector entities, I look forward to hearing from a representative of the American National Standards Institute and an individual who has made greater access to government information, including the videos of congressional hearings like these, his longstanding mission.

Before I conclude my opening remarks, let me turn to a few other issues not being heard today. I am sure that there is no one in this hearing room who isn't aware that the Supreme Court announced, on Friday, that it will hear oral arguments later this spring in the Aereo case regarding another issue related to the scope of copyright, the public performance right. The court also announced Friday that it will hear oral arguments in two cases with implications for the patent troll issue, something this Committee and the House has already addressed. These three intellectual property cases are in addition to earlier patent cases taken up only a few months ago by the Justices. It is hard for me not to notice that once again this Committee continues to lead the way on critical policy issues.

And I want to thank the witnesses again for their time here today and for their flexibility in their schedules to enable them to be here.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Chairman Goodlatte.

We have a very distinguished panel today and I will begin by swearing our witnesses in, before introducing them.

[Witnesses sworn.]

Mr. ISSA. Mr. Chairman?

Mr. COBLE. Yes.

Mr. ISSA. In order to have this in the record at the time of the hearing, could I ask unanimous consent to put documents in the record at this time, so they can be copied for the Members?

Mr. COBLE. Without objection.

Mr. ISSA. Thank you. Do you want to hear them all or just you will take all of them?

Mr. COBLE. We will take all of them——

Mr. ISSA. Thank you very much.

Mr. COBLE [continuing]. Without objection.*

Mr. ISSA. Thank you.

Mr. COBLE. Thank you, witnesses.

I will introduce the witnesses.

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*The information referred to is not re-printed in this hearing record but is on file with the Subcommittee and can be accessed at:

https://law.resource.org/pub/us/code/ga/
https://law.resource.org/pub/us/code/id/
https://law.resource.org/pub/us/code/ms/

Chairman Goodlatte mentioned standing-room only crowd. And this shows me that you all have more than a casual interest in this very significant issue. And we are pleased to have all of you with us today.

Our first witness today is Mr. David Nimmer a professor at the UCLA School of Law and an attorney in private practice to the Law Firm of Irell & Manella. In addition to his numerous books and articles on United States and international copyright law, Mr. Nimmer has updated and revised Releases 19 through 92 for Nimmer on Copyright. He received his J.D. from the Yale School of Law and his A.B. with distinction and honors from Stanford University.

Our second witness is Mr. Glynn Lunney, Jr., a professor at Tulane University School of Law, where he teaches courses in intellectual property, unfair competition and contracts. Professor Lunney earned his J.D. from the Stanford School of Law and his B.S. from Texas A&M University. He also earned his M.A. and Ph.D. in Economics from Tulane University, while teaching at the law school.

Our third witness today is Mr. Mark Schultz, Professor of Law at Southern Illinois University of Law and Senior Scholar at the Center for the Protection of Intellectual Property at George Mason University School of Law. Professor Schultz received both his J.D. with honors and B.A. in International Economics at George Washington University. Professor, is that the Salukis? Is that the name?

Mr. SCHULTZ. Yes, that is right.

Mr. COBLE. That's the name most folks without any connection with the university know the nickname with the dog?

Mr. SCHULTZ. It is an Egyptian racing dog. Yes, sir.

Mr. COBLE. Alright, thank you. Do I get—are you awarding me special credit for knowing that? I will accept it.

It is good to have you with us, Mr. Schultz.

Our fourth witness is Mr. James Love, Director of Knowledge Ecology International. Mr. Love earned a Masters in Public Administration from Harvard University, the Kennedy School of Government and a Masters in Public Affairs from Princeton University, Woodrow Wilson School of Public and International Affairs.

Our fifth witness today is Ms. Patricia Griffin, Vice President and General Counsel of the American National Standards Institute. Ms. Griffin joined ANSI in 2004, after 20 years of private practice. And she earned her J.D. from the Albany Law School and her B.A. from Skidmore College.

Our sixth and final witness is Mr. Carl Malamud, President of Public Resource Organization. Mr. Malamud founded the nonprofit in order to work on the publication of public domain information from the local, State and Federal Government agencies. Mr. Malamud received his MBA degree from the Indiana University, Kelley School of Business.

We welcome you all.

Our first witness will be Mr. Nimmer.

And it is good to have all of you with us. Gentlemen—lady and gentlemen, if you could confine your statements to on or about 5 minutes. There is a panel on your desks. When the green light turns to amber, the clock begins ticking and you are about to come

up on 5 minutes, which will appear when the red light illuminates. And we try to apply the 5-minute rule to ourselves as well. So, during questioning, if you could be as curt as possible that would be appreciated.

Mr. Nimmer, if you will kick the ball?

It is good to have all of you with us.

TESTIMONY OF DAVID NIMMER, PROFESSOR FROM PRACTICE, UCLA SCHOOL OF LAW, OF COUNSEL, IRELL & MANELLA, LLP, LOS ANGELES

Mr. NIMMER. Thank you so much, Mr. Chairman. And thank you to all the Members of the Committee for the invitation to testify this morning.

We gather to consider the scope of the rights that belong to copyright owners. One of those rights is public distribution. The question today is how to prove violation of that distribution right. Specifically, does the act of placing a digital file containing a copyrighted work into a file sharing folding on the Internet violate the law? Or, must the copyright owner additionally prove that a third party downloaded that particular file before the uploader can be held responsible? In short, does copyright law's distribution right include a making available component?

Let us imagine that a user uploads a full copy of the motion picture *Avatar* to a share folder operated by a peer-to-peer service. Anyone else on the P2P network can then watch *Avatar* at no charge. I respectfully suggest that the better course of congressional action is to reaffirm the existence of a making available right so that the unauthorized upload itself is considered infringing. The alternative is to force the copyright owners to prove that third parties subsequently downloaded that particular copy of *Avatar*. That alternative unnecessarily clogs judicial procedures and threatens user privacy.

As the eloquent introductions at the opening stated, it was the intent of Congress, in 1976, to include a making available right and the U.S. has joined two treaties that require this country to recognize that right. Unfortunately, nonetheless, there have been divided ruling on the subject from the district courts. Although there is one recent ruling from the Tenth Circuit recognizing the making available right, there is still, as that court recognizes, a dissensus in the courts. For that reason, I urge Congress to reaffirm the making available right aspect of the copyright owners' distribution right.

A brief history helps to frame the issue. Reverting to the mid-20th century, the Copyright Act in effect then gave owners the exclusive right to publish or vend the copyrighted work. Someone who made a work accessible to the public was therefore an infringer with no further proof needed.

If we imagine a bookstore in 1950 featuring numerous copies of a best-seller stacked on a table near the front door, the case against the store owner was complete. In other words, copyright law, at that time, imposed no obligation to place undercover agents near the cash register to develop evidence that third party customers actually walked out the door with copies of the book in hand.

Translated to today's vernacular, copyright owners at that point enjoyed the exclusive right to make available the protected work. Of course they could have hired investigators to stand in the corner and record every transaction, but that exercise was always considered unnecessary. It should be considered equally unnecessary today.

Rather than a private eye unobtrusively watching the cash register to see who bought books, proof of downloading today is far more invasive. It requires the issuance of subpoenas to Internet service providers to identify, for example, all subscribers behind the Internet protocol addresses who downloaded *Avatar* on a given day. Such subpoenas are multiplied 10,000-fold. For that reason, we have seen case after case confronting procedural challenges to these types of subpoenas. The entire exercise can and should be avoided. As opposed to extensive motion practice over subpoenas or digital dragnets designed to ensnare the identity of everyone who uses a P2P service, there is a much more straight-forward option: continue copyright law on its traditional path by holding liable those who make works available to the public without the copyright owner's permission.

Ideally litigation procedures against uploaders should be streamlined. The resulting case need not delve into intricate questions of who downloaded the work on which day. Equally, it should not result in a multimillion dollar judgment and massive trial procedures. For that reason, I recommended that Congress investigate two sensible adjuncts to its reaffirmation of the making available right. The first is recalibration of statutory damages to a sensible level that deters uploaders from their infringing activities, but not through the possibility of billion-dollar rewards as at present. The second is establishment of a form of small claims court to consider routine P2P cases and to award those appropriately reduced damages after liability has been established in a fair and expedited proceeding.

These reforms will not solve all the problems faced by the copyright world, but they will set the law on a reasonable course designed to protect the interests of copyright owners and to safeguard user privacy interests on the Internet.

Thank you very much.

[The prepared statement of Mr. Nimmer follows:]

Written Statement

David Nimmer

Professor from Practice, UCLA School of Law

Of Counsel, Irell & Manella LLP, Los Angeles

"Policy Considerations Relating to Copyright Law's 'Making Available' Right"

presented at the hearing on

The Scope of Copyright Protection

Committee on the Judiciary

Subcommittee on Courts, Intellectual Property, and the Internet

United States House of Representatives

2141 Rayburn House Office Building

January 14, 2014

Policy Considerations Relating to Copyright Law's "Making Available" Right

David Nimmer

I. Framing the Issue

I thank the House Judiciary Committee for inviting me to address a critical question that goes to the essential functioning of copyright protection in the modern age—whether the act of placing (or "uploading") a digital file containing a copyrighted work into an Internet-accessible resource, such as a filesharing folder, violates copyright law. More precisely, the issue at hand is whether that act of uploading should itself be considered to violate the copyright owner's exclusive rights or, alternatively, whether the copyright owner should be required to shoulder the burden of proving, in addition, that a third party downloaded that particular digital file, before the person who uploaded it can be held responsible.

To confront the matter in a concrete posture, let us imagine that a user uploads a full copy of the motion picture *Avatar* to a share folder operated by a peer-to-peer (P2P) service. The consequence is that anyone else on that P2P network can watch *Avatar* at no charge. The issue under examination is whether the copyright owner should be able to state a claim for infringement against that individual by showing proof of the unauthorized upload—or conversely, should be forced to prove, as part of its case in chief, that other third parties subsequently downloaded that particular copy of *Avatar*.

To be clear at the outset, there is no stand-alone "making available" right. Instead, current copyright law accords proprietors various exclusive rights, including the right to distribute their works to the public. The item currently on the table is whether the activity of making a work available is one means by which a plaintiff can demonstrate that its existing distribution rights have been violated.

In resolving such matters posing the "making available" question as the above *Avatar* hypothetical, courts have ruled on both sides and there is no clear path towards resolution of this split of authority. The matter therefore becomes ripe for clarification by Congress. For the reasons set forth below, I respectfully suggest that the better course of congressional action is to reaffirm the existence of a "making available" right. That course of action streamlines judicial procedures, comports with our treaty obligations, and continues the sound policy adopted by Congress in past copyright enactments.

II. The Historic Basis for the "Making Available" Right

Before turning to the core policy analysis, I note that this issue arises largely as the result of an arcane jurisprudential twist that was long submerged in the 1976 Copyright Act's turgid history, and only recently excavated. The matter has been the subject of confusion and controversy in the federal courts, the legal academy, the press, and among the public since it first rose to the fore more than a decade ago.

From the passage of the first federal copyright law in 1790 through the 1909 Act that governed throughout most of the twentieth century, copyright law recognized the "twofold right to make and to *publish* copies" as the "historic basis of copyright."[1] Had the 1976 Act retained the terminology of "right to publish," the "making available" question likely never would have arisen, given that the act of "publication" entails no requirement that a copyrighted work be received by a third person. Merely making a copyrighted work available to the public without authorization would have violated the copyright owner's right to "publish" under the old regime.

In fact, though, the actual language adopted in the Copyright Act of 1976 rendered the issue murky. That Act recast the historic right to publish as the right "to distribute."[2] Nonetheless, until the advent of file-sharing technology at the turn of the millennium, whether actual receipt of a copy formulated an element of proof was of little significance. Most copyright enforcement actions were premised on violations of the *reproduction* right;[3] the relatively rare cases invoking the *distribution* right involved unusual scenarios, such as placing a copyrighted work in a library that was open to the public. NIMMER ON COPYRIGHT, along with other treatises, reported on the sparse interpretations of the distribution right, but did not delve into the legislative history that might reveal why Congress shifted from a right to "publish" to a right to "distribute." (More on that score is explicated in Appendix 1 to this statement.)

It was only after record companies began suing music file-sharers en masse a decade ago that this theoretical puzzle assumed salience. Lacking compelling guidance, some courts construed the language of the 1976 Act to afford copyright owners the right to make their works available as a construction of the statute's distribution right, others reached the opposite conclusion.[4]

In response to those divided rulings, Prof. Peter Menell (with whom I had co-authored several past copyright articles) mined the legislative history of the 1976 Act to develop insight into this fundamental question of how to construe the copyright owner's distribution right.[5] As Prof. Menell's exegesis details, the change in terminology from the right to "publish" to the right to "distribute" in the 1976 Copyright Act stemmed not from any legislative intention to narrow the historic publication right, but rather out of concern over the confusing jurisprudence surrounding technical details inherent in the law of "publication" (namely, the distinction between *investive* and *divestive* publication). Examined closely, the legislative history of the 1976 Copyright Act confirmed that the drafters intended to *broaden* protection beyond the historic publication right, in order "to

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[1] U.S. Copyright Office, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 22 (July 1961) (emphasis added).

[2] 17 U.S.C. § 106(3) (1976 Act, which took effect on January 1, 1978).

[3] 17 U.S.C. § 106(1).

[4] *Compare Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006), *with Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278 (D. Conn. 2008).

[5] *See* Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPR. SOC'Y 1 (2011).

avoid any questions as to whether 'publish' or 'vend' is used in such a narrow sense that there might be forms of distribution not covered."[6]

That voluminous history affords no indication that Congress 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" that might unfold "10, 20 or 50 years" in the future.[7] The particular legislative history looking "50 years" into the future actually was articulated 49 years ago[8]—making return to it particularly timely today.[9]

After examining the contemporaneous explanation behind the shift in terminology during the revision process of the Copyright Act that took place from the 1950s through 1971, as illuminated in Prof. Menell's article, I invited him to collaborate in redrafting the sections of NIMMER ON COPYRIGHT devoted to that subject matter. 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.

III. The Policy Underlying the "Making Available" Right

That history serves as prologue. The focus of today's hearing is not on the proper interpretation of the words that were enacted as part of the 1976 Act, but instead on the optimal policy for Congress to adopt going forward with respect to this thorny and high-stakes question of copyright law.

A. The Need to Act

As noted above, district courts have reached conflicting rulings regarding the existence of a "making available" aspect of the copyright owner's distribution right. As a result, both copyright holders and potential target defendants have been left wondering what

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[6] *Id.* at 57.

[7] *See* Appendix 2 to this statement, for the lengthy excerpt by the Register of Copyrights, from which that language was drawn.

[8] For another expression that same year of the sentiment that "we must be prepared to live with any new copyright law for 50 years or more," *see Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 89th Cong (1965) (statement of Prof. Melville B. Nimmer, School of Law, University of California, Los Angeles), 7 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1809-12 (George S. Grossman, ed., Wiilliam Hein & Co., Inc. 2001).

[9] It took over two decades of study until the Copyright Act was enacted in 1976. The final contours of most issues—including the distribution right here at issue—were reached in 1965. The succeeding 11 years were spent working out ongoing disagreements about jukebox compulsory licenses, cable television, and other matters not relating to the core rights of the copyright owner.

the precise extent of their rights and liabilities might be. Last month, the first appellate court to confront the scope of the distribution right since the publication of Prof. Menell's research endorsing the "making available" theory handed down its ruling. The Tenth Circuit agreed with both that article and the discussion of that issue in NIMMER ON COPYRIGHT, relying on both sources.[10]

In doing so, however, the court recognized the "dissensus, particularly among district courts," regarding this issue.[11] Other circuit courts may follow the Tenth Circuit's lead—or may decline to do so. At the present time, uncertainty continues to cloud the legal rights and liabilities fundamental to the recording, motion picture, and publishing industries As such, legislative clarification of the "making available" right is appropriate, if not imperative.

The Register of Copyrights has issued a clarion call for legislative reform.[12] Attentive to that suggestion, this committee has scheduled a number of hearings.[13] For today's hearing, the committee specifically has asked for my views on the "making available" component of the copyright owner's distribution right.

B. Defining the "Making Available" Right to Serve Copyright Law's Goals

The premise of our copyright law is that enforcement of the Act's exclusive rights generally promotes progress in the creative arts. Those considerations lead organically to recognition of the "making available" right. When a studio releases a current picture such as *The Wolf of Wall Street* in theaters, or an older film such as *Avatar* in Blu-ray, there is simply no valid reason for a P2P user to place the entirety of that work in a share folder accessible to the world-at-large. The issue is not "remixing" or generating other "user generated content," as those aspects are inapplicable to the hypothesized upload of an entire motion picture. Neither is the issue the facilitation of third-party "sampling"—interested fans enjoy many legal avenues to view trailers for that film (or, in the case of music, to listen to a segment on iTunes, for example) without the work's entirety being uploaded to a share folder.

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[10] "No consummated act of actual distribution need be demonstrated . . . to implicate the copyright owner's distribution right." *Diversey v. Schmidly*, 2013 U.S. App. LEXIS 25506, 2013 WL 6727517, at *4 10th Cir. Dec. 23, 2013) (quoting NIMMER ON COPYRIGHT § 8.11[B][4][d]).

[11] *Id.* n.7 .

[12] *The Register's Call for Updates to U.S. Copyright Law: Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6-38 (2013) (statement of Maria A. Pallante, Register of Copyrights of the United States); *see* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

[13] *Press Release, U.S. House of Representatives, Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Law* (Apr. 24, 2013), http://judiciary.house.gov/news/2013/04242013_2.html (visited January 9, 2014).

Both sides of the "making available" issue recognize that copyright owners enjoy the exclusive right to control distribution of their works; their only point of disagreement concerns the quantum of proof needed to demonstrate that distribution took place (simple uploading for proponents of the right, uploading plus proven downloading for its opponents). Thus, both should agree that deterring unauthorized distribution (properly defined) promotes progress in the creative arts by empowering creators to determine when and how to commercialize their works. To proponents of the "making available" right, its creation of effective enforcement against uploaders of entire films "will channel consumers into the marketplace for copyrighted works—increasing the ability of creators to appropriate a return to their efforts, competition, and incentives to develop improved dissemination technologies and platforms."[14]

To be sure, even for opponents of the "making available" aspect of the distribution right, the same consequences flow. The difference is that, under their scheme, there is much less certainty of reaching those consequences, and the need to slog through cumbersome legal maneuvering before reaching them. For the reasons set forth in the next subsection, that maneuvering carries heavy burdens without any corresponding gain that might justify its adoption.

C. Streamlining Judicial Proceedings

The salient difference between recognizing or denying the existence of a "making available" component as part of the copyright owner's distribution right inheres in how P2P cases unfold in the courts. If that right is recognized, then proof of the plaintiff's case becomes extremely straightforward: Once evidence has been presented that the plaintiff uploaded the totality of the copyrighted work in question, the plaintiff's case in chief is complete. At that point, expeditious procedures, such as summary judgment, can quickly resolve the entire matter. Indeed, if Congress were to couple recognition of the "making available" right with the adjunct amendments offered below—tightening up damage awards and furnishing a "small claims" tribunal for resolution of P2P claims—the amount of judicial time saved in these matters promises to be immense.

By contrast, if the "making available" right is denied, then essentially every P2P upload case becomes a trying exercise in laborious discovery. The copyright owner, after identifying the uploader in question, would need to issue subpoenas to Internet Service Providers in order to furnish the identity of the subscribers behind the Internet Protocol addresses that have engaged in downloading from that user. Extensive monitoring would be required, in order to generate that list. After the subpoenas have issued, the copyright owners would still need to slog through the type of extensive discovery disputes that have punctuated these proceedings in the past. Among the issues that judges across the country have confronted in P2P proceedings are the following: improper joinder and severance in the context of "swarms" from which a given copyrighted work is accessed by numerous users;

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[14] Peter S. Menell, 59 J. COPR. SOC'Y at 64-65. In addition, discouraging infringement at the end-user level reduces the pressure to enforce copyright protection at the distribution level, thus relieving potential chilling effects on software developers. *Id.* at 65 (citing Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004)).

whether personal jurisdiction and venue are properly asserted in the district in question against numerous downloaders scattered across the country; the need for specially tailored protective orders; when intervention is permissive to challenge the scope of the copyright owners' subpoenas; whether those subpoenas compromise their targets' rights of due process; and a hornet's nest of other procedural pitfalls (including the ones detailed in the next section).[15]

D. Protecting User Privacy

Additional defenses have arisen in the raft of P2P cases just mentioned that implicate user privacy. Some challenge those subpoenas as a statutory matter under the Electronic Communications Privacy Act.[16] Others, more broadly, invoke the Constitution to protect the anonymity interests of those targeted by subpoenas.[17] As a matter of First Amendment doctrine, those challenges have proven largely unsuccessful in the past.[18] Nonetheless, the broader policy implications of those challenges remain of the utmost concern at present and for the future.

History affords invaluable perspective here. Let us revert to the world of 1955, when Congress first embarked on the copyright reform that ultimately culminated in adoption of the 1976 Act. At that time, the copyright owner enjoyed the exclusive right to "publish, copy, [or] vend the copyrighted work."[19] Someone who published the work without authorization was therefore an infringer (absent affirmative defenses); likewise the vendor who purveyed a work produced by another. Accordingly, if we imagine a bookstore in 1955 featuring numerous copies of *The Good Shepherd* by C.S. Forester stacked up on a table near the front door, the case against the store owner was complete. In other words, copyright law at that time imposed no obligation to place undercover agents near the cash register to develop evidence that third-party customers actually walked out with copies of the book in hand.

Still, if such evidence had been affirmatively required in that era, the exercise at least could have been performed—it simply would have been a needless waste, and for that reason never formed part of the copyright owner's case for copyright infringement. By contrast, if Congress were to adopt a new regime defining the distribution right not to incorporate the right of "making available," the result would be to saddle copyright owners with the burden of developing evidence regarding third party downloads. Unlike the

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[15] A rundown of many such cases, and their conflicting rulings, is set forth in 4 NIMMER ON COPYRIGHT § 12B.09[A][4].

[16] *See First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241 (N.D.Ill. 2011).

[17] Again, a rundown of many such cases is set forth in 4 NIMMER ON COPYRIGHT § 12B.09[A][3].

[18] Still, courts have recognized that there is "some limited First Amendment protection" associated with making files available to others via P2P networks, which "subject[s] the plaintiff's subpoenas to somewhat heightened scrutiny." *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp. 2d 153, 162-63 (D.Mass. 2008).

[19] 17 U.S.C. § 1(a) (1909 Act).

hypothesized investigator standing unobtrusively in the corner of a 1955 store, the consequences in 2014 would be far more intrusive—and troubling. On the one hand, the exercise might require the type of after-the-fact investigation just described, of massive subpoenas served on ISPs to disclose subscriber identities. Alternatively, it could necessitate even more invasive measures—one can imagine systematic dragnets placed in advance on P2P systems, in order to identify everyone who is undertaking every transaction there, such that they can be identified later and charged with facilitating infringement. Given how unpopular and contentious this type of comprehensive electronic data-vacuuming has proven of late, we should powerfully disfavor "potentially offensive strategies that have deleterious implications for privacy, anonymity, and freedom of expression."[20]

One attempt to avoid this dilemma that prospective plaintiffs have employed in the past is to send their investigators to download copyrighted works directly from the defendant who uploaded it. If the opponents of a "making available" right would concede the adequacy of that procedure, it could at least be performed without engendering the invasion of numerous third parties' privacy interests. Yet that expedient itself has been rejected by those defending P2P uploading cases, who have interposed the defense that the investigator's conduct on behalf of the copyright owner "ratifies" the distribution in question, thus rendering it unable to sustain an infringement claim.[21] The important point for the present is that the entire problem can be avoided simply by confirming the existence of the "making available" aspect of the copyright owner's distribution right.

The Supreme Court has called the probable scope of P2P infringement "staggering,"[22] and even those courts that construe the statutory language of the 1976 Act not to include a "making available" right agree with the proposition that "continuous, high-volume file sharing—offering exact duplicates to millions of peer-to-peer users for free—would negatively affect the market for these copyrighted works."[23] When vacating the damages component of that last ruling, the Court of Appeals added, "Between 1999 and 2008, the recording industry as a whole suffered a fifty percent drop in both sales and revenues, a figure plaintiffs attribute to the rise of illegal downloading."[24] Under those circumstances, it is difficult to imagine how sound policy could favor solicitude to file-sharers, allowing them to evade liability depending on the vicissitudes of evidence-gathering from third parties.

In sum, the only effect of rejecting "making available" is to unduly raise the costs of enforcing the copyright owner's distribution right, with the unfortunate concomitant of

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[20] Sonia K. Kaytal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 224 (2005).

[21] *See* 2 NIMMER ON COPYRIGHT § 8.11[D][5][a] (collecting cases); Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145, 1157-60 (2008).

[22] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 923 (2005).

[23] *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 222 (D. Mass. 2009).

[24] *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 492 (1st Cir. 2011).

reducing the deterrent effects of copyright enforcement. The better path of the law is to discourage unauthorized file-sharing of copyrighted works, channeling fans of such works into the marketplace, which thereby increases the rewards available to creators.[25]

E. Complying With Treaty Obligations

The foregoing considerations have focused on domestic concerns. When we broaden our perspective to encompass the requirements of international law, additional reasons emerge for Congress to adopt an explicit "making available" right into our copyright laws.

The U.S. adheres to several multilateral copyright treaties, which require all adherents (such as the United States) to embody such a provision. Indeed, the precise phrase of "making available" entered the copyright lexicon from the two WIPO Internet Treaties, which the United States was instrumental in formulating.[26]

The first treaty accords copyright owners a general "right of communication," which includes "the exclusive right of … 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."[27] The other treaty incorporates articles captioned "Right of Making Available of Fixed Performances" and "Right of Making Available of Phonograms."[28]

Since those two treaties were formulated in 1996, the United States government has consistently taken the position that our domestic copyright law already includes the "making available" right within the existing distribution right.[29] By the same token, the Register of Copyrights has stated to Congress that "making [a work] available for other users of [a] peer to peer network to download ... constitutes an infringement of the exclusive distribution right…."[30]

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[25] *See* Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, J. COPR. SOC'Y (forthcoming 2014) (42nd Donald C. Brace Memorial Lecture).

[26] *See* David O. Carson, *Making the Making Available Right Available*, 33 COLUM. J.L. & ARTS 135, 140-41 (2010).

[27] WIPO Copyright Treaty, art. 8, Dec. 20, 1996, 2186 U.N.T.S. 121, S. Treaty Doc. No. 105-17.

[28] WIPO Performances and Phonograms Treaty, arts. 10, 14, Dec. 20, 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17.

[29] 33 COLUM. J.L. & ARTS at 146 (reflecting "consensus within the Copyright Office and the Patent and Trademark Office, the two expert agencies involved in the negotiations and the formulation of implementing legislation").

[30] *Piracy of Intellectual Property on Peer-to-Peer Networks: Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 1 (2002) (letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Subcomm. on Courts, the Internet and Intellectual Prop.).

Moving backwards and forwards in time from those 1996 treaties strengthens the treaty rationale for recognizing the "making available" right. Back in 1971, the United States ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.[31] That treaty obligates member states to "protect the producers of phonograms . . . against the making of duplicates without the consent of the producer . . . and against the distribution of such duplicates to the public."[32] The last clause, in turn, is defined as "any act by which duplicates of a phonogram are *offered*, directly or indirectly, to the general public or any section thereof."[33] Thus, in substance if not by name, the "making available" right of international copyright law dates back over forty years.

More recently, the United States has entered into free trade agreements (FTAs) with twenty other countries,[34] obligating this nation to provide a "making available" right tracking the language of the WIPO Internet Treaties.[35] Based on all the extensive history noted above, the General Counsel of the United States Copyright Office concluded that "the United States is obligated by a number of treaties and trade agreements to provide a making available right."[36]

F. Separating Out Issues that Do Not Bear on "Making Available"

To avoid confusion, it is essential not to be sidetracked by collateral issues that exert no effect on the current investigation. A number of hot-button issues can arise in the context of peer-to-peer services that, by themselves, may warrant redress—but because they do not bear on the "making available" right, they fall outside today's scope.

For instance, a given individual might use only 15 seconds out of *Avatar* for the purpose of engaging in her own remix. If sued, she could defend herself by asserting the fair use doctrine. Although all the circumstances would need to be ventilated to determine the robustness of that defense, in the abstract, it seems likely to prevail. That fair use doctrine arises as an affirmative defense asserted by the defendant . The matter at hand, by contrast, concerns only the plaintiff's prima facie case of infringement. If the "making available" right is recognized as part of the copyright owner's distribution right, then the plaintiff's

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[31] 25 U.S.T. 309, 888 U.N.T.S. 67 (Oct. 29, 1971).

[32] *Id.*, art. 2.

[33] *Id.*, art. 1(d) (emphasis added).

[34] *See Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Jan. 9, 2014).

[35] 33 COLUM. J.L. & ARTS at 148-49. Carson quotes the FTA with Australia as typical—its Article 17.5 mandates that "each Party shall provide to authors the exclusive right to authorise or prohibit the 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." *Id.*

[36] *Id.* at 150.

case is complete once proof is tendered that the defendant uploaded the file in question; at that point, the case can revolve around her fair use defense of remixing, which she remains free to develop in full. Conversely, if the "making available" right is not recognized, the plaintiff will have to separately prove the existence of a downloader; at that juncture, the case will still proceed to the fair use defense of remixing. Thus, remixing has nothing to do with the instant policy determination regarding the "making available" right.

The same considerations apply across the board to all other affirmative defenses. Let us imagine that a different user buys a DVD of *Avatar* and then uploads it to a P2P service, ostensibly in order to watch it at his vacation home. If sued, that hypothetical defendant might defend himself by asserting that his "space shifting" amounts to fair use or is otherwise defensible under the "first sale" doctrine. Again, all the circumstances would need to be ventilated to determine the robustness of those defenses but, in the abstract, they seem unlikely to prevail; after all, that individual could easily watch the movie at his vacation home without making it accessible to millions of others through a P2P network. The important point, once again, is that those putative defenses will arise regardless of whether the law recognizes a "making available" right.

In short, the question on the table is how much proof to require of a plaintiff whose works have been uploaded without permission, which is a matter of calibrating the case in chief. Affirmative defenses are, by definition, wholly independent of the case in chief. Therefore, the matter at hand should not be clouded with such distractions as fair use and the "first sale" doctrine, as they raise affirmative defenses that do not affect the "making available" right.

By the same token, the current investigation focuses on the case in chief for *direct* liability; it is not concerned with *indirect* liability, whether denominated vicarious liability, contributory infringement, or inducing infringement. The standards adopted for "making available" are therefore distinct from those doctrines, which remain unaffected by any clarification that the copyright owner's distribution right extends to the unauthorized uploading of protected works. One may add that online services that are sought to be held accountable for works made available through their instrumentality enjoy an additional statutory safe harbor from liability.[37] As yet another affirmative defense, that aspect falls outside the current investigation, for the reasons already articulated.

To belabor what is *not* at issue in the current investigation, there should be no relitigation of any copyright cases posing issues other than proof of the copyright owner's distribution right. As already noted, there is no stand-alone "making available" right. Therefore, no new causes of action should be permitted under the self-standing rubric of making works available; neither individual users of copyrighted works nor online service providers should be concerned about facing new-fangled theories of liability. Instead, the only matter under scrutiny at present is how a copyright owner can prove violation of its distribution right—proponents of the "making available" right believe that proof of that violation occurs by showing that the subject work has been uploaded; opponents maintain that additional proof is required that the copy in question was subsequently downloaded. Anything beyond that question falls outside the scope of today's hearing.

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[37] *See* 17 U.S.C. § 512.

Another aspect that should not be conflated with the current inquiry arises out of the large number of P2P suits that have arisen against those who obtain access to pornographic material. A flood of such complaints has been filed; individual cases often target thousands of individual defendants in a single pleading.[38] Typically, those cases arise in the mirror-image of such cases as our *Avatar* hypothetical above, in which the copyright owner files suit against an uploader for unauthorized exploitation of its distribution right through making the work available. In the pornography context, by contrast, it is usually the copyright owner itself who uploads the work in question, in the hopes of ensnaring numerous parties as downloaders who have engaged in unauthorized exploitation of its distribution right.[39]

The vice of those pornography cases is that, after a particular downloader has been identified by his ISP, "To save himself from embarrassment, even if he is not the infringer, the subscriber will very likely pay the settlement price. And if the subscriber is a business, it will likely pay the settlement to save itself from the hassle and cost of complying with discovery—even though one of its customers or employees is the actual infringer."[40]

One judge has condemned the filing of those sort of P2P complaints as "essentially an extortion scheme" in which "many Does will send back a nuisance-value check to the plaintiff."[41] For current purpose, the vital feature is that each John Doe who sends back a check has already been identified through discovery as a downloader of the particular file in question. Therefore, even if the law were modified to eliminate any "making available" right, that unfortunate spate of pornography cases would continue unabated. In other words, the same mischief would continue to unfold in those cases, which arise only after the plaintiff has issued subpoenas to "the ISPs to obtain the identities of these Does."[42] Therefore, imposing a burden on the plaintiffs beyond proof of the "making available" of its works cannot shut down any of those "extortion schemes."

But the cost of imposing that burden on non-pornography copyright plaintiffs in general would be to make enforcement geometrically more complicated in their non-extortionate cases. In a universe containing no "making available" aspect of the distribution right, the complaint filed against those who upload *Avatar* to P2P sites for no legitimate reason would be transmuted into an inherently complex proceeding. That change represents a loss with no corresponding gain. For all these reasons, the best policy is for Congress to

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[38] *See West Coast Prods., Inc. v. Does 1-5829*, 275 F.R.D. 9 (D.D.C. 2011).

[39] The issue of what might be called "attempted copyright entrapment" sweeps far more broadly than P2P exploitation and affects works across the board, not only pornography. *See Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006). Nonetheless, any necessary redress for those problems occupies its own domain, far afield from today's "making available" investigation.

[40] *Malibu Media, LLC v. Does 1 through 10*, No. 2:12-cv-3623, 2012 U.S. Dist. LEXIS 89286, 2012 WL 5382304, at *2 (C.D. Cal. June 27, 2012).

[41] *Id.* at *3.

[42] *Id.*

recognize that the copyright owner's distribution right includes a "making available" component.

IV. Changes Adjunct to Clarification of the "Making Available" Right

Of course, any amendment to the Copyright Act must fit into its larger fabric. In that spirit, I would like to broaden our current focus, to consider alterations to other aspects of copyright law that fit naturally with a recognition of the "making available" right.

A. Rationalization of Statutory Damages

In the case of the "making available" right, the same district judges who rejected that doctrine also systematically overturned the jury verdicts rendered against file-sharers as unconscionably large.[43] The affected trial judges viewed the conduct of file-sharing as wrongful, but nonetheless "fairly low on the totem pole of reprehensible conduct"[44] such that defendants who made no personal profit from such file-sharing should not saddled with multi-million dollar judgments. The dilemma that those judges faced is that Congress set the level of statutory damages in 1999—prior to the full onslaught of the P2P era—to allow recovery of up to $150,000 per infringed work. Given that one individual may share many thousand files, the theoretical multiplication of damages becomes astronomical.

The potential of such stratospheric statutory damages seems to have functioned as the proverbial "elephant in the room" when it came time for those district judges to construe whether the 1976 Act incorporates a "making available" component of the distribution right.[45] The unpalatability of those mega-awards may have influenced them to deny the existence of a "making available" right, whereas they very well may have recognized the existence of that same right, had it been prone to give rise to more reasonable recoveries.

The time is ripe for Congress to confront the appropriate level of statutory damages for the digital age. An individual file-sharer should face meaningful recovery, far more than the amount that could have been paid at the outset to obey the law or a slap on the wrist reflecting a modest increase over that amount. Sitting as a district judge, Justice Sotomayor captured the essential features that a sensible law must embody: Statutory damages "serve the dual purposes of the Copyright Act—compensation and deterrence."[46] At the same time that the amount of statutory damages "should bear some relationship to the actual damages

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[43] *See Capitol Records Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1001 (D. Minn. 2011), *vacated*, 692 F.3d 899 (8th Cir. 2012); *Sony BMG Music Entm't v. Tenenbaum*, 721 F.Supp.2d 85, 121 (D.Mass. 2010), *vacated in part*, 660 F.3d 487 (1st Cir. 2011).

[44] *Tenenbaum*, 721 F. Supp. 2d at 116.

[45] Menell, 59 J. COPR. SOC'Y at 19.

[46] *Peer Int'l Corp. v. Luna Records*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

suffered,"[47] they must not be "calibrated to favor a defendant by merely awarding minimum estimated losses to a plaintiff."[48]

On the other hand, statutory damages against an individual file-sharer should not ramify to the level of a small nation's gross national product. It is not necessary for a Jamie Thomas-Rassett to face a multi-billion dollar award in order to deter her infringement and provide just compensation to the plaintiffs. In sum, at the same time that Congress reassesses the "making available" right, it should appropriately calibrate recovery of statutory damages.

B. Institution of Small Claims Courts for Routine P2P Cases

Some years ago, the Copyright Office reported to this committee, "we believe that consideration of new procedures, such as establishment of a 'small claims' or other inexpensive dispute resolution procedure, would be an important issue for further study by Congress."[49] In 2012, the Office completed two series of hearings on the subject. Its report should be issued in the near future.

The raft of P2P cases in which no cognizable affirmative defense is presented seems ideal for summary disposition. If the range of available damages is limited, as proposed above, then there should be little impediment to their orderly resolution. Therefore, as part of the full parcel of reforms, Congress may wish to consider the appropriate shuttling of those cases to a newly established tribunal for resolution by a type of copyright "small claims" court.

C. Attention to Other Aspects of the Distribution Right

Today's hearing is devoted to the "making available" right, which is a subspecies of the copyright owner's distribution right. In the context of fine-tuning the distribution right, it only makes sense to examine all of its components. That exercise could reasonably lead, in turn, to at least two other contested aspects of the distribution right, apart from its "making available" component.

The first concerns the interplay between the copyright owner's distribution right (insofar as it is incorporated into a coordinate importation right[50]) and the exception to the

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[47] *Id.*

[48] *Top Rank, Inc. v. Allerton Lounge, Inc.*, No. 96 Civ. 7864, 1998 U.S. Dist. LEXIS 2267, 11998 WL 35152791, at *1 (S.D.N.Y. Mar. 25, 1998). In this instance, Judge Sotomayor rejected the magistrate's lenient recommendation corresponding to "estimated losses to the plaintiff," and instead imposed larger awards of statutory damages. *Id.*

[49] *Remedies for Small Copyright Claims: Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 45-48 (2006) (statement of the U.S. Copyright Office).

[50] Pursuant to the 1976 Act, "Importation into the United States or exportation from the United States, without the authority of the owner of copyright under this title, of copies

distribution right for particular copies that have been lawfully made, colloquially called the "first sale" doctrine.[51] In short, the question arises whether "gray market" goods lawfully manufactured abroad may be imported into the United States, or conversely may be excluded at the border. After decades of divided rulings on the subject from lower tribunals, the United States Supreme Court last year adopted a scheme of "international exhaustion," effectively allowing such importations.[52] The dissent complained that the Court's ruling placed the United States out of sync with our trading partners and contravened the U.S. government's position in negotiating international treaties.[53] The majority responded that the determination whether copyright owners should have the "commercial power to divide international markets is a matter for Congress to decide."[54] This issue forms part of the constellation of the copyright owner's distribution right, and hence is live for review in the broader context of the matters at issue in today's hearing.

The second also concerns the reach of the "first sale" doctrine, but this time solely in the domestic context. The flash point in past cases has arisen with regard to software. In 1980, Congress defined computer programs as a type of "literary work" in the eyes of the Copyright Act. Just as old novels and textbooks can be freely sold at second-hand shops or lent out by libraries, the same status applies to old diskettes, CD-ROMs, and the like. But Congress tweaked that treatment in 1990, by prohibiting the *rental* of copies of computer programs, at the same time continuing to allow their untrammeled *sale*.[55]

The legal consequence of that progression is that extant law allows resale equally of old books and old CD-ROMs. In practice, nonetheless, most courts have drawn a line between those two domains. The majority rule has banned copies of computer programs from resale on the secondary market, with some decisions ruling to the contrary.[56] At present, Congress therefore has the option of clarifying its intent: barring resale of books and ROMs alike; allowing their resale alike; or constructing one rule for "literary works" in the nature of software and another for literary works that more traditionally fit that moniker. The matter obviously requires considerable finesse, to formulate the optimal resolution.

Taking the matter one step further, we stand at the cusp of a major paradigm-shift today. The advent of "cloud computing" portends a world in which books, records, videos,

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or phonorecords … is an infringement of the exclusive right to distribute copies or phonorecords…." 17 U.S.C. § 602(a).

[51] Notwithstanding that label, the doctrine applies not only to first "sales" but also other authorized transfers. *See* 17 U.S.C. § 109(a).

[52] *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

[53] *Id.* at 1385 (Ginsburg, J., dissenting).

[54] *Id.* at 1375 (majority opinion of Breyer, J.).

[55] *See* Computer Software Rental Amendments Act of 1990, Act of Dec. 1, 1990, Pub. L. 101-650, 104 Stat. 5089, tit. VIII.

[56] *Compare Adobe Sys. Inc. v. One Stop Micro, Inc.*,84 F. Supp. 2d 1086 (N.D. Cal. 2000), *with Softman Prods. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001).

ROMs, and other physical media are no longer sold. Instead, users will be able to obtain temporary access via their computer screens to the bestsellers they wish to read, the hits they wish to hear, the blockbusters they wish to watch, and the software they wish to run.[57] In that world of The Cloud, there is no "owner of a particular copy" able to assert a "first sale" defense.[58] Notwithstanding that "United States copyright law historically has carved out important exceptions to the rights of copyright owners,"[59] that history faces its potential end in the storm of The Cloud. Fair use could be rendered into "fare" use, as every private utilization of protected expression becomes transformed into a revenue-generating opportunity.[60]

Confronting these questions, Congress could determine, at one extreme, that the "first sale" doctrine was only needed ancillary to the legal doctrine of alienation of physical chattels, and therefore has no purchase in the world of The Cloud. Or it could determine, at the opposite end, that the "first sale" doctrine has served as an essential counterbalance to proprietors' rights since it was articulated in 1908 and remains necessary even today and tomorrow to guard against "a 'pay per use' society."[61] It could also choose an intermediate point on the spectrum as the ideal compromise. As deep waters swirl here whose depths have not been remotely plumbed, the matter can only be identified at present as a fitting item for further study.[62]

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[57] *See* DEPT. OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 79-80 (July 2013).

[58] 17 U.S.C. § 109(a).

[59] The full quotation, made in the context of the Digital Millennium Copyright Act (DMCA), is as follows:

> As copyrighted works are afforded more protection, they will be encrypted in "digital wrappers" that make them impenetrable to anyone other than those who are willing to pay the going rate. While that may sound like the American way, it is not. United States copyright law historically has carved out important exceptions to the rights of copyright owners.

144 Cong. Rec. H7099 (daily ed. Aug. 4, 1998) (remarks of Rep. Dingell).

[60] *See* Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 580-81 (1998).

[61] One of the flashpoints in congressional deliberations over the DMCA was "the specter of moving our Nation towards a 'pay-per-use' society." 144 Cong. Rec. S11887 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft). Speakers from both sides of the aisle and in both chambers unanimously denounced that specter. *See* 144 Cong. Rec. H7101 (daily ed. Aug. 4, 1998) (remarks of Rep. Stearns) (noting the inclusion of language to "protect consumers from a 'pay-per-view' world in the digital area"); 144 Cong. Rec. E2144 (daily ed. Oct.13, 1998) (remarks of Rep. Tauzin) (describing pay-per-view as "profoundly antithetical to our long tradition of the exchange of free ideas and information").

[62] At passage of the DMCA, the committees charged with formulating the bill incorporated into it various safeguards designed to mitigate "the risk that enactment of the bill could establish the legal framework that would inexorably create a 'pay-per-use'

V. Possible Alternative Directions

The subject matter of today's hearing is recognition of the copyright owner's distribution right as including the right of "making available." Nonetheless, because we stand at the very start of the process of copyright reform, it is possible that new directions will emerge with the passage of time. When Congress started to consider reform of the 1909 Act, it took more than two decades to reach fruition. Many changes of directions are therefore possible, as Congress grapples with the best avenues to reform the 1976 Act.

A. Defining Rights More Broadly than "Distribution"

One possibility is to carve up rights differently. At its adoption in1976, the Act accorded five exclusive rights to copyright owners. Dissension has arisen over all five of those rights, not solely as to *distribution*—witness Circuit Judge Chin's scathing critique of a recent Second Circuit construction of the *performance* right not to apply to a service offering its subscribers the ability to view over-the-air shows on demand.[63] One can find equal dissension concerning the other rights of the copyright owner.

In 1995, Congress added a sixth right, in an amendment designed to accommodate the digital age—the Digital Performance Right in Sound Recordings Act of 1995.[64] Unfortunately, technology moves quickly, often faster than lawmaking. In fact, the hermetic boundaries separating distribution from performance and from reproduction had already broken down by the time that amendment was adopted, rendering suspect much of that 1995 handiwork.[65] Accordingly, the question arises whether the unitary flow of digits in the

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society." H.R. Rep. No. 105-551, Part 2, 105th Cong., 2d Sess. 25 (1998). Nonetheless, their handiwork fell short of its goal, as the actual safeguards incorporated into the law do little to guard against that specter. *See* 4 NIMMER ON COPYRIGHT § 12A.06[B][3]. The advent of The Cloud brings new threats of creating "a 'pay-per-use' society." Thus, the matter with which Congress grappled in 1998 now returns to the fore.

[63] *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting) ("the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law"); *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013) (Chin & Wesley, JJ., dissenting from the denial of rehearing *en banc*).

[64] *See* Act of Nov. 1, 1995, Pub. L. 104-39, 109 Stat. 336.

[65] Consider that amendment's definition of one type of *distribution*:

> A "digital phonorecord delivery" is each individual *delivery* of a phonorecord by digital *transmission* of a sound recording which results in a specifically identifiable *reproduction* by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

17 U.S.C. § 115(d) (emphasis added). That definition contemplates that a "delivery" (seemingly implicating copyright law's distribution right) will be accomplished via "transmission" (a species of copyright law's performance right) resulting in a "reproduction"

current world would be better suited by one omnibus right under copyright, as opposed to the five-fold division adopted a half-century ago (or its six-fold enumeration elaborated two decades ago).

The 1996 WIPO Copyright Treaty takes a step in that direction. One of its articles accords a "right of communication to the public."[66] It is possible that variations on that wording could set the framework for a better scheme than attempting artificial separation between the current six-fold enumeration of rights. But it is important to realize that even that Treaty provision is drafted to explicitly "includ[e] 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."[67] Thus, even with a reformulation of rights, it appears likely that any well-drafted copyright law will include a "making available" right as part of the copyright owner's arsenal. Without prejudging the issue, it would therefore appear that the subject matter of today's hearing will continue to form part of the backbone of any revised Copyright Act.

B. Defining Distribution as Other Than a "Right"

Of course, even more radical revisions to the Copyright Act are conceivable. Rather than according copyright owners the legal right to control unauthorized distribution of their works, the concept of *superdistribution* turns the legal scheme on its head by making all works of authorship made publicly available in encrypted form and encouraging their widespread dissemination.[68] Besides that strategy, other commentators have proposed a variety of new approaches to solve the P2P phenomenon, ranging from imposition of levies to "entertainment taxes" to governmental subventions of the arts.[69]

These proposals face obstacles in terms of both feasibility and treaty incompatibility.[70] None has gained sufficient traction to make it an obvious candidate for legislative reform. Nonetheless, it is impossible at present to predict what twists and turns the future legislative process may assume. In the event that one of those options were to

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(the essence of copyright law's reproduction right). It thus promiscuously crosses three barriers in the course of a single sentence. Such confusion is part and parcel of the digital world, in which the division between separate rights is often difficult to discern.

[66] WIPO Copyright Treaty, art. 8.

[67] *Id.*

[68] *See* Ryoichi Mori & Masaji Kawahara, *Superdistribution: The Concept and the Architecture*, TRANSACTIONS OF THE INSTITUTE OF ELECTRONICS, INFORMATION, AND COMMUNICATION ENGINEERS, vol. E73 #7 (1990).

[69] *See* WILLIAM W. FISHER III, PROMISES TO KEEP (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003). Other articles are cited in DEPT. OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 41 n.212. (July 2013).

[70] *Id.*

gain consideration, its effect on copyright law's "making available" right would need to be evaluated.

APPENDIX 1

The bulk of my written statement confronts the policy implications of the "making available" right. In the past, I have written up the doctrinal basis for that right under the language adopted as part of the Copyright Act of 1976. The additional considerations set forth below flesh out that aspect of the matter.

1. A number of cases have construed the Copyright Act of 1976 not to include any "making available" component of the distribution right, and have cited my writings to support that proposition. Illustrative is a 2008 case so holding:

> The general rule, supported by the great weight of authority, is that "infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords." * * * 2 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8.11[A], at 8-149 (2007) ("Infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.").[71]

That analysis in NIMMER ON COPYRIGHT § 8.11[A] attempts to vindicate the language of the distribution right as enacted in the 1976 Act. By contrast, the instant written statement focuses on the policy implications of a prospective amendment to the 1976 Act. The two tasks are distinct. Nonetheless, it is worth sketching the genesis of the sentence as quoted from the treatise. Its background arose out of a suit that was filed two decades ago.

In the early 1990s, a man named Michael Agee contended that Paramount violated the distribution right in his Laurel & Hardy sound recordings by transmitting those works. The Southern District of New York issued a tortured opinion about the performance right that threatened to set the law on the wrong path.[72] The Second Circuit stopped that approach in its tracks, as can be observed from the following excerpt:

> 3. *Distribution Right*. Agee contends that Paramount infringed his exclusive right to distribute his sound recording when it transmitted Hard Copy, including his work, by satellite to the TV stations because such a transmission constituted a distribution of one or more copies of his recording "to the public" under 17 U.S.C. § 106(3). His contention is meritless.
>
> * * *
>
> We find no basis for concluding that Paramount's transmission of Agee's recording to viewers via the TV stations, rather than directly, was a "distribution." In a slightly different context, a number of courts have held that "transmissions by a cable network or service to local cable companies

[71] *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008).

[72] *See Agee v. Paramount Commc's, Inc.*, 853 F. Supp. 778 (S.D.N.Y. 1994).

> who in turn transmit to individual cable subscribers constitute 'public performances' by the network under [the Copyright Act]."
>
> * * *
>
> It is clear that merely transmitting a sound recording to the public on the airwaves does not constitute a "distribution"; otherwise, sound recording copyright owners would have the performance rights expressly denied to them under the statute. For this reason, distribution is generally thought to require transmission of a "material object" in which the sound recording is fixed: a work that is of "more than transitory duration." *See* 17 U.S.C. § 101 (defining "copy"); David Nimmer & Melville B. Nimmer, 2 NIMMER ON COPYRIGHT, § 8.11[A] (1993) (distribution right is right "publicly to sell, give away, rent or lend any material embodiment of copyrighted work"). *See also* House Report at 138 ("any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed").
>
> Although we are unwilling to say that disseminations must always be in physical form to constitute "distributions," *see, e.g., Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (unauthorized uploading of copyrighted images onto computer bulletin board with knowledge that images would be downloaded by other bulletin board subscribers), in the broadcasting context, the distinction between material and non-material embodiments, and the fact that Paramount, like most television and radio broadcasting networks, transmitted its program for broadcast to the public, are relevant factors in determining whether Paramount engaged in broadcasting rather than distribution. We conclude that Paramount's transmission of Agee's recording constituted a performance of that recording and not a distribution.[73]

After that decision was handed down, I revised the text and footnotes of § 8.11[A], as cited by the Second Circuit, to reflect the developments of that case. The 1996 edition of NIMMER ON COPYRIGHT therefore included a paragraph as follows:

> Infringement of this right requires an actual dissemination of either copies or phonorecords. A public performance of a work is not a publication and hence, even if unauthorized does not infringe the distribution right. Given that transmissions qualify as public performances, liability for that conduct lies outside the distribution right.[74]

The footnote accompanying that text cited *Agee*. It is the first sentence of that excerpt that is quoted out of context by decisions such as the one noted above.

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[73] *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 324-27 (2d Cir. 1995).

[74] 2 NIMMER ON COPYRIGHT § 8.11[A] (1996).

To appreciate what that excerpt conveyed and did not convey, it is useful to posit two propositions of law:

- Proposition 1: To violate the copyright owner's distribution right, plaintiff must show that a tangible copy of the work passed hands, rather than to show the existence of a volatile instantiation by which the public got to experience the work. In other words, there had to be "actual distribution" of the work, not its constructive "distribution" over the airwaves.

- Proposition 2: To violate the copyright owner's distribution right, plaintiff must show not only that the subject work was offered to the public, but also that the transaction was consummated. In other words, there had to be an "actual distribution" of a given copy to a proven individual.

These propositions are wholly distinct. The former contrasts 17 U.S.C. §106(3) with 106(4). The latter, solely within the ambit of 17 U.S.C. §106(3), makes an evidentiary point about how much proof is required.

The 1996 write-up of *Agree* contained in NIMMER ON COPYRIGHT purported to address only Proposition 1. It had nothing to do with Proposition 2. Indeed, at that juncture, the phrase "actual distribution" only had the sense of Proposition 1, and it did not occur to me at that time that there could be a distinct evidentiary point using the same nomenclature.

Let us imagine a case arising in 1997 in which the treatise language became operative. It could not have been a peer-to-peer case, as Napster (the first P2P service) still lay another two years in the future. But one could imagine a publisher suing a bookstore for violating the public distribution right by having 20 piratical copies of *Into Thin Air* offered for sale on a table near the front window. The defendant could thereupon remonstrate,

> "I can't be held culpable for infringing the copyright, as the proof shows only that I was offering those copies for sale to the public. Notably absent is any proof that a customer actually came in and plopped down $15.00 to purchase one of the infringing copies. As NIMMER ON COPYRIGHT clearly indicates, 'Infringement of this right requires an actual dissemination of either copies or phonorecords.' There is no such evidence here, so I deserve summary judgment."

If a court had adopted that proposition, I would have written up the decision as conflating two different propositions. In actuality, though, the issue did not arise until much later, when the P2P cases came down. At that point, many of those cases quoted the one treatise sentence above in isolation. They did so for the analytically incorrect proposition just ventilated.

I was not sufficiently attentive to the conflation until I had the chance to review the comprehensive research undertaken in the interim by Prof. Peter Menell.[75] His article amply

[75] *See* Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPR. SOC'Y 1 (2011).

proved that the correct resolution of Proposition 2 is to reject the heightened evidentiary burden. When the treatise wrote up those cases in 2011, it made exactly that point, based on his outstanding article. At the same time, the revision preserved the old paragraph from the treatise, to show how courts in the interim had taken that simple proposition out of context. *See* 2 NIMMER ON COPYRIGHT § 8.11[C][1][a] n.116 (Release 85).

2. Four months later, the treatise turned to another aspect of the distribution right. Again, its concern was to vindicate the language of the 1976 Act, not to advocate optimal policy resolutions for future possible amendments to the statute. Specifically, the treatise discussed three decisions from a Ninth Circuit panel, which construed the distribution right in the context of the "first sale" defense. *See* 2 NIMMER ON COPYRIGHT § 8.12[B][1][d][i][III] (Release 86).

In that section, the treatise offered its view on each of those cases. One Ninth Circuit ruling upheld the defense and ruled against the copyright owner. The treatise agreed with its statutory construction. The other two Ninth Circuit decisions rejected the defense and ruled in favor of the copyright owners as to the distribution right. The treatise registered its respectful disagreement with those rulings. Thus, in all three instances, the treatise construed the 1976 Act to "limit" the distribution right of the copyright owner. That stance marks a counterpoint with the foregoing discussion of the "making available" aspect, in which the treatise construed the 1976 Act to "expand" the distribution right of the copyright owner.

The overarching lesson is that each domain must be treated on its own merits. The treatise has no *a priori* stance towards expanding or limiting the distribution right. It attempts to interpret the Copyright Act faithfully and independently as to each case it considers.

3. During the interval noted above (1996-2011), I represented a variety of clients, ranging from Verizon to Disney to Amazon.com to numerous individuals. I did not spend any significant amount of time during those decades representing any record company or other entities in the music business.

The work noted above in Releases 85 and 86 was performed in my scholarly role. By the same token, Prof. Menell's composition of *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, which furnished the backbone for the treatise's discussion of the "making available right" in Release 85, likewise took place in his scholarly role. Neither he nor I ran the contents by any client or industry representative for approval. Indeed, during that general time-frame, Prof. Menell consulted for the plaintiff in a case adverse to a subsidiary of Universal Music Group,[76] as he discusses in his Brace Lecture.[77]

4. Supplementing my Disclosure Form to the Committee, I would like to add that my receipt of federal funds has occurred exclusively for participation in the Federal

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[76] *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

[77] See *This American Copyright Life*, *supra*.

Judicial Center's Intellectual Property in the New Technological seminar, which has taken place annually over the past two decades in Berkeley, California. For lecturing about copyright law to federal judges, I have received reimbursement of my travel expenses from Los Angeles.

APPENDIX 2

Excerpt from *1965 Report of the Register of Copyrights*[78]

The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.

Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

For these reasons, we believe that 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. In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.

We are entirely sympathetic with the aims of nonprofit users, such as teachers, librarians, and educational broadcasters, who seek to advance learning and culture by bringing the works of authors to students, scholars, and the general public. Their use of new devices for this purpose should be encouraged. It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of "fair use," may severely curtail the copyright owner's market for copies of his work. Likewise, it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable

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[78] SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89TH CONG, 1965 REVISION BILL 13-14 (Comm. Print 1965).

adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."

Mr. COBLE. Thank you, Professor Nimmer.

Mr. Lunney, I will—talked to Mr. Schultz about the Salukis. I will admonish you because the Texas football team was not a very genial Bowl host in their recent Duke University/Texas A&M football. But, I will hold you harmless for that. [Laughter.]

Mr. COBLE. Good to have you with us, sir.

TESTIMONY OF GLYNN S. LUNNEY, JR., McGLINCHEY STAFFORD PROFESSOR OF LAW, TULANE UNIVERSITY LAW SCHOOL

Mr. LUNNEY. Thank you, Committee Chair.

I am terribly sorry that the Aggies were not polite to your team in the Bowl game. Maybe not that sorry. [Laughter.]

But, it was a good game. And, if you didn't stay to the end, you missed something pretty exciting, didn't you?

So, I am here and I probably have the hardest task of the witnesses up front, because the first point I would like to make to the Committee is that file sharing may not be quite the scourge that it has been made out to be. It is not the scourge of American culture. It is not the scourge of American business.

The second point I would like to make is, even if it were, the making available right is not going to solve the problem.

And the third point is, if we add the making available right using the linguistic framework we see in the WIPO Treaties to our Act, we are going to reopen a lot of what seem to be fairly settled issues on the Internet with respect to linking, cloud computing, social networking, these things that have been resolved under existing linguistic framework. If you add a vague right that says making available to the public, we will have to re-litigate them all over again. And I think that is a problem.

Now, I know I am—I, sort of, don't have much chance to persuade you that file sharing is not a bad thing. But, for me, there is a fundamental difference between copying and stealing. Stealing is basically wrong and we should prohibit it wherever we find it as a general rule. Copying, on the other hand, is generally a good thing.

It is not just the best thing since sliced bread, we wouldn't have sliced bread without copying. We wouldn't have culture. We wouldn't have civilization. I can speak to you today and you can understand what I am saying, or at least I hope you can, because you and I speak the same language. We speak the same language because we are born with the intrinsic ability to hear or see what another speaks or does and imitate that. Copying is a fundamental attribute. It is what makes our civilization possible.

And so, when I look at file sharing, I don't see a scourge of culture. I see an invention that has put music in the hands of more Americans than any invention since the phonograph. Now, I am told that the problem is it puts them in the hands of those Americans without them paying for it. And this is the real problem. It is a problem for the economy. Jobs are lost. It is a problem for the creation of music. People are not getting paid, why would they remain in the business?

And so, when we think about those problems, for me at least, the jobs argument is reflecting a very old fallacy that economists have

identified since 1850. That money is not lost. It doesn't go out of the economy. The fact that consumers don't have to pay it for music means it remains in their pocket and they can invest it or spend it elsewhere in the economy and the jobs are just created elsewhere in the economy. They are still American jobs, so there is no loss in the jobs front.

Now, with respect to the creation of music, this is—goes really to the heart of copyright. Its fundamental premise for 300 years is that more copyright equals more revenue equals more works. And we have very few opportunities to test that premise. But, file sharing gives us one of the few. Revenues to the music industry, in particular, have fallen dramatically. Now, whether all of that is due to file sharing or other factors, it is a little difficult to say.

I am perfectly willing to accept that some part of it is due to file sharing. But, my concern is what happened to music output? And we turn to measures of music output by most of the measures we could use, music output seems to be remarkably healthy. And, if the goal of copyright is to produce more and better works, the progress of science, then file sharing doesn't seem to be interfering with that at all.

Now, maybe you don't accept my perspective on that particular issue, that filing sharing is not quite the scourge it is made out to be. So, let us move on to the second point, which is that a making available right is not going to enable us to solve the file sharing problem. It is not the proverbial silver bullet.

The point here is basically this simple: whether you have to prove a making available or your have to prove a distribution, the way you are going to do it is to download the work from the file sharing program. In the distribution context you may have to download it to show that a distribution was made. In the making available context you have to download the work to prove that the link really is to the work it says it is. Things on the Internet are not always what they say they are. That may surprise Members of the Committee. So, you actually have to download it to check and make sure it is the actual work. So, as a practical matter, there is no real difference here.

From 2003 to 2008 the music industry sent demand letters to some 35,000 Americans for engaging in file sharing. And none of those cases or instances, as far as I know, were dismissed because they could not show a download. Rather the music industry gave up that battle because, while they went after 35,000, estimates suggest there might be 35 million Americans engaged in file sharing. So, it was never realistic to go after all of them. And, second, these are your clients, your customers. Suing them is probably not good for business. And third, it wasn't working. So, I don't think a making available right will change any of that in the file sharing context. As a business decision for music industry, it is still not going to make sense to go after these individual file sharers.

The final point I would make is that it is going to reopen a lot of what seem to be settled issues. And I think that will unfortunately really chill business innovation and investment in new technologies.

Thank you.

[The prepared statement of Mr. Lunney follows:]

United States House of Representatives
113th Congress
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Statement of Glynn S. Lunney, Jr.
McGlinchey Stafford Professor of Law
Tulane University School of Law

January 14, 2014

Hearing: *The Scope of Copyright*

AGAINST THE 'MAKING AVAILABLE' RIGHT

Introduction

Committee Chairman Goodlatte, Subcommittee Chairman Coble and Ranking Member Conyers, and members of the subcommittee, thank you for the opportunity to speak to you today. I am Glynn Lunney, the McGlinchey Stafford Professor of Law at Tulane University in New Orleans. I am an engineer, a lawyer, and an economist, and I have been writing, teaching, and practicing in the field of copyright for over twenty years.

I appreciate the opportunity to address whether Congress should give copyright owners the exclusive right to make their works available to the public. As a general rule, I believe that copyright for the economy is like sugar for my coffee: a little bit is a good thing, but too much is worse than none at all. While giving copyright owners the exclusive right to make their works available to the public would probably not change existing law very much, I oppose the addition of the making available right to the copyright statute for three reasons. First, there is no need to add such a right expressly to the Act in order to satisfy our international treaty obligations. The combination of the reproduction, distribution, public performance, and public display rights under current United States law, together with principles of secondary liability, provides protection effectively equivalent to a "making available" right and thus fully satisfies our obligations under the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Second, there would be no benefit from adding such a right. Although giving copyright owners the exclusive right to make their work available to the public might make it slightly easier to pursue file sharers, it would not put the proverbial file-sharing genie back in the bottle, nor is file sharing the problem that the copyright industries would have us believe. Rather than help legitimate businesses control the unauthorized copying and distribution of their works through file sharing networks, giving copyright owners the exclusive right to make their works available to the public would more likely contribute instead to the growing problem of copyright trolls.

Third, adding the right would cause very real harm to the economy. Whether intended to displace or merely supplement the existing framework of public performance, public display, and distribution rights, adding a making available right to the act would create substantial and undesirable uncertainty. Although the existing legal framework is far from perfect, we have spent the last twenty years litigating whether, and if so, when various uses of the Internet, and digital networks more generally, infringe the existing legal rules. If Congress were to give copyright owners a new making available right, this relatively predictable legal framework, and the resulting certainty, would be gone. It would be gone not because Congress decided, as a policy matter, that some of the existing rules were wrong. Rather, it would be gone because the linguistic scope of a "making available" right is sufficiently vague and ambiguous that it would give parties a perfectly plausible excuse to re-litigate cases they lost under the existing statutory

language. As a result, we would have to re-litigate previously-settled areas of law; legitimate businesses would, once again, be forced to close in the face of ruinous litigation expense; and investment in new business models and technological innovation would be stifled.

Thus, we have little to gain and much to lose if Congress were to give copyright owners the exclusive right to make their works available to the public. As a result, I oppose the addition of a making available right to the act. To assist the Subcommittee in its deliberations, I will further develop each of these three concerns.

Discussion

1. *There is No Need to Add a Making Available Right.*

There is no need to give copyright owners the exclusive right to make their works available to the public. The existing rights of reproduction, distribution, public performance, and public display, together with secondary liability doctrines, already provide effectively equivalent protection, and fully satisfy our obligation to provide such a right under the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Under the heading "Right of Distribution," article 6(1) of the WIPO Copyright Treaty provides:

> Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their work through sale or other transfer of ownership.[1]

Also under the heading "Right of Distribution," article 12(1) of the WIPO Performances and Phonograms Treaty provides an identical "making available" right for the distribution of "phonograms" to the "[p]roducers of phonograms."[2]

In addition, both Treaties require a further making available right. The Copyright Treaty, under the heading "Right of Communication to the Public," provides in Article 8:

> . . .[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their work, 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.[3]

Similarly, the Performances and Phonograms Treaty, under the heading "Right of Making Available of Phonograms," provides in Article 14:

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[1] WIPO Copyright Treaty, art. 6(1), Dec. 20, 1996 (available at http://www.wipo.int/treaties/en/ip/wct/).

[2] WIPO Performances and Phonograms Treaty, art. 12(1), Dec. 20, 1996 (available at http://www.wipo.int/treaties/en/ip/wppt/).

[3] WIPO Copyright Treaty, art. 8.

> 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.[4]

The United States is a signatory to, and in 1999, ratified, both treaties.

In negotiating these Treaties, the United States delegation was well aware that our Copyright Act did not provide an express right to communicate or otherwise make available a work to the public. To ensure that our existing law would satisfy our obligations to provide for a making available right, during the Diplomatic Conference associated with these Treaties, the United States stated, and no delegation opposed the statement, that each Contracting Party would be free to satisfy the obligation to provide the "making available" right through the application of some other right or through a combination of different rights.[5] A similar approach has long been followed by member countries under the Berne Convention.[6] It recognizes that the legal characterization of a right may differ from country to country. The United States is therefore free to provide equivalent protection through our existing structure of rights, rather than through a separate "making available" right.

This is precisely what we have done. During the ratification process for these Treaties, both the Administration and the Register of Copyrights at the time, Marybeth Peters, stated that we did not need to add a separate making available right to our Copyright Act in order to satisfy our treaty obligation. Our existing structure of rights, including the reproduction, distribution, public performance, and public display rights, provided protection essentially equivalent to the making available right.[7] As a result, an express making available right was unnecessary.

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[4] WIPO Performances and Phonograms Treaty, art. 10.

[5] Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, CRNR/DC/102, ¶ 301, Geneva, December 2 to 20, 1996 (noting that Mr. Kushan, of the United States, "stressed the understanding—which had never been questioned during the preparatory work and would 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 were covered by such rights.").

[6] *See* Mihaly Fiscor, *The Spring 1997 Horace S. Manges Lecture – Copyright for the Digital Era: The WIPO Treaties*, 21 COLUM.-VLA J.L. & ARTS 197, 211-12 (1997).

[7] See Letter from Marybeth Peters, The Register of Copyrights of the United States of America, to The Honorable Howard L. Berman, Subcommittee on Courts, the Internet and Intellectual Property (Sept. 25, 2002) ("As you are aware, in implementing the new WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in the Digital Millennium Copyright Act, 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 under Article 8 of the WCT."). See also WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 & H.R. 2180 Before the House Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, 105th Cong. 43 (1997) (Statement of Marybeth Peters, Register of Copyrights).

We continue to provide essentially equivalent protection under our law today. The United States pushed for these treaties in order to address two issues. The first was the streaming of works on the Internet, and the second was the digital distribution of works on the Internet. Both at the time of ratification, and today, streaming a work across the Internet would, absent a license, violate the public performance right for, literary and artistic works, as well as both musical works and sound recordings. Although the United States provides for statutory licensing for certain public performances of sound recordings,[8] the Performances and Phonograms Treaty expressly leaves room for such statutory licensing.[9] Similarly, both at the time of ratification, and today, the digital distribution of copies or phonograms, through sale or other transfer of ownership, would violate the distribution right.[10] Although the United States limits the distribution right when a first sale has occurred, both Treaties expressly leave room for Contracting Parties to limit the "making available" right when a first sale, or exhaustion, has occurred.[11]

Thus, both at the time of ratification and today, existing U.S. law provides protection equivalent to the "making available" provisions of these two Treaties. There is therefore no need to add a separate "making available" right to our Copyright Act.

2. *There is No Benefit from Adding a Making Available Right.*

There would be no benefit from giving copyright owners the exclusive right to make their works available to the public. Although adding the right might make it slightly easier to pursue file sharers, file sharing is not the problem copyright owners would have us believe, and even if it were, a making available right would not solve it. Rather than help legitimate businesses control the unauthorized copying and distribution of their works through file sharing networks, adding a making available right would instead contribute to the growing problem of copyright trolls.

As discussed, the making available right is intended to ensure that copyright owners have the exclusive right to stream and distribute their works digitally over the Internet. Existing United States law already provides such protection. Adding a making available right would not materially improve copyright owners' ability to seek legal relief against either: (i) so-called

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8 17 U.S.C. § 114 (2013).

9 WIPO Performances and Phonograms Treaty, arts. 15, 16(1).

10 In section 106(3), the Act gives the copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public." 15 U.S.C. §106(3). In section 101, the Act defines both copies and phonorecords as "material objects" in which a work or sounds are fixed. Courts have accepted without much discussion the proposition that a digital download constitutes a "material object." *See, e.g.*, New York Times Co., Inc. v. Tasini, 533 U.S. 483, 498 (2001) (holding that LEXIS/NEXIS, by selling copies of copyrighted articles through its NEXIS database, had exercised the exclusive right of distribution recognized by Section 106(3)); *In re* Aimster Copyright Litig., 334 F.3d 643, 644 (7th Cir.2003) (accepting without discussion that Internet users who swap computer files containing popular copyrighted music by making and transmitting digital copies commit acts of infringement); A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir.2001) (agreeing with district court that downloading and uploading of copyrighted music infringes exclusive rights of reproduction and distribution respectively).

11 WIPO Copyright Treaty, art. 6(1); WIPO Performances and Phonograms Treaty, art. 12(1).

"rogue" sites, often located in foreign jurisdictions, which offer to stream copyrighted works to American consumers; or (ii) file sharing.

With respect to streaming, as the *iCraveTV* litigation[12] demonstrates, a foreign website that offers streaming of copyrighted works to American consumers violates the public performance right under our existing Copyright Act. In the *iCraveTV* litigation, a Canadian website was retransmitting American and Canadian television broadcasts over the Internet. Although its actions were legal under Canadian law, American copyright owners sued the website in Pennsylvania, alleging copyright infringement under United States law. In deciding whether to grant a preliminary injunction against the website, the district court found that many of the retransmission streams were going to United States residents. It therefore held that such streams, although originating in Canada, violated the copyright owners' public performance right under United States law, and granted the injunction.[13]

As this case reflects, existing United States law already addresses streaming from foreign sites to United States residents. In some instances, pursuing foreign sites has proven difficult, but the difficulties do not arise from some deficiency in copyright's existing scope. Rather, the difficulties arise from limitations on our ability to enforce a United States judgment in a foreign jurisdiction. Even if we were to add a making available right to the Act, these difficulties would remain.

With respect to file sharing, as the $222,000 and $675,000 statutory damages judgments in the *Thomas-Rasset* and *Tenenbaum* cases demonstrate, an individual who engages in file sharing violates the existing rights of reproduction and distribution.[14] To be perfectly fair, file sharing is the issue on which adding a making available right expressly to the statute would most clearly change existing law, at least as a formal matter. It would not, however, change existing law very much, and as a practical matter, perhaps not at all. Under existing law, to establish infringement under the reproduction or distribution right, a majority of the district courts that have addressed the issue have required a copyright owner to prove not only that an individual made a copyrighted work available for sharing through a peer-to-peer service or cyber-locker, but that the copyrighted work was, in fact, shared.[15] If Congress were to give copyright owners

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[12] *See* Twentieth Century Fox Film Corp. v. iCraveTV, 2000 WL 255989, 2000 Copr. L. Dec. ¶ 28,030, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000).

[13] *Id.*

[14] *See* Capital Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012) (reinstating jury's award of $222,000 in statutory damages for distributing and reproducing twenty-two songs through file-sharing network); Sony BMG Music Enter. v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011) (affirming finding of copyright infringement against an individual for file sharing and reinstating jury's award of $675,000 in statutory damages), *cert. denied*, 132 S. Ct. 2431 (2012).

[15] *Compare* Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976, 983 (D. Az. 2008) (requiring proof of a download to establish violation of the distribution right); Elektra Entm't Group, Inc. v. Barker, 551 F.Supp.2d 234, 242-43 (S.D.N.Y.2008) (same); London-Sire Records, Inc. v. Doe 1, 542 F.Supp.2d 153, 168-69 (D. Mass. 2008) (same), *with* Universal City Studios Prods. LLP v. Bigwood, 441 F.Supp.2d 185, 190-91 (D. Me. 2006) (holding that making work available on a file sharing network constitutes distribution even without proof of a download);

the exclusive right to make their works available to the public, then a copyright owner could establish a *prima facie* case of infringement by showing simply that the copyrighted work was made available for sharing. No proof that the file was, in fact, shared, or that another user actually downloaded the work would be required, at least as a matter of formal law.

Yet, as a practical matter, adding a making available right would make essentially no difference in the sort of evidence a copyright owner would need in order to show infringement in the file sharing context. To find infringing file sharers, copyright owner typically retain investigators who use file sharing programs to browse the files made available. While browsing, the investigator identifies IP addresses at which copyrighted works are available for sharing, and uses that information to begin the subpoena process to identify the individual who owns the associated account. Under existing law, the copyright owner must show a download to establish an infringing distribution, but can do so simply by having its investigator download a copy of each of the works made available.[16] If Congress adds a making available right, it would not change things. The investigator would still need to download the works listed as available. The investigator would need to do so, not to satisfy a specific element of the making available right, but to verify that the listed work was, in fact, the copyrighted work at issue. Things on the Internet are not always what they say they are. A work listed as available on a file sharing program could as readily be a spoof file, or malware, or mislabeled. The only way to prove that the file listed as available was in fact the copyrighted work at issue would be to download the file and check. As a practical matter, then, there is no material difference between the evidentiary burden to establish infringement under a making available right, and the burden to establish infringement under the existing distribution right. In either case, the investigator will need to download the work, and by doing so, can establish infringement. It is hard therefore to see how giving copyright owners the exclusive right to make their works available would facilitate legal action against file sharing.

Moreover, when measured against copyright's constitutionally-delimited purpose, the unauthorized copying, distribution, and streaming of copyrighted works across the Internet are not the problem that copyright owners would have us believe. Copyright owners complain that file sharing has significantly reduced their revenue, especially in the music industry. Yet, the purpose of copyright is not to maximize the revenue of the music industry, or copyright owners, more generally. Copyright owners argue that the loss of this revenue has reduced employment in

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Motown Record Co. v. DePietro, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, at *12, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007) (same).

[16] *See, e.g.*, John Wiley & Sons, Inc. v. Doe Nos. 1-30, 284 F.R.D. 185 (S.D.N.Y. 2012) ("On May 24, 2012, Wiley filed an *ex parte* application for an order authorizing the issuance of subpoenas on ISPs to obtain subscriber information for the IP addresses identified in Schedule A. (Dkt. No. 2). In support of its application, Wiley filed a declaration of its attorney, William Dunnegan, Esq., explaining that a paralegal at Dunnegan's firm had 'downloaded the copyrighted works listed on Schedule A ... from John Doe Nos. 1–30 using BitTorrent software [and, after doing so,] used a tool available on the Internet to look up the [ISP] for each IP address.' (Declaration of William Dunnegan in Support of Plaintiff's Ex Parte Application for an Order Authorizing the Issuance of Subpoenas on Certain Internet Service Providers to Determine the Identity of Defendants, dated May 24, 2012 ('Dunnegan Decl.') ¶ 6 (Dkt. No. 3)).").

the copyright industries. Although this argument represents a well-known fallacy,[17] the purpose of copyright is also not to provide more employment in the copyright industries.

The Constitution authorizes Congress to enact copyright for a sole purpose: "to promote the Progress of Science."[18] The Supreme Court has defined this standard to encompass two legitimate ends: (i) encouraging the creation of new works; and (ii) encouraging the dissemination of existing works.[19] When we measure file sharing against these ends, it is undeniable that file sharing promotes the dissemination of existing works. Even while formally illegal, file sharing has provided much broader access to existing works than the preexisting market mechanisms had accomplished.[20] Yet, even as it promotes broader dissemination, the concern has been that because file sharing is unauthorized and unpaid, it will reduce the revenue authors, artists, and copyright owners will receive for any given work and hence lead to fewer new works.

To the question, "How will file sharing affect the creation of new works?," there would seem to be a simple answer. If consumers can obtain a copy of a work for free, why would anyone bother to pay? And if no one bothers to pay, why would anyone bother to create new works? Despite the attraction of this neat and plausible reasoning, the answer to whether file sharing reduces creative output turns out to be not quite so straightforward. In both theory and practice, the relationship between revenues and marginal output in the field of creative authorship is more complex than "more incentives equals more works." In the end, the only way to know whether any given increase or decrease in revenues will lead to more or fewer new original works is to allow the increase or decrease to occur and then see what happens.

Opportunities to test copyright's fundamental premise in this way do not arise very often. Understandably, Congress does not and should not arbitrarily change the copyright laws just to see what will happen. Nevertheless, the rise of file sharing has presented us with a rare opportunity to explore the essential relationship between copyright protection, revenue, and

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[17] This argument represents an example of Frederic Bastiat's Broken Window fallacy. Copyright owners argue that if copyright were broader and file sharing were stopped, they would receive additional revenue. If they received additional revenue, it would in turn support additional employment. Thus, they argue, broader copyright creates jobs. But, as Bastiat showed in his 1850 essay, "*Ce qu'on voit et ce qu'on ne voit pas*," this is a fallacy. For broader copyright to create jobs in the copyright industries, it must increase revenue to copyright owners. Yet, for the copyright industries to receive more revenue, consumers must pay more for works of authorship. Broader copyright, after all, does not generate revenue from thin air. It has to come from somewhere. If consumers have to pay more for works of authorship, they will have less to spend on everything else. Thus, more revenue for the copyright industries necessarily means less revenue for other sectors of the economy. If more revenue for copyrighted works means more jobs for the copyright industries, presumably less revenue everywhere else means fewer jobs elsewhere in the economy. Thus, even if broader copyright generates more revenue for copyright owners, it does not increase net employment in the economy; it merely shifts employment from one sector to another.

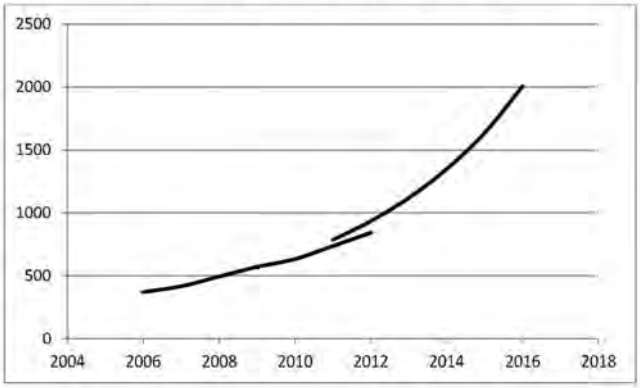
[18] U.S. CONST. ART. I, § 8, cl. 8.

[19] Golan v. Holder, 132 S. Ct. 873, 888-89 (2012); *see also* Harper & Row Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[C]opyright supplies the economic incentive to create and disseminate ideas.").

[20] *See* Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U.L. REV. 975, 1028-29 (2002) (estimating that, file sharing on Napster in September 2000, essentially doubled the dissemination of existing music compared to the preexisting market mechanisms).

creative output. We are all familiar with file sharing's basic story. Since Napster opened its virtual doors in 1999, widespread consumer copying and distribution of copyrighted works through file sharing services has become the new reality. While copyright has formally defined file sharing as infringement, file sharing has nonetheless become commonplace. To illustrate the growth in file sharing, Figure 1 presents an estimate of the file sharing traffic on the Internet in North America, from Cisco's Visual Networking Index for 2008 and 2012.[21]

Figure 1. File Sharing Traffic on the Internet: North America (in petabytes/month). Source: Cisco, Visual Networking Index for 2008 and 2012.



As Figure 1 reflects, file sharing traffic in North America presently amounts to just under one thousand petabytes per month, and, as of the 2012 index, that traffic was expected to double over the next three years, reaching two thousand petabytes a month by 2016.[22] Just to give a sense of scale to this issue, the typical music CD contains 800 megabytes of data. One step up from a megabyte is a gigabyte. A gigabyte is one thousand megabytes, and a typical DVD contains 4

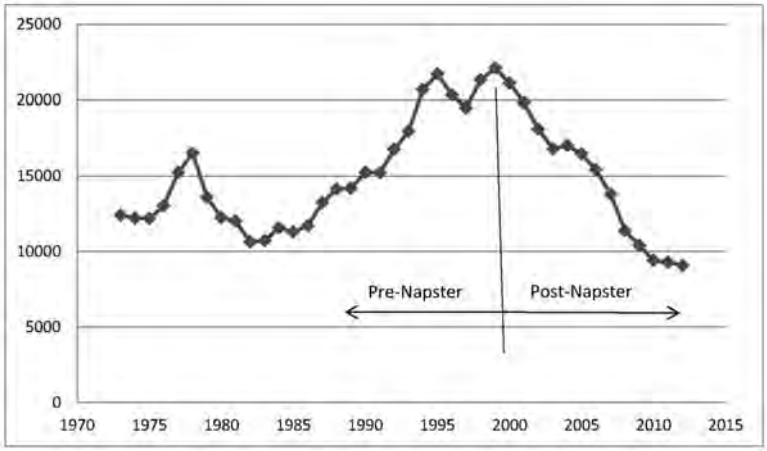
[21] CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2011-2016, at 9 (2012); CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2007-2012, at 4 (2008).

[22] Interestingly, in its most recent index, released in May 2013, Cisco projects that file sharing traffic in North America will grow much more slowly from 2012 to 2017 than it had previously projected. CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2012-2017, at 11 (2013). Instead of continuing to growth by 15 to 20 percent annually, as Cisco had consistently projected in its 2008, 2009, 2010, 2011, and 2012 indices, in its 2013 index, Cisco projects that file sharing traffic will grow by only 9 percent annually in North America from 2012-2017. *Id.* Rather than double every three years for the foreseeable future, as Figure 1 suggests, Cisco now projects that file sharing traffic is beginning to level out. It is not clear what is behind this slowdown. In its 2013 index, Cisco projects a slowdown in the growth rate for file sharing traffic over the next four years, not just for North America, but worldwide. Indeed, for two of its regions, Africa and the Middle East, and Western Europe, Cisco projects that file sharing traffic will actually start declining, at respective rates of ten and two percent annually, over the next four years. In any event, given that the slowdown is worldwide, the slowing growth rate does not appear to be the result of a legal intervention by any particular country. It may simply be that file sharing is running its intrinsically self-limiting course. Yet, whatever is causing the slowdown in the growth of file sharing traffic, the slowdown itself tends to diminish the need for further legal intervention to address the file sharing issue.

gigabytes of data. At one thousand petabytes per month, the current rate of file sharing traffic represents approximately 250 million DVDs or 1.25 billion CDs, copied each month. Compare that to the roughly 70 million albums that I estimated U.S. consumers made through file sharing on Napster in September 2000,[23] and we can see that, despite the copyright industries' "victories" over file sharing, file sharing has increased by a factor of nearly twenty over the past twelve years. While not all of this traffic represents the unauthorized copying and distribution of copyrighted works, estimates suggest that the vast majority of it does.[24]

Unable to stop consumer copying, the effective level of copyright protection provided to original works has fallen dramatically since 1999. As file sharing has grown and the *de facto* level of copyright protection provided has fallen, the music industry, in particular, has been hard hit. With the rise of file sharing, the music industry has seen revenue from record sales decline steadily and sharply. To illustrate this, Figure 2 presents the total dollar value for music shipments, in all formats, whether physical or electronic, from 1973 to 2012.[25] In order to account for inflation, shipments are in constant 2012 dollars.

Figure 2. Dollar Value of Music Sales (All Formats) in the United States (Constant 2012 Dollars, in Millions): 1973-2012. Source: RIAA.



[23] *See* Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U.L. REV. 975, 1028-29 (2002).

[24] *Cf.* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 922 (2005) (noting that a study by an expert for the plaintiff showed that "nearly 90% of the files available for download on the FastTrack system were copyrighted works").

[25] This data is from the RIAA Shipment Data (available at www.riaa.com). The year 1973 is as far back as the RIAA data goes.

As Figure 2 reflects, since Napster opened its doors, the RIAA reports that shipments of music have fallen from a peak of $22.1 billion in 1999 to only $9.1 billion in 2012. This is a fall of some $13 billion, or 58.9 percent. Such a fall is not entirely unprecedented. A similar peak and fall occurred from 1978 through 1982, when shipments peaked at $16.5 billion (in constant 2012 dollars) before falling to $10.6 billion in 1982 – a fall of some $6 billion or 35.8 percent. Presumably, not even the music industry would contend that file sharing caused this initial fall in music sales. Rather, this initial fall was likely due to difficulties in the economy generally from 1980 through 1982. Because music is a luxury good, spending on it can fall quite rapidly when unemployment rates rise or per capita income falls.

Yet, even if not entirely unprecedented, the decline in music shipments that follows Napster and parallels the rise of file sharing is both sharper and lasts longer than the decline during the early 1980s. Undoubtedly, difficulties in the economy generally, particularly after the start of the Great Recession in 2008, contribute to the post-Napster decline in music shipments. But file sharing may also have played a role. Existing economic studies disagree as to whether, and if so, to what extent, file sharing may have contributed to this decline.[26] Yet, I am perfectly prepared to accept that file sharing is responsible, directly or indirectly, for some part of this decline.

The relevant question, however, is not whether file sharing caused this decline in record sales, but how this decline in record sales affected the creation of new music. Before examining how this decline in revenue from record sales affected the creation of new music, I should acknowledge that record sales are not the only source of revenue that supports the creation of new music. Sync licenses,[27] endorsement deals, concert ticket sales and associated merchandising, and public performance royalties, just to name a few, provide revenue streams that support the creation of new music, as well. Many of these are complements to the sale of

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[26] *See* Birgitte Andersen and Marion Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, University of London Working Paper (2008) (finding that file sharing increasing sales: twelve additional downloads associated with additional 0.44 CD purchases); Sudip Bhattacharjee, Ram D. Gopal, Kaveepan Lertwachara, James R. Marsden and Rahul Telang, *The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Albums on Ranking Charts*, 53 MANAGEMENT SCIENCE 1359 (2007) (finding that file sharing has no overall effect on length of time song spends on charts); Ram D. Gopal and Sudip Bhattacharjee, *Do Artists Benefit from Online Music Sharing?*, 79 J. BUS. 1503 (2006) (finding that students with faster Internet connections sample more, and that sampling increases the propensity to purchase authorized copies); Martin Peitz and Patrick Waelbroeck, *Why the Music Industry May Gain From Free Downloading: The Role of Sampling*, 24 INT'L J. INDUSTRIAL ORG. 907 (2006) (using macro data from sixteen countries to estimate that file sharing reduced sales by 20 percent); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J. L. & ECON. 29 (2006) (finding that five unauthorized downloads substitute for a single authorized purchase in their sample); Felix Oberholzer-Gee and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (finding that unauthorized downloads do not reduce authorized purchases); Tatsou Tanaka, *Does File-sharing Reduce CD sales?: A Case of Japan*, Conference Paper Prepared for Conference on IT Innovation, Hitotsubashi University, Tokyo (2004) (finding that file sharing has no effect on sales).

[27] A synchronization license or "sync" license is required when a movie, television program, or advertisement wants to include a musical work and synchronize the music to the visual images.

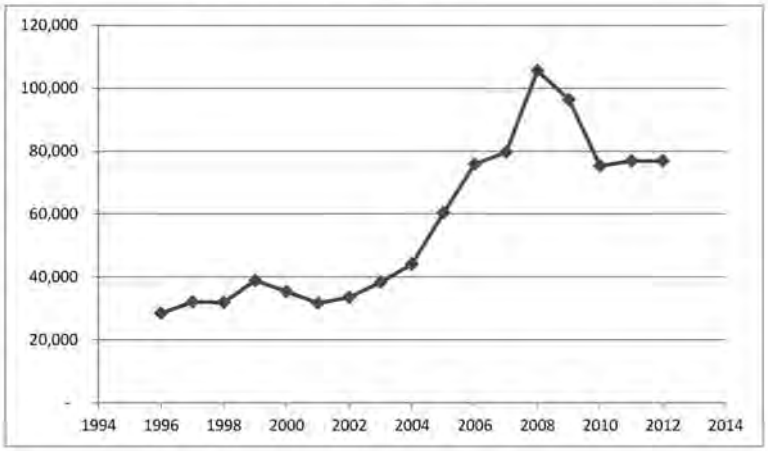
recorded music, and so may serve as a means for recapturing part of the revenue lost as a result of declining music sales.

While possible in theory, in reality, growth in the revenues associated with complementary products, such as live performances, has not done much to mitigate the decline in music sales. While we do not have data on all of the revenue sources available to artists and songwriters, two of the main alternative revenue sources, concert revenue and public performances royalties, are available, and they have not grown sufficiently to offset the revenues lost from falling record sales. As reported by Pollstar, revenue from the top 200 concerts grew from $2.07 billion in 1999 (adjusted to 2012 dollars) to $2.52 billion in 2012. Similarly, royalties paid by ASCAP and BMI for the public performance of musical works grew from $1.29 billion in 1999 (again, adjusted to 2012 dollars) to $1.58 billion in 2012. Since 2003, SoundExchange has also begun paying royalties for the public performance of sound recordings, and paid out approximately $426 million in 2012. While these revenue sources grew faster than the rate of inflation, the total increase in revenue available from these two sources from 1999 to 2012, at roughly $1.166 billion, is not enough to offset the $13 billion decline in revenue from record sales over that same period.[28]

This brings us to the heart of the matter: how has this decline in revenue affected creative output in the music industry? We begin with industry data. Figure 3 presents data from SoundScan on the number of new albums released in the United States each year since 1996.

[28] *Compare* Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, at 20-21 (2010) (available at http://www.hbs.edu/research/pdf/09-132.pdf) (suggesting that sale of complementary goods has largely offset loss of record sale revenue, but including iPod sales and failing to account for inflation by using a nominal, rather than constant, dollar analysis).

Figure 3. New Albums Released in the United States: 1996-2012.
Source: Nielsen SoundScan.



As Figure 3 illustrates, the quantity of new music released in the United States is up substantially since Napster's debut. Using a consistent methodology, SoundScan estimates that the number of new albums released increased from just under forty thousand albums in 1999 to a peak of over one hundred thousand albums in 2008. With the onset of the recession in 2008, the number of new albums fell back in 2009-2012, but even so, the number of new albums released in 2012, at just under eighty thousand, nearly doubles the pre-Napster output.

While the increasing number of albums released suggests that the revenue decline has not affected music output in terms of quantity, it does not account for a possible decline in quality, nor does it foreclose the possibility that even more albums might have been released but-for the decline in revenue. In a just completed empirical study,[29] I have attempted to account for these possibilities. In the study, I treat the rise of file sharing and the parallel fall in music industry revenue as a natural experiment in radically reduced copyright protection. To explore the relationship between copyright protection, revenue, and high quality creative output, I created a hand-coded data set for the songs that appeared in the top fifty of the Billboard Hot 100 in the first week of each month for each year from 1985 through 2013. I focused on songs that appeared in the top fifty of the Hot 100 as a proxy for, and in order to control for, quality.[30] Both

[29] Glynn S. Lunney, Jr., *Empirical Copyright: A Case Study of File Sharing and Music Output* (available on www.ssrn.com).

[30] For other quality-consistent measures of music output, *see* Joel Waldfogel, *Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music Since Napster* (NBER Working Paper No. 17503) (2011); Joel Waldfogel, *Bye Bye Miss American Pie? The Supply of New Recorded Music Since Napster*, NBER Working Paper No. 16882) (2011).

before and after file sharing, a radio station maximizes its advertising revenue by playing those songs that best satisfy the musical preferences of its listeners. A new song will hit the top fifty of the Hot 100 only if it receives repeated radio airplay. It will receive repeated radio airplay only if it satisfies the preferences of the radio station's listeners better than the preexisting songs that a radio station could have played instead.[31] Appearance in the top fifty thus provides a reasonable proxy for quality that should be consistent across the pre- and post-file sharing eras.

Using regression analysis, I show that the sharp decline in music industry revenue that paralleled the rise of file sharing was associated, if we hold all else constant: (i) with fewer new artists entering the market; but (ii) also with more hit songs, on average, by those new artists who did enter. Moreover, because the second marginal effect was larger than the first, the decline in revenue since file sharing began was associated with a net increase in the number of new hit songs, holding all else constant. Thus, for the music industry, the rise of file sharing and the parallel decline in revenue has meant the creation of more new music.[32]

If copyright really intends, then, to promote "the Progress of Science," file sharing, at least for the music industry, is not the problem copyright owners would have us believe. While this is only one study and it focuses on only one industry, it strongly suggests that, with file sharing, we may be able to have both broader dissemination and vibrant creative output. Giving copyright owners the exclusive right to make their works available to the public would not therefore be desirable even if adding that right proved to be the silver bullet that could solve the supposed problem of file sharing.

Unfortunately, even if we wanted to end file sharing, adding a making available right is not the proverbial silver bullet. From 2003 through 2008, the music industry threatened or filed copyright lawsuits against more than thirty-five thousand Americans for file sharing. As discussed, file sharing constitutes copyright infringement under existing law. In the end, the music industry abandoned this approach as a viable means for controlling file sharing. It did so not, however, because it was too difficult to prove a download and thus establish copyright infringement under existing law. Rather, it abandoned this approach for three reasons. First, there are tens of millions of file sharers in the United States alone.[33] Suing all of them was never a practical approach, whether the copyright owner had to establish a download as part of its *prima facie* case or not. Second, these file sharers were also the music industry's customers. Suing them was bad for business. Third, suing file sharers directly did not work. As Figure 1 illustrates, file sharing continued to grow unabated.

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[31] While listeners may have a preference for "new," as well as "good," music, there is no evidence that this preference has changed from the pre- to the post-file sharing era.

[32] For similar results using other measures of music quality, see Joel Waldfogel, *And the Band Played On: Digital Disintermediation and the Quality of New Recorded Music* (2012) (available on www.ssrn.com); *see also* Oberholzer-Gee & Strumpf, *supra* note 28, at 2, 24 (noting that book publishing, movie production, and music output have all risen substantially since file sharing began).

[33] *See, e.g.*, NPD Group, *Music File Sharing Declined Significantly in 2012* (Feb. 26, 2012) (available at https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/).

Even if we assume, merely for the sake of argument, that a making available right would make it much easier to establish copyright infringement by individual file sharers, it is far from clear that the music industry, or any other legitimate business, would resume, or begin, filing mass lawsuits against individual file sharers. Given that threatening tens of thousands of Americans with lawsuits was not sufficient to stop, or even slow, file sharing, copyright owners might have to sue hundreds of thousands, perhaps millions, to make this approach work. Even if a making available right would make such lawsuits cost effective, suing millions of Americans for file sharing would not stop file sharing. Instead, accusing so many Americans of violating the law would more likely create a political firestorm that would lead Congress to change the law.[34]

As a result, even if file sharing were the problem that copyright owners would have us believe and even if a making available right would facilitate mass filings against individual file sharers, the addition of a making available right would not solve the file sharing "problem" for legitimate businesses. Instead, the addition of a making available right would more likely exacerbate the growing problem of copyright trolls. Unlike a legitimate business, the business model of a copyright troll is to make money by threatening to sue a file sharer for copyright infringement. A troll creates its own customers (or victims) by planting its copyrighted work on a file sharing system.[35] Then when the work is downloaded, the troll uses the subpoena power of the federal courts to identify the owner of the downloading account in order to begin a campaign to extort a "settlement" payment from the owner. In its campaign, the troll may use the threat of embarrassing exposure, litigation costs, or statutory damages to persuade the file sharer to settle for a small fee in order to avoid a lawsuit.[36] Unlike a legitimate business, the troll is not trying to slow or stop file sharing in order to promote legitimate sales of its work. In some cases, the

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[34] *Cf.* Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 909 (2001) ("Yet, requiring copyright owners to act directly against ordinary citizens helps ensure that the resulting political battle is more balanced. Rather than a disorganized and unaware populace, copyright owners will confront a fully aroused and fully aware citizenry. Even with their transaction costs and collective action advantages, copyright owners should fear such a confrontation.").

[35] *See Prenda seeded its own porn files via BitTorrent, new affidavit argues*, ARS TECHNICA (June 3, 2013) (available at http://
arstechnica.com/tech-policy/2013/06/prenda-seeded-its-own-porn-files-via-bittorrent-new-affidavit-shows.)

[36] As one district judge has explained:

> While it is without question that a valid copyright holder is entitled to seek protection of its intellectual property in federal court, it appears that in at least some of these cases, adult film companies may be misusing the subpoena powers of the court, seeking the identities of the Doe defendants solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims. And while it is true that every defendant to a lawsuit must assess reputational costs in his or her determination of whether to settle or defend an action, the potential for embarrassment in being publicly named as allegedly infringing such salacious works as "Big Butt Oil Orgy 2" or "Illegal Ass 2," may be playing a markedly influential role in encouraging a myriad of Doe defendants to settle once subpoenas are issued – a bargaining chip the adult film companies appear to well understand.

Third Degree Films v. Does 1–47, 286 F.R.D. 188, 190 (D. Mass. 2012) (footnotes omitted).

work at issue is not available through legitimate distribution channels. Rather, the troll aims to make money by suing or threatening to sue file sharers. It does not therefore want to stop file sharing. For the troll, more file sharers means more money. Moreover, the troll is not using copyright "to promote the Progress of Science." Whatever original work the troll may create, or in which the troll may claim copyright, is simply bait.

While facilitating lawsuits against individual file sharers may not help legitimate businesses much, it is likely to advance the business model for copyright trolls a great deal. As a result, rather than legitimate copyright owners, copyright trolls are likely to be the real beneficiaries were Congress to give copyright owners the exclusive right to make their works available to the public. Thus, adding a making available right to the Act would not generate any real benefit.

3. *There is Real Harm from Adding a Making Available Right.*

Adding a making available right to the Copyright Act would cause real harm to the economy by creating uncertainty as to when, and under what circumstances, particular uses of copyrighted works on the Internet and digital networks more generally, create a substantial risk of copyright liability. While it is relatively clear that a making available right would ease the evidentiary burden on copyright owners in the file sharing context, for a wide variety of other uses, it is entirely unclear both whether, and if so, how, a making available right would change the law. In contrast, litigation over the last twenty years has gone a long ways towards resolving whether certain uses on the Internet create a risk of liability under our existing statutory language.

For example, in *Perfect 10, Inc. v. Amazon.com, Inc.*[37] the Ninth Circuit addressed whether framing and inline linking[38] of a copyrighted photograph constituted direct infringement of the public display right, or alternatively, whether such linking could serve as a basis for secondary liability. In the case, when a user searched on Google[39] for images, Google would display reduced resolution thumbnails of the responsive images, and also would display a linked image of the full-size image directly from the website where the image was found. As a result of such displays, Perfect 10 sued alleging copyright infringement, claiming that the images Google found and displayed were unauthorized copies and public displays of its work. In resolving the case, the Ninth Circuit applied the so-called "server" test on the issue of direct infringement. Under the "server" test, Google itself was liable for direct infringement of the public display

[37] 508 F.3d 1146 (9th Cir. 2007).

[38] An inline link is coding on a webpage that instructs an Internet browser to display a specific image. The image at issue may be stored on another website's server or on the website's own servers. To the person viewing the page, there is no difference in the appearance of the page whether the image is stored on the website's own servers or on another website's server.

[39] Google was also a named defendant in the case. Although Amazon.com was the first named defendant, when an individual searched for images on Amazon.com, Amazon.com simply inline linked to Google's search results.

right only for those images Google displayed from its own servers.[40] If, instead, Google used a link that displayed an image from the server of another website, then Google was not liable for direct infringement of the public display right. Applying this test, the Ninth Circuit held that Google could be directly liable for the thumbnail image, because it was displayed directly from Google's own servers. However, the Ninth Circuit further held that the thumbnail was a fair, and therefore, non-infringing use.[41] With respect to the link, which displayed the full-size image, Google did not display the full-sized image from its own servers but rather provided instructions or code that caused the consumer's browser to display the image directly from the servers for the website where the image had been found. As a result, the Ninth Circuit held that Google was not liable for direct infringement of the public display right.[42] Although not directly liable, the court held that Google could be liable for the display of the full-sized image under the doctrine of contributory liability. On that issue, the Ninth Circuit remanded for further proceedings to determine whether Google had the requisite knowledge that the image was infringing.[43]

By so ruling, the Ninth Circuit reinforced the notice-and-takedown approach to copyright infringement on the Internet. Rather than place the burden on a search engine to police the Internet for infringing content and subject the search engine to potentially astronomical statutory damages under a strict liability regime when it failed, the Ninth Circuit's approach placed the burden of policing infringements on the copyright owner. Google, and other search engines, are required to cooperate with a copyright owner's efforts to police its copyrights, by complying with proper takedown requests. They are not, however, required to guess: (i) the ownership of the copyright on any given image, and (ii) whether the copyright owner has authorized, or in any event, objects to a given use of its work, on the Internet.

It is not clear whether adding a making available right to the Copyright Act would change the applicable legal rules on these issues. With respect to the reduced resolution thumbnail, presumably fair use would still apply. With respect to the inline link to the full image, it is possible that such a link would infringe the making available right directly. Indeed, I have heard some suggest that the "making available" right would impose strict liability on a search engine if it merely provided a hyperlink to the website where an infringing image appeared, or perhaps even if the search engine provided a hyperlink to an authorized copy of the image posted on the copyright owner's own website. Whether, in the end, the legal rules governing linking would or would not differ under a making available right is simply unclear. In Europe, where many states provide an express making available right, European courts are struggling to resolve these issues under their own "making available" and "communication to the public" statutory provisions.[44]

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40 *Perfect 10, Inc.*, 508 F.3d at 1159-61.

41 *Id.* at 1164-68.

42 *Perfect 10, Inc.*, 508 F.3d at 1161.

43 *Id.* at 1170-73.

44 *See, e.g.*, Reference for a preliminary ruling from the Svea hovrätt (Sweden) lodged on 18 October 2012 - Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retreiver Sverige AB, (Case C-466/12). Four questions are presented in the case, dealing with different types of linking. The first question concerns whether a

Re-opening the question whether hyperlinking, and other forms of linking, constitutes direct copyright infringement would be exceedingly dangerous. The European Copyright Society, for example, has asked the European Court of Justice to conclude, in a case now pending, that hyperlinking does not constitute a "communication to the public." In its opinion on the issue, the European Copyright Society warned the Court of the essential role hyperlinking plays on the Internet:

> Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is the single most important feature that differentiates the Internet from other forms of cultural production and dissemination. Hyperlinking is intimately bound to the conception of the Internet as a network, and hyperlinks constitute paths leading users from one location to another. [...] The legal regulation of hyperlinking thus carries with it enormous capacity to interfere with the operation of the Internet, and therefore with access to information, freedom of expression, freedom to conduct business, as well – of course – with business ventures that depend on these types of linkages.[45]

This is equally true in the United States. Linking is fundamental to the essential nature of the Internet. All sorts of websites link to all sorts of content on other websites for all sorts of reasons. That is, in some sense, the point of the Internet. Just to take one example, Youtube licenses millions of audio and video works for performance on its website. Thousands of other websites link to or embed these licensed videos on their own sites. Some of these websites use a hyperlink – the glowing blue text that merely sends users to Youtube to perform the video if they click the link. Other websites use inline linking, embedding, or framing, which are instructions that cause Youtube's servers to perform the video through the other website directly. Given that copyright protects essentially everything on the Internet, adding a making available right would threaten every website that links to material on any other website with the possibility of strict liability for copyright infringement. It would radically disrupt settled legal expectations, and imperil both existing licensing arrangements and prospective investment decisions.

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hyperlink alone constitutes a "communication to the public." The second question concerns whether a hyperlink constitutes a communication to the public if the host website is open to the public without any access restrictions. The third question concerns whether an inline link, framing, or embedding constitutes a communication to the public. With these links, the image appears to the Internet user as if it comes directly from a given website, even though the image is in fact coming, through the link, from another site. The fourth question concerns the leeway that the member states may have to provide greater protection for communications to the public than is available under the relevant European Directive.

[45] European Copyright Society, Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*, at 1, Feb. 15, 2013 (available at http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf).

To take another example, in *Cartoon Network, LP v. CSC Holdings, Inc.* (*"Cablevision"*),[46] the Second Circuit addressed whether the provision of a remote digital video-recorder ("dvr") constituted infringement of the public performance right. Copyright owners argued that Cablevision was essentially offering a video-on-demand service that fell within the scope of copyright's public performance right. Cablevision countered that it was merely enabling consumers to record and playback television programs remotely, rather than through a set-top box. Given that a consumer's decision to record and playback through a set-top box constitutes a private, rather than public, performance, so too should a consumer's decision to record and playback through a remote dvr, or so Cablevision argued. Presumably, the question whether a performance is public or private should not depend on the length of the cable running from the dvr to the television. In resolving the case, the Second Circuit sided with Cablevision and held that providing a remote dvr, which individual consumers used to record and playback their own individual copies of television programs, did not violate the public performance right.[47]

Once again, it is unclear whether a court would reach the same conclusion were Congress to give copyright owners the exclusive right to make their works available to the public. It may be that a court would. The making available right still requires that a defendant make the work available to the public, and so the reasoning of the *Cablevision* court, that it is the individual consumer, not Cablevision who is performing the work,[48] may still control.[49] Yet, the change in language would make that unclear. Only through another round of litigation could we know for certain whether such conduct would or would not violate the making available right.[50]

Once again, re-opening this question would create substantial uncertainty and threaten investments in new business models and technological innovation made in reliance on the *Cablevision* decision. Here, the central concern is cloud computing. In *Cablevision*, the Second Circuit held that when a user directs a remote dvr to record a television program, and then later plays it back, that constitutes a private, rather than public performance. Moreover, it remains a private performance even if numerous individuals use the remote dvr to record and playback the same television program, so long as each of them records their own separate copy.[51] Cloud

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[46] 536 F.3d 121 (2d Cir. 2008). In keeping with common practice, I will hereafter refer to this case as the *Cablevision* decision.

[47] *Cablevision*, 536 F.3d at 134-40.

[48] *Cablevision*, 536 F.3d at 137 ("And because the RS–DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS–DVR transmission is the single subscriber whose self-made copy is used to create that transmission.").

[49] In addition, the Diplomatic Conference concerning the WIPO treaties adopted an agreed statement that "that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty (the WCT) or the Berne Convention." *See* Fiscor, *supra* note 6, at 214. Given this statement, a cable company that offered a remote dvr to its customers could argue that it was merely providing the physical facilities that would allow its customers to record and replay television programs.

[50] Courts in Germany and Australia have reached the same conclusion under the making available right as the Second Circuit did in *Cablevision*. *See* De Wolf & Partners, European Union Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive") 41-42 (2013).

[51] *See Cablevision*, 536 F.3d at 134-37.

computing works similarly. The cloud provider offers each of its users specific assigned space on its servers. The user can then upload files and subsequently download them to another computer or device. It gives people the ability to access their own documents, e-mails, music collections, and other data seamlessly across multiple devices. I can begin working on a document at my office, continue working on it on my cellphone during my commute, and resume working on it when I get home. Of course, others may be uploading and downloading their own files through their own assigned storage space in the cloud. In some cases, different users may each upload and download their own copies of the same work. I can store on my cloud space an extra, back-up copy of Taylor Swift's *Red*, that I purchased from iTunes, and so can thousands of other users. *Cablevision*'s holding ensures that, so long as each of us is uploading and downloading our own copies from our own assigned space in the cloud, these uploadings and downloadings, taken together, do not become a public performance. It thereby allows a cloud provider to operate without the need for a public performance license and without fear of copyright liability. *Cablevision* thus helps provide the legal certainty companies need to invest in cloud computing.[52]

Even if we thought that reaching the opposite result in either *Cablevision* or *Perfect 10* would have better served copyright's purposes, we have to recognize that we are no longer writing on a clean slate. To reach the degree of legal certainty on these issues that we have has taken years of costly litigation. Along the way, some businesses that simply could not afford the costs of high-stakes copyright litigation were forced to fold. In some instances, businesses folded in the face of the high litigation costs even though their legal positions were eventually vindicated. Veoh, for example, was a video sharing website similar to Youtube. Copyright owners sued the website, as well as its investors, for copyright infringement. After nearly six years of litigation, Veoh prevailed.[53] Even so, it spent its money on litigation, rather than innovation, and remains closed to this day.

Given the costs of uncertainty, it is, in some sense, more important to have an answer on these issues, than it is to have the right answer. Whether right or wrong, these decisions established a legal framework that has facilitated the development of new business models and supported the development of social networking and cloud computing. Yet, these decisions were inextricably and precisely tied to the existing statutory language. If we add a making available right to the statute, whether to replace the existing distribution, public performance, and public display rights, or simply to supplement them, this relatively predictable legal framework, and the resulting certainty, would be gone. Moreover, it would be gone not because Congress had specifically decided that one or another of these decisions was wrong as a policy matter. It would be gone because the "making available" right is so inherently vague and ambiguous that the parties who lost in the first round would have a perfectly plausible basis to re-litigate under

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[52] *See* Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*, Nov. 1, 2011, at 9 (*available at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf).

[53] *See* UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 718 F.3d 1006 (9th Cir. 2013).

the new statutory language. New cases would be brought; we would have to re-litigate previously-settled areas of law; legitimate businesses would, once again, be forced to close in the face of ruinous litigation expense; and investment in new business models would be stifled.[54]

Giving copyright owners the exclusive right to make their works available to the public would thus come at a very high cost.

Conclusion

In conclusion, I oppose giving copyright owners the exclusive right to make their works available to the public for three reasons. First, the right is unnecessary. The existing reproduction, distribution, public performance, and public display rights, together with secondary liability doctrines, already provide equivalent protection and fully satisfy our treaty obligations. Second, the right would not materially advance copyright's constitutionally-delimited purposes. While it might make it easier for copyright owners to sue individual file sharers, it would not stop file sharing, and in terms of encouraging the creation of new works and the dissemination of existing works, file sharing is not the problem that copyright owners would have us believe. Rather than address file sharing that threatens legitimate businesses, a making available right would instead only exacerbate the growing problem of copyright trolls. Third, the right would come at a very substantial cost to the economy. Simply by switching from an existing and legally tested legal doctrine to a new and untested doctrine, adding the making available right would reopen settled issues on the Internet. The resulting uncertainty would force legitimate businesses to close and would stifle investment in new business models and innovative technologies.

[54] On the issue of cloud computing, for example, the Oberlandsgericht Hamburg decided in 2008 that the mere upload of protected subject matter to a "cloud service", such as Rapidshare, amounted to an act of making available. Four years later, it changed its position and held that the mere upload of protected subject matter to a cloud service did not amount to an act of making available. De Wolf & Partners, *supra* note 50, at 35.

Mr. COBLE. Thank you, Professor Lunney.

Professor Schultz?

TESTIMONY OF MARK SCHULTZ, PROFESSOR OF LAW, SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF LAW

Mr. SCHULTZ. Chairman Goodlatte, Chairman Coble, Ranking Member Conyers and Members of the Subcommittee I appreciate the chance to speak with you.

Today's subject, the scope of copyright, is the right place to start a detailed review of the Copyright Act. However, the subject matter of copyright should be one of the least controversial parts of copyright because it goes to the very heart of its justification.

Today I will be speaking on my own behalf, as a copyright lawyer and scout.

I will speak first about the scope and subject matter of copyright in general, and then I will specifically address how these principles apply to protection for broadcasts.

Copyright has traditionally had a broad scope, for good reason. Copyright protects the productive intellectual labor of authors provided that those labors result in an original expressive work. It exists to provide those who create, invest in and commercialize content the chance to enjoy the benefits of what they create through exclusive rights. When creators can benefit from their labors, the public also benefits. While many speak of striking a balance between the rights of copyright owners and the interests of the public, in truth those interests are rarely out of balance, at least with respect to core copyright principles such as the scope and subject matter of copyright.

James Madison recognizes fact in the Federalist Papers when he said of intellectual property that, "The public good fully coincides with the claims of individuals." The public will get the works that educate, entertain and inspire and inform them only if their creators can obtain just compensation. In the end, creators, businesses and the public are all best served when our intellectual property laws recognize the essential core value that those who invest labor and risk capital to create and distribute original content deserve protection of their property rights.

Which brings me to the topic of legal protection for broadcasts. In the copyright and telecommunications laws, Congress created a legal framework that ensures that both creators of television programs and local broadcasters have the opportunity to be compensated for their labor, investment and innovation.

This legal framework has two purposes. The first is to prevent third parties from undermining the labor, investment and incentives of creators and broadcasters by freeriding on their labor and investment. The second purpose is to encourage high quality, locally-focused broadcast television. The laws have been a success.

We have a dynamic and vibrant broadcast industry in which the rights of individuals and the public good are both promoted. Here are just a few examples. There are nearly 1400 full-power commercial broadcast television stations in the United States. Seventy 8 percent of Americans get their news from local TV daily, including important emergency news. Nearly 60 million people still depend exclusively on over-the-air signals, including 30 percent of house-

holds with annual incomes under $30,000. Broadcasters air over 90 of the top 100 most watched programs. Perhaps more than anything, the quality of modern programming shows that the public is well served by the current system.

Unfortunately, many underestimate the substantial investment required to make it happen. The airwaves may be viewed as public resource, but privately created broadcast systems and the programs transmitted over them are not. Local broadcasters maintain expensive transmission facilities and invest in new technology, including billions in the recent shift to high definition broadcasting. They pay network affiliation fees and syndication fees. In an era of shrinking news budgets, the average local news' operating budget is a welcome exception of over $4 million a year on average.

In conclusion, there is no such thing as a free lunch. Creators and broadcasters need protection of their property rights that make this tremendous enterprise possible. In this context, it is clear that the public good, as Madison said about the intellectual property laws generally, fully coincides with the claims of individuals.

Thank you.

[The prepared statement of Mr. Schultz follows:]

STATEMENT OF

MARK SCHULTZ

Professor of Law,
Southern Illinois University School of Law

Senior Scholar,
Center for the Protection of Intellectual Property
George Mason University School of Law

BEFORE THE

COMMITTEE ON THE JUDICIARY
Subcommittee on Courts, Intellectual Property and the Internet

U.S. House of Representatives

The Scope of Copyright Protection

JANUARY 14, 2014

INTRODUCTION

Chairman Goodlatte, Chairman Coble, Ranking Member, and Members of the Subcommittee:

Thank you for this opportunity to speak with you today about the scope of copyright protection and copyright protection for broadcasts.[1] Today's topic addresses the very heart and purpose of copyright law. I will begin by addressing how copyright's broad subject matter reflects the moral and economic purposes of copyright law, and then I will address how those principles apply to protection for broadcasts.

THE SUBJECT MATTER OF COPYRIGHT

For over 200 years, our copyright law has progressively evolved to recognize that all original expressive works lie within its subject matter. As the years have passed and technology has progressed, copyright law has protected an ever-increasing variety of works – starting with books, maps, charts, and fine arts, and then including music, photographs, motion pictures, sound recordings, computer programs, video games, and many other works.

[1] Professor Schultz is speaking on his own behalf, and his views do not necessarily reflect the views of any institution with which he is affiliated.

While Congress and the courts have often revisited and adjusted the margins and peripheries of copyright, the heart of copyright has remained consistent: Copyright protects the productive intellectual labor of authors, provided that those labors result in an original expressive work.

Copyright's broad subject matter is in keeping with both its moral and economic purposes. One of the influential proponents of America's first copyright laws,[2] Joel Barlow, stated the moral case for property rights in authors' original expressions:

> There is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination: And when he has spent great part of his life in study, wasted his time, his fortune & perhaps his health in improving his knowledge & correcting his taste, it is a principle of natural justice that he should be entitled to the profits arising from the sale of his works as a compensation for his labor in producing them, & his risque of reputation in offering them to the Public.[3]

Barlow's description of the justification for copyright reflects a long-held understanding that the case for copyright lies not in the specific type of work produced, but rather in the productive, creative labor that results in original expression that edifies, entertains, informs, or otherwise improves the lives of others.

The Supreme Court later described the economic justification for copyright in similar terms in *Mazer v. Stein,* yet another case that confirmed[4] the broad subject matter of copyright:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and the useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.[5]

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[2] Barlow, along with Noah Webster, was a proponent of copyright during the 1780s. As a result of the Barlow's letter, quoted below, a committee of the Continental Congress including James Madison passed a resolution encouraging the states to adopt a copyright law. 24 Journals of the Continental Congress 326-27 (May 2, 1783). Eleven of twelve states followed the recommendation in the years leading up to the adoption of the U.S. Constitution. The preamble to the Rhode Island and Massachusetts acts echoed Barlow's language quoted here, stating "such security is one of the natural rights of all men, there being no property more peculiarly man's own than that which is produced by the labour of his mind." For more on Barlow and the pre-1790 state copyright acts, *see* Justin Hughes, Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson, 79 Southern California Law Review 993 (2006); Terry Hart, Letter from Joel Barlow to the Continental Congress (1783), Copyhype, January 28, 2013, http://www.copyhype.com/2013/01/letter-from-joel-barlow-to-the-continental-congress-1783/; Terry Hart, Myths from the Birth of US Copyright, Copyhype, May 15, 2012, http://www.copyhype.com/2012/05/myths-from-the-birth-of-us-copyright/.

[3] Letter from Joel Barlow to the Continental Congress (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org, http://copy.law.cam.ac.uk/record/us_1783b

[4] Mazer v Stein, 347 US 201 (1954) (extending copyright protection to mass-produced statuettes incorporated into lamps).

[5] Mazer v Stein, 347 US 201, 219 (1954).

For these reasons, the courts and Congress have long taken a broad view of copyright's subject matter, focusing on a work's originality rather than its characterization as a particular type of work. As Justice Holmes observed, "a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."[6]

Still, policymakers may be tempted to employ restrictions on the scope of copyright to resolve particular public policy concerns. After all, one might reason that copyright is supposed to serve the public interest, and modern policy discussions thus frequently refer to the need to "balance" the interests of authors and creators against those of the public. The scope of copyright, however, would be the wrong place to strike such a balance.

In truth, the interests of creators and the public are rarely out of balance, at least with respect to core copyright principles such as the scope and subject matter of copyright. Copyright exists to provide those who create, invest in, and commercialize content the chance to enjoy the benefits of what they create through exclusive rights. When they are able to do so, the public also benefits.

We have relatively little direct evidence of the intent of the Framers with respect to the Intellectual Property Clause, but in that limited record this very point was made clear: The interests of creators and the public in securing intellectual property rights are one and the same. In advocating for the Intellectual Property Clause, in *Federalist Paper* 43, James Madison observed that "the public good fully coincides in both cases with the claims of individuals." The public is more likely to get the works that educate, edify, entertain, and inform them if their creators can obtain just compensation.

At the heart of copyright – its subject matter – the interests of copyright owners and the public need no balancing or reconciliation. The genius of the American political and economic system is that it has shown time and time again that allowing free people to reap the rewards of their labor benefits both the individual and society in great and equal measures. Just as we embrace the rights of individuals and businesses to own homes, cars, machines, and bank accounts without apology or embarrassment, we also promote their rights to own intellectual property.

The public interest is best served when individuals and entrepreneurs are empowered and free, and property rights of all kinds are essential to such full and free lives. Like other property rights, intellectual property rights are essential to the individual liberty and free-market system that drive our dynamic economy.

At the margins of copyright, on specific issues, Congress and the courts often must and do reconcile the rights and needs of copyright owners with the interests of others. Both promoters and critics of copyright often describe this exercise as striking a "balance" between the rights of copyright owners and the interests of the public. However, this characterization is really far too

[6] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (holding that works of advertising fall within copyright's subject matter).

adversarial because it fails to capture Madison's important and uniquely American insight that property rights and the public interest coincide.

In particular cases where a dispute has arisen, it is not really a matter of "balancing" two equal and inherently conflicting claims. Rather, it requires the sometimes difficult task of defining the scope of rights properly, based on the nature of the property and the legitimate rights of others. For instance, we do not "balance" the alleged liberty interests of deliberate trespassers with the rights of homeowners—there is no right to liberty in trespassing. Although this insight can be difficult to apply to complex social and economic situations enabled by modern technology, it is important to recognize that the rights of intellectual property owners are no more opposed to the public interest than the rights of homeowners necessarily clash with the interests of their neighbors.

A well-defined system of intellectual property rights thus serves both individual interests and the public good. Moreover, other laws – antitrust, consumer protection, communications law – can and do impose proper limits on the use of copyrighted works.

In the end, creators, businesses, and the public are all best served when our intellectual property laws recognize the essential core value that those who invest labor and risk capital to create and distribute original content deserve protection.

PROTECTION FOR BROADCASTS

These principles apply to legal protection for broadcasts, since substantial labor and investment goes into the creation and distribution of television content. In the modern copyright and telecommunications laws, Congress created a legal framework that ensures that both creators of television programs and their distributors (via broadcast signals) have the opportunity to be compensated for their work, investment, and innovation.

The purpose of this legal framework is clear: To prevent third party commercial enterprises from free-riding on the labor and investment of creators and broadcasters by retransmitting broadcast programming and signals for their own ill-gotten profit. Such actions undermine the labor, investment, and incentives of creators and broadcasters and the very purpose of intellectual property rights.

Thus, the Copyright Act of 1976 secured an exclusive right to authorize the public performance of audiovisual works.[7] This provision expressly overturned Supreme Court decisions that held that retransmission of broadcast programs by cable systems did not constitute a public performance.[8]

[7] 17 U.S.C. § 106(4).

[8] *See Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

Later, Congress enacted the Cable Television and Consumer Protection and Competition Act of 1992,[9] and the Satellite Home Viewer Improvement Act of 1999[10] to create a separate right for broadcasters in their signals. These statutes create an exclusive right in broadcast signals distinct from copyright, thus creating a market in the right to retransmit broadcast signals, separate from the copyright in the programs on those signals.

Together, these provisions recognize and secure the rights of creators and broadcasters. The airwaves may be viewed as a public resource, but privately created broadcast systems and the programs transmitted over them are not, and should not be treated as such. They require substantial labor and creative effort to produce and vast amounts of capital to distribute via local broadcast signals. As between the creators of programming and broadcasters on the one hand, and other, unrelated third party commercial enterprises on the other, only the creators and broadcasters have both a just moral and economic claim to commercially exploit the programs and signals.

These are the core policies animating US intellectual property laws since their inception in 1790, and expanded and developed by Congress and the courts since.

Specifically with respect to TV broadcasts, Congress sought to encourage the production of high-quality, locally-focused broadcast television that consumers can watch for free. Of course, broadcast programming is not in fact "free" to create or to broadcast, and has always been financed through commercials and then, later, by pay TV subscriptions. For this reason, broadcasters require the same protections under the copyright and telecommunications laws as other creators and distributors of creative works.

Our copyright and telecommunications laws have indeed achieved their purpose, promoting and securing a dynamic and vibrant broadcast industry in which the rights of individuals and the public good are both promoted. There are nearly 1400 full-power commercial broadcast television stations in the United States.[11] These stations serve local needs and tastes, providing news, sports, and public interest programming.

Local broadcasters serve a number of important functions. First, they deliver the news – the Pew Research Center found that "78% of Americans get news from a local TV station" on a "typical" day.[12] Such news is particularly important in emergency situations.

Second, over-the-airwaves broadcast television is still the exclusive source of television for a significant number of Americans – nearly 60 million people.[13] Those households include 30% of households with annual incomes under $30,000.[14]

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[9] Pub. L. No. 102-385, 106 Stat. 1460.
[10] Pub. L. No. 106-113, 113 Stat. 1501.
[11] News Release, FCC, Broadcast Station Totals as of September 30, 2013 (Oct. 24, 2013), http://tinyurl.com/FCC9-30-13.
[12] Pew Research Center, Understanding the Participatory News Consumer 10 (March 1, 2010), *available at* http://tinyurl.com/PewNewsConsumer.
[13] Press Release, National Association of Broadcasters, Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises (June 21, 2013), http://tinyurl.com/NABRenaissance (citing GfK Media & Entertainment, The Home Technology Monitor (2013)).

Moreover, most others who watch television receive broadcast television that is lawfully retransmitted by a cable, satellite, or other distributor (known collectively as multichannel video programming distributors (MVPD)).[15] Of course, these subscribers pay a fee, and the MVPDs in turn pay for retransmission rights.

By the most important measures, the market enabled by these property rights appears to be working well. While there have been notably challenging negotiations regarding retransmission fees, such tough dealings are typical of all business deals between a producer of a highly desirable product and a major customer. A better metric is to look at the product enjoyed by millions of consumers. This market promotes and supports a system of locally based broadcast stations that provide a unique blend of international, national, and local programming that is the best in the world.

It is often said today that we are enjoying a Golden Age of Television, where creators and consumers both find great fulfillment. The most ambitious young screenwriters seek to write for television, while broadcasters aired 96 of the top 100 most-watched programs in the 2011 – 2012 TV seasons.[16] Televised sporting events have reached new heights of quality and technical excellence.[17] While the National Football League is more popular than ever, teams this year have faced unprecedented challenges selling playoff tickets to fans who increasingly prefer the televised experience.[18] The quality of modern programming, more than anything, shows that the public is well-served by the current system.

The fact that broadcast television comes to consumers free over the airwaves causes many to underestimate the substantial investment required to make it happen. Local broadcasters must maintain expensive transmission facilities and invest in new technology – including the recent shift to high definition broadcasting. They pay network affiliation fees and syndication fees. And they spend substantial amounts of money to create local programming. In an era where news budgets and organizations are disappearing, local TV stations are a welcome exception – a

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[14] Id.

[15] The National Association of Broadcasters puts the number at 100 million households. *See* Comments of the National Association of Broadcasters, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, at 2 (Sept. 10, 2012), *available at* http://tinyurl.com/NABComments (citing GfK-Knowledge Networks, Home Technology Monitor, 2012 Ownership Survey and Trend Report (Spring 2012/Mar. 2012)).

[16] TVB, TV Basics 11 (June 2012), http://tinyurl.com/TVBasics (broadcasters aired 96 of the top 100 most-watched programs in 2011-12).

[17] For example, to broadcast a single NFL game, Fox brings in a team of more than 150 people and "$25 million worth of equipment, with thousands of individual parts." David Pierce, Any Given Sunday: Inside the Chaos and Spectacle of the NFL on Fox, The Verge, November 25, 2013, http://www.theverge.com/2013/11/25/5141600/any-given-sunday-the-chaos-and-spectacle-of-nfl-on-fox.

[18] Kevin Clark and Jonathan Clegg, NFL Fans Forgo Playoff Tickets, Prefer the Couch
Packers, Colts, Bengals Struggle to Sell Seats Despite Soaring TV Ratings, Wall Street Journal, Jan. 3, 2014, http://online.wsj.com/news/articles/SB10001424052702304325004579298840229263538

National Association of Broadcasters survey of TV stations reported an average news operating budget of over $4 million a year.[19]

There is no such thing as a free lunch. Broadcast programming is paid for in part by advertising, but in an era of DVRs, advertising cannot be the sole source of revenue. The retransmission fees enabled by the property rights regime in broadcast signals provide essential support for local programming. They also represent a cross-subsidy to the 60 million viewers who depend solely on broadcast television, many of whom are typically underserved by other mediums - disproportionately minorities, poorer viewers, and younger viewers. Without retransmission fees, we would likely have less free, high quality television and essential local news, particularly for those who cannot afford pay television.

CONCLUSION

Wholesale changes to the scope or content of copyright law, or to retransmission consent, are unnecessary. In the framework of exclusive property rights in creative content and broadcast signals, "the public good," as Madison said about the intellectual property laws generally, "fully coincides . . . with the claims of individuals."

Nevertheless, certain open legal questions resulting from evolving technologies may require this Committee to revisit this area of law to ensure that its implementation continues to comport with Congressional intent. There may be some need for readjustments at the margins to ensure that the law continues to protect creators and broadcasters sufficiently. Two issues that the Committee may wish to consider in particular are:

> (1) The use of distributed retransmission by companies such as Aereo, who are attempting to exploit alleged technical legal distinctions between multiple, aggregated streams and public performance; and
>
> (2) The need for explicit protection of content and broadcast signals from unauthorized retransmission over the Internet.

However, core provisions such as the scope of copyright need no revision; so long as Copyright continues to protect the original expressions of creators, the scope of copyright is right. As Congress intended, the law should continue to ensure that broadcasters are compensated for both the carriage of their programming and use of their signals regardless of the distribution platform or technology employed.

[19] Comments of the National Association of Broadcasters, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 5-6, 33 (May 7, 2010), *available at* http://tinyurl.com/FutureNewMedia.

Mr. COBLE. Thank you, Professor Schultz.

Mr. Love?

TESTIMONY OF JAMES PACKARD LOVE, DIRECTOR, KNOWLEDGE ECOLOGY INTERNATIONAL

Mr. LOVE. Thank you, Mr. Chairman, for the opportunity to testify.

I have been asked to talk about the rights of broadcasting organizations, including proposals for a new UN treaty that would establish a set of neighboring or related rights for entities that distribute information they did not create and do not own.

The UN agency responsible for the development of intellectual property right policy is known as the World Intellectual Property Organization, or WIPO for short. Located in Geneva, WIPO has a Standing Committee on Copyright and Related Rights known as the SCCR. Since 1998, the WIPO SCCR has been trying to obtain consensus on a new global treaty dealing with broadcast organizations. Several member states have called for a diplomatic conference on this treaty in 2015. There are major differences among countries regarding every important aspect of this treaty, as evident from the current working document, SCCR/24/10, and the new proposals tabled during negotiations in December 2013.

The WIPO Treaty would create a new layer of rights that coexist with copyright benefiting the organizations that broadcast information. The broadcasters and several member states of WIPO, such as Japan and the member states of the European Union, are pressing for an agreement that would expand considerably the set of related rights that exist in a 1961 treaty, the Rome Convention, that the United States has not signed.

The 1961 Rome Convention created a system of related rights for performers and producers of sound recordings to supplement protections that authors have under the Berne Convention. In 1961 a decision was made to give broadcast organizations a layer of rights as a reward for their role as an intermediary between authors and audiences, essentially on a par with actors, singers, musicians, and other performers. Many consider the 1961 Rome Convention a mistake and the broadcaster right as the weakest and least defensible type of intellectual property right because it is provided by entities that play no role in the creation of the content itself. The United States did not sign the Rome Convention but does provide some broadcasting entities with limited retransmission rights through the communications regulation system, including through 47 U.S.C. 325.

In WIPO, several countries want to expand the Rome Convention beneficiaries to include non-free subscriber channels provided by cable and satellite, such as TNT, Hallmark Channel, ESPN, the Discovery Channel, or the subscriber-based radio channels provided by SiriusXM and also giving them rights in content they distribute but did not create. A growing number of countries want to expand the 1961 Rome system approach more broadly to the Internet and expand the economic rights to the more broadly defined group of broadcasting entities and provide for 50 years of exclusive rights on fixations of broadcast.

At WIPO, USPTO has proposed a compromise that would establish a new right for broadcast cable and satellite services to, "Authorize the simultaneous or near-simultaneous retransmission of their broadcast or pre-broadcast signal over any median." This includes the Internet but in the U.S. proposal no post-fixation rights. So far, no country has voiced support for the U.S. proposal. And much more aggressive alternatives, from Japan and the European Union, are being considered that would provide new economic rights to broadcasting entities for distributing information they did not create or own. This is akin to giving Amazon or Barnes & Noble a layer of copyright in every book they write, or making Google a part-owner in every webpage they locate on the Internet.

Free over-the-air broadcasters do face some unique challenges regarding the retransmission of their signals. And the USPTO proposal at WIPO may be appropriate to address some of these channels. Here we have an open mind. But, for pay services and webcasting, there is no need to create a new intellectual property right dealing with retransmissions. Copyright, theft of service laws and contracts are sufficient to address piracy. For all broadcasting organizations there is no economic justification for giving the distributor any rights in the underlying content. It does not make sense and it creates a number of grave risks for those who create works in a republic to create rights for people that distribute information that lay on top of the underlying interests that you have in copyright.

Thank you very much.

[The prepared statement of Mr. Love follows:]

Testimony of James Packard Love

Hearing on: The Scope of Copyright Protection

January 14, 2014

Subcommittee on Courts, Intellectual Property, and the Internet

Thank you for the invitation to testify on the scope of copyright. My name is James Packard Love. Since 1990, I have worked on issues relating to intellectual property rights, first as an employee of the Center for Study of Responsive Law (CSRL), where among other things, I directed the Center's Taxpayer Assets Project (TAP) and the Consumer Project on the Technology (CPTech). Since 2006, I have been the Director of Knowledge Ecology International (KEI), a non-profit organization with offices in Washington, DC and Geneva, Switzerland.[1] Beginning in 1994, I have participated in international negotiations over intellectual property norms and practices, including copyright, related rights for performers and producers of phonograms, broadcaster rights, and sui generis protections of databases. I also participate in other negotiations relevant to the scope of copyright protection, such as the World Intellectual Property Organization (WIPO) proposals for norm setting in the areas of intellectual property rights in traditional knowledge (TK), genetic resources (GRs) and traditional cultural expressions (TCEs), and various trade negotiations over intellectual property rights in regulatory test data.[2] KEI also follows other intellectual property issues, including those relating to patents and other types of industrial property.

Since 2002, I have followed the negotiations at the World Intellectual Property Organization (WIPO) over a new treaty for broadcasting organizations, and my testimony today will focus on this negotiation, which stalled in 2007, but has regained momentum in recent months.

At the risk of excessively simplifying details, the historical context WIPO negotiations can be summarized as follows.

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[1] Knowledge Ecology International (KEI) is a not for profit non governmental organization that searches for better outcomes, including new solutions, to the management of knowledge resources. KEI is focused on social justice, particularly for the most vulnerable populations, including low-income persons and marginalized groups. KEI was created as an independent legal organization in 2006, assimilating the staff and work program of the Consumer Project on Technology (CPTech), while redefining the mission of the organization. In 2006, KEI received the MacArthur Award for Creative and Effective Institutions, for its work in advancing the public interest in intellectual property policy. The KEI web page is at http://keionline.org.

[2] Including but not limited to the limited obligations to provide protections against unfair commercial use for the regulatory data used to register pharmaceutical or agricultural chemical products under Article 39.3 of the WTO TRIPS Agreement, Article 1711 of NAFTA, or in other trade agreements.

The 1961 Rome Convention

In 1961, several countries, not including the United States, agreed to a new international treaty whose beneficiaries were performers, producers of phonograms, and broadcasting organizations.[3] This agreement, commonly referred to as the Rome Convention, was designed to expand the scope of intellectual property rights beyond those then protected by the two leading copyright agreements, the Berne Convention and the Universal Copyright Convention -- treaties that protected authors.

The diplomatic conference that produced the 1961 Rome Convention was convened jointly by two UN agencies -- the International Labour Organization (ILO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO) -- and the United International Bureaux for the Protection of Intellectual Property (BIRPI), a private organization that became the specialized UN agency for intellectual property in 1974 under its current name, the World Intellectual Property Rights (WIPO).

The most commonly expressed rationale for the 1961 Rome Convention was concern regarding the welfare of performers, and this was the earliest issue raised, including work by the ILO dating from 1926, and raised during various revisions of the Berne Convention.

Producers and manufactures of phonographic records and broadcasting organizations later managed to attach their lobbying efforts to the interests of the performers, and all three entities, performers, producers of phonograms and broadcasting organizations, were included in a draft treaty written by a committee of experts in 1951. While the ILO had been chiefly concerned about the welfare of performers, the rights to the two new beneficiaries, producers of phonograms and broadcasting organizations, were for business entities.

The Rome Convention created special, nuanced rights for each of the three beneficiaries. These were described as neighboring rights at the time, to illustrate the relationship of the rights to copyright.

The first Article of the Rome Convention said that the new rights "shall in no way affect the protection of copyright in literary and artistic works."

> **Article 1: Safeguard of Copyright Proper[4]**
>
> Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

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[3] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Done at Rome on October 26, 1961. http://www.wipo.int/treaties/en/text.jsp?file_id=289757

[4] The titles of the Articles in the Rome Convention were given later by WIPO to "facilitate their identification." There are no titles in the signed text.

Some delegates were skeptical of the need for the Convention.

> At the opening of the Conference, the Delegation of France declared that it considered a convention on neighbouring rights both superfluous and untimely: superfluous because most of the situations covered by it can be regulated by contracts, and untimely because international conventions follow rather than precede juridical developments.[5]

The question of the adequacy of contracts was discussed extensively during the 1961 negotiations, and remains relevant today as WIPO considers a new treaty specifically for the protection of broadcasting organizations. The ILO had seen the 1961 Rome treaty as a mechanism to increase the incomes of performers, and to establish their contributions as independent protectable creative expressions. Phonogram producers and manufacturers could establish their rights through contracts with authors and performers, but under the treaty obtained separate economic rights.[6] Broadcasting organizations were an odd fit, and in the eyes of many had a weak claim for an intellectual property right in content they did not author, perform, produce or own.

The tortured rationale for including all three beneficiaries in the 1961 treaty was described by UNESCO as follows:[7]

> 2.1 Mr. SABA (representing Mr. Vittorino Veronese, Director-General of Unesco) delivered the first opening address on behalf of the Director-General . . .
>
> 2.4 Performers had always played the part of intermediaries between authors and audiences and that role was no less important from the social than from the cultural standpoint. The same part was also being played, in a new way, by producers of phonograms and broadcasting organizations. The three Organizations had worked in unison to ensure that the future international instrument should be a composite whole, reconciling as far as possible the various legitimate interests at stake, those of the intermediaries as well as those of the authors themselves and those of the general public

While broadcasters could be described as "intermediaries" between the authors and the general public, the same could be said of bookstores, newspaper delivery services, or other distributors of copyrighted content. What was special about broadcasting organizations that gave rise to an intellectual property right?

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[5] Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961, page 37.
[6] As well as protection for recordings of "other" sounds not based upon a performance. "It has been suggested that bird songs and other nature sounds are examples of sounds not coming from a performance." Records. Page 40.
[7] First plenary meeting, Tuesday, 10 October 1961. Records, pages 63-4.

In 1961, radio and television was primarily focused on free over the air (OTA) broadcasting activities, subject to various forms of public interest and public service regulatory obligations. Some argued that the costs of broadcasting television were significant, and the rights were needed to protect the high investments. Unlike a bookstore, the broadcast typically was freely available to the public without subscription.

The new rights in the Rome Convention permitted the broadcasting organizations to authorize or prohibit, and effectively charge money, for the rebroadcasting of broadcasts, as well as the fixation, reproduction of fixations, and "communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee."[8] Ironically, in a treaty first conceived as an instrument to protect performers, the the new rights for broadcasting organizations were available even when a broadcaster did not compensate performers or producers of phonograms.

The Rome Convention has been signed by 91 countries. In contrast, the Berne Convention has been signed by 167 countries.

The United States became a member of the Berne Convention in 1989, but never signed the Rome Convention. The United States does provide some rights to broadcasting organizations, including those in 47 USC 325, regarding "Consent to retransmission of broadcast station signals." Broadcasting organizations in the United States are also both the subject and beneficiary of a variety of compulsory licenses in U.S. copyright law.

Some countries expanded the notion of a broadcasting organization to include new beneficiaries, including cable television and satellite television services that are only available to paying subscribers.

After the Rome Convention

In 1996, WIPO convened a diplomatic conference to consider three new treaties that would expand copyright and related rights. Two treaties were adopted during the December 1996 diplomatic conference, one dealing with the rights of authors (the WCT), another dealing with the rights of performers and producers of phonograms (the WPPT). The third treaty proposal, which proposed a new *sui generis* protection for databases faced considerable opposition, and was not adopted.

The WCT and the WPPT expanded the rights of authors, performers and producers of phonograms. In 1997, broadcasting organizations lobbied WIPO and its member states to have the economic rights in the 1961 Rome Convention expanded.

[8] Rome Convention. Article 13.

In November 1998, a report on Existing International, Regional And National Legislation Concerning The Protection Of The Rights Of Broadcasting. (SCCR/1/3) was presented at the first meeting of the new WIPO Standing Committee on Copyright and Related Rights (SCCR). The report stated:

> The WIPO Performances and Phonograms Treaty (WPPT) harmonizes and updates international norms on the protection of performers (except for their "audiovisual performances") and producers of phonograms, but it does not cover the third traditional category of related rights beneficiaries, namely broadcasting organizations. During the preparatory work that led to the adoption of the WPPT and the WIPO Copyright Treaty (WCT), and at the September-October 1997 sessions of the Governing Bodies of WIPO, several delegations proposed that WIPO include in its program the issue of harmonization of the rights of broadcasting organizations. The WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, held in Manila in April 1997, and the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, held in Cancun, Mexico, in February 1998, identified several areas where international harmonization and updating of existing norms is necessary and indicated that this activity may have to extend to the rights of distributors of cable-originated programs.

This report (SCCR/1/3) also described a long list of rights that broadcasters were seeking in a new treaty:

> From April 28 to 30, 1997, WIPO organized, in cooperation with the Government of the Philippines and with the assistance of the Kapisanan ng mga Brodkaster ng Pilipinas (KBP) (National Association of Broadcasters of the Philippines) the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, in Manila. (The proceedings of the Symposium are published in WIPO publication No. 757 (E/F/S).) At this symposium, representatives of broadcasting organizations pointed out a number of issues which they proposed to be addressed at the international level. Some of these issues are listed in the following paragraph.
>
> According to these proposals, broadcasters should be granted exclusive rights to authorize o prohibit the following acts:
>
> - simultaneous or deferred rebroadcasting of their broadcasts, whether these are transmitted via satellite or by any other means;
> - simultaneous and deferred retransmission of their broadcasts in cable systems;
> - the making available to the public of their broadcasts, by any means, including interactive transmissions;

- the fixation of their broadcasts on any media, existing or future, including the making c photographs from television signals;
- the transmission to the public of programs, transmitted by cable;
- the decoding of encrypted signals; and
- the importation and distribution of fixations or copies of fixations of broadcasts, made without authorization.

In addition, broadcasters should be granted a right of remuneration for private copying, and it should be clarified that the protection applies to not only the sounds and/or images of broadcasts, but also to (digital) representations of such sounds and/or images.

In the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, held in Cancun, Mexico, from February 16 to 18, 1998, the participating broadcasting organizations and cable program distributors, in the conclusions adopted by them, formulated similar requests for an international protection system. In addition, they requested the following exclusive rights:

- the right of broadcasters to authorize the communication to the public of their broadcasts, whether or not the communication is to a paying audience or is made in places accessible to the public against payment of an entrance fee;
- the right of broadcasters, cable distributors or other distributors to distribute to the public their own signals, transported by communications satellites or intended for them; and
- the right to authorize the rental of copies made from the fixation of broadcasts.

In both above-mentioned symposia, nearly all participating experts from WIPO Member State favored continuing discussions at international level on the need for a more up-to-date protection of broadcasters' rights, while reserving their respective governments' position on that need in general as well as on the extent to which new international norms may be necessary in this respect.

The report from SCCR/1 included 2,883 words devoted to the discussion of a new treaty for broadcasting organizations. By SCCR/2, in April of 1999, the Secretariat presented a draft treaty proposal.[9] The broadcasting treaty discussion continued for several years, but began to face resistance beginning in 2002, from a variety of civil society and consumer groups, including several with a particular interest in the Internet.

[9] SCCR/2/5. Agenda Item 4: Protection Of The Rights Of Broadcasting Organizations Submissions Received from Member States of Wipo and The European Community By March 31, 1999.

Until 2002, WIPO was generally considered a venue to promote an ever expanding set of legal rights and privileges for various right holder lobby groups. Indeed, when WIPO considered holding a meeting in 2003 to discuss the role of new open collaborative projects to innovation and knowledge as a public goods, the USPTO objected, on the grounds that WIPO's mission was only to promote more expansive intellectual property rights.[10] But by 2004, a large number of civil society organizations, development NGOs and academics, several WIPO member states were calling for a more balanced work program.

As the discussions over the WIPO broadcast treaty progressed from 2004 to 2007, a great deal of attention was focused on proposals to extend the rights not only to cable and satellite operators, but also to webcasting entities. The rationale for extending rights to cable and satellite entities was non-existent, since both services only provided broadcasts to subscribers, and piracy of either satellite or cable services was considered both an infringement of the underlying copyright, and a violation of various theft of service and regulatory regimes. The webcasting lobby, led by Yahoo, under then CEO Terry Semel, and the Digital Media Association (DiMA), was primarily motivated to obtain regulatory and intellectual property protection parity with over the air and cable broadcasters, which they saw as their rivals. The proposals to extend the Rome Convention-type rights to the Internet alarmed many civil society and Internet rights groups, because it would create a new layer of intellectual property rights, potentially protecting even material in the public domain, or material subject to copyright exceptions, or material freely licensed under creative commons licenses. The new layer also increased the risks of being sued for infringement by entities that neither created nor owned the underlying content, and made it more difficult (and costly) to clear rights.

Technology was also changing rapidly, and the costs of both broadcasting and webcasting were rapidly falling, and the use of webcasting was now being extended to a plethora of new uses, including the webcasting of meetings, lectures, current events (including this Congressional hearing), breaking news, video game tournaments, dating services, dog shows, TED talks, conferences, and investor briefings, to mention a few (and not the most innovative). Most of the people attending this hearing have in their possession a smartphone capable of creating and distributing high definition video.

The notion that distributors of information should obtain intellectual property rights in content they did not not create and do not own creates a potential nightmare of rent seeking and innovation stopping litigation, particularly if such rights continue to spread, and are extended more broadly to the countless parties now playing a role in the distribution and sharing of information goods.

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[10] Declan Butler, Drive for patent-free innovation gathers pace, Nature, Vol 424. Page 118. July 10, 2003. William New, Global Group's Shift On 'Open Source' Meeting Spurs Stir, Technology Daily, August 19, 2003. William New. U.S. Official Opposes 'Open Source' Talks At WIPO, Technology Daily. August 19, 2003. Jonathan Krim, The Quiet War Over Open-Source, *Washington Post*. August 21, 2003; Page E01. Declan Butler, Business backlash kills off software meeting, Nature, Vol 424. Page 984. August 28, 2003. Page 984. Lawrence Lessig, Open-Source, Closed Minds, eWeek, October 1, 2003.

There was also considerable opposition to new broadcaster rights by groups representing authors, performers and producers. Groups representing performers and phonogram producers found it appalling that a broadcasting organization would obtain new economic rights, even while they did not pay anything to the entities that performed or owned sound recordings. And, eventually some U.S. based technology companies began to pay attention to the WIPO negotiations, with IBM, Intel, AT&T and other companies eventually taking positions in opposition to a treaty that would extend Rome Convention type broadcaster rights to the Internet.

As the debate progressed at WIPO, the positions of member states were miles apart on nearly all important substantive issues, but there was growing support by several members to move away from the broad economic rights favored by the broadcasters, and toward a narrower "signal protection" approach, that did not give broadcasters rights in program content, and to narrow the treaty to "traditional" broadcasters, which, in some formulations, included cable and satellite services, but excluded webcasting. In 2006, the SCCR began to separate webcasting from "traditional" broadcasting and cablecasting.

The 2007 Decision at WIPO

In 2007, WIPO's General Assembly decided that it would "consider convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved." (WO/GA/34/16). At that point, the proposal for a diplomatic conference for a broadcasting treaty was effectively blocked, pending some greater consensus on these issues.

The rebirth of the broadcast treaty negotiations

In 2011, the WIPO Secretariat wanted new movement for a diplomatic conference on broadcasting rights, but as a lower priority than progress on two other treaties. In 2012, WIPO convened a diplomatic conference in Beijing for a new Treaty on Audiovisual Performances. The Beijing treaty was modest in its substantive provisions (neither the United States nor the EU changed their laws) but the fact that it was concluded at all was considered a major achievement for WIPO. In June 2013, WIPO concluded a more controversial and substantive treaty on copyright exceptions for persons who were blind or had other print disabilities. This gave WIPO two copyright treaties in two years. By the WIPO General Assembly in the fall of 2013, the WIPO broadcast treaty was highlighted as the next candidate for a diplomatic conference, possibility in 2015.

The WIPO Secretariat is aggressively pushing for a diplomatic treaty for a new broadcasting treaty, despite major differences in views regarding the beneficiaries and the nature of the rights and exceptions to rights.[11]

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[11] The WIPO secretariat describes the "outstanding issues" in the negotiation, in terms quite favorable to the broadcasters, in this web page.
http://www.wipo.int/pressroom/en/briefs/broadcasting.html

In December 2013, at SCCR 26, WIPO held the first major talks on the broadcast treaty since 2007. During these talks, Japan and the EU both made proposals for a treaty with extensive new rights for broadcast organizations, defined to include cable television and satellite services that require paid subscriptions.

The USPTO, on behalf of the United States, made a proposal for a much less ambitious treaty, for "Broadcasting Organizations." There would be a single right "to authorize the simultaneous or near-simultaneous retransmission of their broadcast or pre-broadcast signal over any medium," including delivery of the broadcast over the Internet. The USPTO proposal would only extend the right to the broadcast signal, and not to the content, and would not include any post fixation rights. The USPTO also offered the following definitions:

- A "near-simultaneous" retransmission is one that is delayed only to the extent necessary to accommodate time differences or to facilitate the technical transmission of the signal.

- A "pre-broadcast signal" is a signal transmitted to the broadcasting organization for the purpose of subsequent transmission to the public.

During the debate at the SCCR, no country voiced support for the USPTO proposal. India objected to the proposal to extend the right to Internet transmissions. Japan, the EU and several other countries pressed for more expansive economic rights for broadcasting entities.

The next round of talks on this proposal will be 2.5 days during the meeting on SCCR 27, from April 28 to May 2, 2014.

KEI views on the WIPO negotiations

The WIPO negotiations over the broadcast treaty highlight a number of complex issues.

KEI is concerned that the treaty negotiation process itself is driven by industry lobbies, and lacks basic information regarding a definition of the problem(s) to be solved, and an explanation of why any of the countless possible versions of the treaty are needed.

Do broadcasters care about signal piracy?

Most of the industry messaging concerns signal piracy, but the broadcast industry lobbying is really over the new economic rights that broadcasters are seeking in the treaty.

In the period from 2006 to 2007, broadcasters could have had a diplomatic conference for a simple anti-piracy treaty, along lines similar to the 2013 proposal by the United States for a thin signal-only, no post-fixation rights approach.

The 2013 USPTO proposal addresses the putative rationale for the treaty -- to prevent piracy of broadcast signals, without undermining the rights of copyright holders, performers and consumers, as regards post-fixation uses of works, and it would be a reasonable conclusion to this long negotiation. But the fact that the USPTO proposal received so little support during the December 2013 SCCR meeting is reminiscent of earlier rejections of this approach by the politically active European broadcasters who are quite influential among EU and Baltic state policy makers.

Are there gaps in copyright or related rights?

In the past, a variety of explanations have been offered as to why broadcasters need any new rights to deal with signal piracy, since in almost all cases, an unauthorized use would be infringement of the copyright or related rights held by authors, performers and producers of program content. One story sometimes offered concerns sports broadcasting, which may have less protection in some non-US markets than it has here. However, when asked, broadcasters are not able to identify countries where the broadcasting rights are not already protected by some type of legal regime. To the extent that there is a plausible issue with sports broadcasting, one can imagine a narrow agreement that addresses this alleged problem, but there appears to be no real interest in such a narrow agreement at WIPO.

Why extend the treaty to cable and satellite operators?

Cable and satellite services are made available to subscribers who pay fees. There is no economy of any significance where it is not already illegal to use these services without paying. What is the rationale for providing cable operators with an intellectual property right in content they are paid to deliver to their subscribers?

The fact that broadcast and cable television are in a similar business is obvious, but what is not obvious is why policy makers at WIPO cannot make reasonable distinctions between the services, based upon differences (as is the case with the highly differentiated US laws).

The WIPO treaty would be more manageable and reasonable if it was narrowed to only benefit free over-the-air broadcasting to the public, without subscriptions.

Why provide rights to broadcasters that don't pay performers?

Performers are right to complain about a treaty that gives broadcasters more rights than they have, in their own performances.

Use caution when introducing new intellectual property regimes to the Internet

It is already very challenging to implement new Internet based services and uses of information, under existing rules regarding copyright and/or related rights. The WIPO proposals present large risks to a dynamic and innovative industry.

Mr. COBLE. Thank you, Mr. Love.

Ms. Griffin?

TESTIMONY OF PATRICIA GRIFFIN, VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN NATIONAL STANDARDS INSTITUTE

Ms. GRIFFIN. Thank you, Mr. Chairman. Good morning ladies and gentlemen.

As noted, my name is Patricia Griffin and I am Vice President and General Counsel of the American National Standards Institute, ANSI, a not-for-profit organization that coordinates the U.S. standardization system.

Most people don't know how much we depend upon standards to ensure our everyday life work. For example, standards help ensure that a light bulb fits in a socket, that you can use any ATM machine in the world and that products on store shelves are safe.

In the United States, our standardization system is led by the private sector with hundreds of individual standards developing organizations, or SDOs, working in different technical areas and industry sectors. It is a consensus-based and market-driven process that is open to participation by all effected stakeholders. Importantly, the U.S. government is one such stakeholder and Federal, State and local governments are active partners in the development of standards and codes when the activity is relevant to their needs. The government uses these standards in a variety of ways, including to establish internal procedures and develop regulations for public safety and welfare. Our national standardization system and its public-private partnership are reflected in the National Technology Transfer and Advancement Act of 1995 and the associated OMB Circular A-119.

The NTTAA directs agencies to consider the use of private sector developed standards in lieu of government-unique standards. When adopting a voluntary consensus standard into a regulation, Federal agencies are permitted to incorporate the standard by reference into the Federal register without publication of the standard itself. For a standard to be incorporated by reference or IBR-ed, the agency must determine that the standard is reasonably available to the class of persons effected by the anticipated regulation. In this case, reasonably available has always meant that the standard is accessible to any potential user. It does not require that the standard be available without a fee.

Now recent concerns have been raised about whether the reasonably available requirement should be changed in light of expectations of free online access. For example, in early 2012, NARA, the National Archives and Records Administration, solicited comments on a petition arguing that IBR-ed materials in the CFR should be for free. But, just 3 months ago, after a comprehensive analysis, NARA concluded that reasonably available continues to mean just that and it does not mean for free. They relied, in large part, on another comprehensive analysis of the issue conducted by ACUS, the Administrative Conference of the United States, in December of 2011.

The question NARA was trying to answer was simple, why shouldn't IBR-ed standards be free? It seems like a valid point.

But, the blanket statement that all IBR-ed standards should be free misses some very important considerations.

First, every standard is a work of authorship and, under U.S. and international law, is copyright protected, giving the owner certain rights of control and remuneration that cannot be taken away without just compensation.

Second, if SDOs can't charge for standards and code, this disrupts the standards development ecosystem. The funding has to come from somewhere. And increasing participation fees to offset lost sales revenues would disenfranchise consumers and small businesses. Those with the money would have all the influence.

Lastly, if SDOs can't afford to stay in business, safety standards would not be updated and standards for new technologies would go unwritten. Thus, this would affect U.S. competitiveness and innovation. The government would have to step up, take over what is now a market-driven system, and somehow find the money, time and expertise.

So, what is the answer? The public and private sectors should continue to make standards and codes available on a reasonable basis. For some this may mean providing read-only but free access. And for others it may mean at reasonable prices. Recognizing that there is not one solution to the access issue, NARA found that it is for the Federal agencies to continue to work with SDOs to provide reasonable access to the IBR-ed standards.

NARA's recent assessment reaffirms the decades old guidance contained in OMB A-119 that when copyrighted works are IBR-ed, those works should not lose their copyright and that government agencies must observe and protect the rights of the copyright holder. And that is just what is being done. Many SDOs make standards available for free or at a discount to consumers, policymakers and small businesses. And some SDOs make certain standards and codes available online on a read-only basis. Do its part, ANSI has launched an online IBR portal for the benefit of the user community, including consumers.

In closing, the standardization community believes, as OMB, NARA and ACUS believe, that the development of complex, highly specialized technical standards requires a massive investment of time, labor, expertise, and money. Standards development in this country is one of the earliest and most successful examples of the public-private partnership, which has benefited our Nation tremendously on many fronts: competitiveness, public safety, successfully commercializing American innovations globally and much more.

Thank you so very much for the opportunity to testify for you today. And I would be happy to answer any questions.

[The prepared statement of Ms. Griffin follows:]

Prepared Statement of Patricia Griffin, Vice President and General Counsel, American National Standards Institute

Thank you, Chairman Goodlatte and Chairman Coble. Good morning, ladies and gentlemen.

My name is Patricia Griffin and I am vice president and general counsel of the American National Standards Institute. ANSI is the coordinator of the U.S. standardization system, and we thank you for the opportunity to testify.

WHY STANDARDS MATTER

Most people don't think about how much we depend upon standards to make our everyday life work. For example, standards help ensure that a light bulb fits in a socket, that you can use any ATM in the world, and that products on store shelves are safe.

Standards are the backbone of trade, the building blocks for innovation, and the basis for quality, safety, and interoperability. Voluntary consensus standards and compliance activities are essential to the U.S. economy. Market-driven and highly diversified, standards support technological innovation, build bridges to new markets, and create gateways for businesses in this increasingly complex world of global access. Standardization also helps to assure health, safety, and quality of life for individuals in the United States and around the world.

THE U.S. STANDARDIZATION SYSTEM

In the U.S., our standardization system is led by the private sector, with hundreds of individual standards developing organizations, or SDOs, working in different technical areas and industry sectors. It is a consensus-based and market-driven process that is open to participation by all affected stakeholders.

The U.S. government is one such stakeholder. And federal, state, and local governments are active partners in the development of standards and codes when the activity is relevant to their needs.

The open, market-driven, and private sector-led nature of our system is critical to achieving the widely shared policy goals of expanded U.S. leadership and innovation on the global stage.

Currently, the U.S. has the most robust standardization system in the world, which gives the nation a competitive advantage. Unlike the standards development systems of many other countries, the U.S. system considers the views of all interested parties in a balanced way. And the openness of the system to new participants means that their needs can be met quickly and through innovative, collaborative solutions.

THE PUBLIC-PRIVATE PARTNERSHIP

One of the great strengths of the U.S. approach to standards and conformance is the "public-private partnership"—a term that stakeholders in government and industry use to describe the long-standing, effective, and cooperative working relationship between the public and private sectors.

The public-private partnership in the United States is strong because it is a true partnership. Neither government nor industry claims or exerts overall authority over the other, and by working together in respectful cooperation, we are able to most effectively respond to the strategic needs of the nation. This dynamic makes our standardization system unique in the world.

Our national standardization system and its public-private partnership are reflected in the *National Technology Transfer and Advancement Act of 1995* (NTTAA), and the associated OMB Circular A–119. The NTTAA directs agencies to consider the use of private-sector-developed standards in lieu of government-unique standards whenever possible.

The government uses standards in a variety of ways, including to establish internal procedures, aid in developing regulations for public safety and welfare, and improve the efficiency of the procurement process. When adopting a voluntary consensus standard into a regulation, federal agencies are permitted to incorporate the standard by reference—that is, without publication of the standard itself—in the *Federal Register*.

INCORPORATION BY REFERENCE AND THE "REASONABLY AVAILABLE" DIALOGUE

For a standard to be incorporated by reference or "IBR-ed," the agency must determine that the standard is "reasonably available" to the class of persons affected by the anticipated regulation. In this case, "reasonably available" simply means that the standard is accessible to any potential user. It does not require that the standard be available without a fee.

In the past few years, concerns have been raised about whether the "reasonably available" requirement should be changed in light of expectations of free online access. For example, in early 2012, Professor Peter Strauss of Columbia University pe-

titioned NARA, the National Archives and Records Administration, arguing that IBR-ed materials in the CFR should be free.[1]

After soliciting and then publishing comments on this petition in October 2013[2], NARA's Office of the Federal Register, OFR, concluded that "reasonably available" continues to mean just that, and it does not mean "for free." OFR relied in large part on a comprehensive analysis of the issue conducted by ACUS, the Administrative Conference of the United States, in December 2011.[3]

The question OFR was trying to answer was simple: why shouldn't IBR-ed standards be free? It seems like a valid point. But the blanket statement that all IBR-ed standards should be free misses some very important considerations:

- Every standard is a work of authorship and, under U.S. and international law, is copyright protected[4], giving the owner certain rights of control and remuneration that cannot be taken away without just compensation.[5]
- Although many people working on standards development are volunteers, SDOs incur significant expenses in the coordination of these voluntary efforts. From the time a new project is commenced until the final balloting and adoption of a standard, the drafting process draws heavily on an SDO's administrative, technical, and support services. Tens of thousands of staff employed by SDOs across the nation provide direct support for the technical development activities of the volunteers.
- SDOs are—for the most part—non-profit organizations. In order to recoup their costs, some SDOs rely heavily on revenue from copyright-protected sales and licensing of the standards. An SDO's right to receive these revenues is based primarily in their copyright rights in the standard. Without such copyright protections, many SDOs would not have the financial ability to continue their work. Some organizations receive revenue through membership support including membership fees, project fees, registration fees, and other member-generated income. Still others rely on a combination of these and other revenue-generating activities. By funding operations at least in part through sales and licensing of standards, SDOs can minimize barriers to qualified participation and maximize independence from entities seeking to influence the outcome for commercial or political reasons. Standards sales also allow non-profit SDOs to recoup basic administrative costs while passing on to implementers all of the benefits of the voluntary and inclusive process of standards development, including openness, balance, opportunities to participate, and protection from undue influence.[6]

  If SDOs cannot charge for standards and codes, this disrupts the standards development ecosystem. The funding has to come from somewhere. Increasing participation fees to offset lost sales revenue would disenfranchise consumers, small businesses, and local governments. Those with the money would have all the influence.
- Standards must be maintained and the publication kept up to date. This requires ongoing development, revision maintenance, and administrative costs. The government and taxpayers benefit from the current system by not paying for these recurring development and administrative costs.
- If SDOs cannot afford to stay in business, safety standards would not be updated, with the potential for dangerous consequences. And standards for new technologies would go unwritten, affecting U.S. competitiveness and innovation. The government would have to step up, take over what is now a market-

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[1] March 2012, *Federal Register:* https://www.federalregister.gov/articles/2012/03/22/2012-6935/incorporation-by-reference.

[2] October 2013, *Federal Register:* https://www.federalregister.gov/articles/2013/10/02/2013-24217/incorporation-by-reference.

[3] http://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf.

[4] http://www.copyright.gov/title17/.

[5] In February 2011, ANSI's Intellectual Property Rights Policy Committee developed a white paper on the copyright implications of voluntary consensus standards in regulation: "Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected," http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf

[6] ANSI Essential Requirements, www.ansi.org/essentialrequirements; World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement Principles for the Development of International Standards, http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

driven system, and somehow find the money, time, and expertise—for every single technology and industry area.[7]

- Finally, decisions made about our national standardization system and our priorities for action reach far beyond our borders, especially when it comes to the continued success of our products, services, and workforce on the global stage. Any decisions or actions that would fundamentally undermine this system will cause the U.S. to lose this competitive advantage to other countries that would be quick to seize the opportunity. Additionally, significant changes to the system would compromise the role that standards play in protecting health, safety, and the environment.

WHAT IS THE ANSWER?

Reasonable availability is the best solution, as it allows for the flexibility required by different industries, agencies, and SDOs. The public and private sectors should continue to make standards and codes available on a reasonable basis. For some this may mean providing read-only but free access, and for others it may mean at reasonable prices.

Recognizing that there is not "one solution to the access issue,"[8] the OFR found that it is for the federal agencies to work with SDOs to provide reasonable access to IBR-ed standards.

The OFR's recent assessment reaffirms the decade-old guidance contained in OMB Circular A–119—to "observe and protect" the right of copyright holders when incorporating by reference into law voluntary consensus standards. The very purpose of this policy is to permit the government to benefit from the efficiencies of the voluntary consensus standards development process. When the government references copyrighted works, those works should not lose their copyright, but the responsible government agency should collaborate with the SDOs to ensure that the public does have reasonable access to the referenced documents.

And that's just what is being done. Many SDOs make standards available for free or at a discount to consumers, policymakers, and small businesses. And some SDOs make certain standards and codes available online on a read-only basis.

For its part, ANSI has launched an online IBR Portal for the benefit of the user community, including consumers. The portal provides a voluntary, centralized infrastructure that can help the hundreds of SDOs in this country make their IBR-ed standards available in read-only format, should they wish to participate.[9]

IN CONCLUSION

The standardization community believes—as OMB, NARA, OFR, and ACUS believe—that the development of complex, highly specialized, technical standards requires a massive investment of time, labor, expertise, and money. Federal agencies continue to incorporate privately developed standards, eliminating costs of developing government-unique standards.

Standards development in this country is one of the earliest and most successful examples of the public-private partnership, which has benefitted our nation tremendously on many fronts—competiveness, public safety, successfully commercializing American innovations globally, and much more.

We thank you for this opportunity to provide testimony.

Due to the limited advance notice of this hearing, we would respectfully request the Chairman to hold the hearing record open for at least 14 days, to allow affected

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[7] Agencies have explored what that scenario might mean. Consider the following findings of the Federal Energy Regulatory Commission (FERC), published in the *Federal Register* in December 20091:

> When the Commission weighed the advantages achieved by the North American Energy Standards Board (NAESB) standards development process against the cost to the Commission and the industry of developing these standards through notice and comment rulemaking, we found, and continue to find, that the benefits of having a well-established, consensus process outweigh whatever costs non-members may incur in having to obtain copies of the standards.

[8] For example, one must take into account the myriad uses of IBR by different agencies. Many standards accepted under IBR have within them normative references to a second, or even third, level of standards. Making each and every standard referenced directly or indirectly through an IBR available free of charge to the public would be challenging and extremely cost-ineffective. Furthermore, many standards under current IBR rules are International Standards such as those promulgated by ISO and IEC. Any changes to reasonable availability requirements would not have any jurisdictional effect on current sales and distribution policies of ISO and IEC.

[9] http://ibr.ansi.org.

organizations or individuals adequate time to file additional testimony on this important subject.

ABOUT ANSI

ANSI is a private, non-profit organization that administers and coordinates the U.S. voluntary standards and conformity assessment system. In this role, the Institute oversees the development and use of voluntary consensus standards by accrediting the procedures used by standards developing organizations, and approving their finished documents as American National Standards.

Internationally, the Institute is the official U.S. representative to the International Organization for Standardization (ISO) and, via the U.S. National Committee, the International Electrotechnical Commission (IEC).

ANSI's membership is comprised of businesses, government agencies, professional societies and trade associations, standards developing organizations (SDOs), and consumer and labor organizations. The Institute represents the diverse interests of more than 125,000 companies and organizations and 3.5 million professionals worldwide. ANSI works closely with stakeholders from both industry and government to identify consensus-based solutions to national and global priorities—an inclusive, collaborative partnership between the public and private sectors.

Mr. COBLE. Thank you, Ms. Griffin.

Mr. Malamud?

TESTIMONY OF CARL MALAMUD, PRESIDENT, PUBLIC.RESOURCE.ORG

Mr. MALAMUD. Thank you, Mr. Chairman, Mr. Ranking Member. And thank you for the opportunity to appear before you today.

I am the Founder of Public.Resource.Org, a nonprofit that puts government databases, that everybody agrees are public, on the Internet and then works closely with the government to help them improve their own operations. I am responsible for placing the SEC EDGAR and U.S. Patent databases on the Internet for the first time. Public Resource has put all the historical opinions of the U.S. Court of Appeals on the Internet for the first time. We worked with Speaker Boehner and Chairman Issa to put a full archive of video from the House Oversight Committee and 14,000 hours of additional hearings online.

I would like to highlight three key points. First, there is a fundamental principle of our democracy, the rule of law, that states that, "If we are to be an empire of laws and not of men, we must publish the edicts of government for all to know, because ignorance of the law is no excuse and an informed citizenry must educate itself on its rights and obligations." That the law has no copyright because it is owned by the people, is a principle that has been repeatedly reaffirmed by the courts.

Despite that principle, my nonprofit has received stern takedown notices for publishing the official codes of Georgia, Idaho, and Mississippi. At the Federal level, the Code of Federal Regulations deliberately and explicitly incorporates by reference public safety codes that become binding law. As Joe Bhatia, the President of the American National Standards Institute, clearly states, "A standard that has been incorporated by reference, has the force of law and it should be available." My nonprofit has assembled a collection of 1,000 of those public safety laws and we have made them available to the public for the first time on the Internet. For that service, three standards bodies are suing us for, and I quote, "Massive

copyright infringement." They are suing us for publishing the law without a license.

My second point is about money. Some standards bodies insist that before one can read or speak the law, one must first obtain their permission. They say everybody needs a license, because they need the money. But, the goal of their process is precisely that their safety codes become the law. They lobby aggressively for that outcome and they boast loudly when their codes are adopted. When a safety code becomes law, the publisher gets a gold seal of approval of the American people. They exploit that position by selling all sorts of ancillary services, such as membership, training and certification. The business has become incredibly lucrative. And these nonprofit standards bodies pay their CEOs million-dollar salaries.

My third point is that the right to read the law and speak the law is necessary for innovation, innovation that leads to better tools for those that use the law every day including government workers, electricians and plumbers, students and apprentices, volunteer firefighters, journalists, and citizens.

Mr. Chairman, I have here for the Committee's inspection 20 public safety standards that are part of Federal law, including the safety requirements for wooden and metal ladders, the safety requirements for protective footwear, the national fuel and gas code. If you were to read these laws into your hearing record, would the Congress face strident objections for speaking the law without a license, like my nonprofit faces? That is why 115 distinguished law professors have joined me in calling on this Committee to consider an edicts of government amendment to the Copyright Act to clarify, once and for all, that the law belongs to the people.

Thank you very much.

[The prepared statement of Mr. Malamud follows:]

An Edicts of Government Amendment

Testimony of Carl Malamud, Public.Resource.Org
Hearings on Review of U.S. Copyright Law

House Judiciary Committee
Courts, Intellectual Property, and the Internet Subcommittee
U.S. House of Representatives
January 14, 2014

Chairman Goodlatte, Subcommittee Chairman Coble, Ranking Member Conyers, and members of the Committee. Thank you for the opportunity to provide to you this testimony on the subject of edicts of government. In this testimony, I will:

1. Review the long-standing doctrine in the common law that edicts of government have no copyright because such court opinions, statutes, regulations, and other pronouncements of general applicability belong to the people.

2. Discuss the legal threats that my non-profit, Public.Resource.Org, faces from several states for copying and posting their state laws online.

3. Discuss similar threats that Public.Resource.Org faces for posting public safety codes incorporated by reference into federal and state law.

4. Discuss why making the law available is not a threat to the business models of standards bodies and codification companies and why making these laws available is essential to promote innovation and the rule of law.

5. Propose a simple amendment to the Copyright Act to bring it into line with long-standing Supreme Court precedent and with public policy.

1. Edicts of Government and the Rule of Law

Edicts of government are the rules of general applicability by which we choose to govern ourselves as a society. When John Adams said we are "an empire of laws, and not of men,"[1] he meant that our democracy is based on public laws that we all know, not on the arbitrary actions taken in star chambers or smoke-filled back rooms.

That ignorance of the law is no excuse is a principle firmly rooted in the law, a principle that can only be true if our laws are public.[2] All modern democracies are based on the doctrine of the rule of law, a doctrine firmly embedded in our common law, enshrined in international treaties, and one of the underpinnings of the constitutions of the United States and other nations.[3]

Legal scholars rarely agree on a single point, but on the idea that the law must be promulgated to be effective, they are unanimous. Professor Tamahana, for example, in his standard text on the subject stated, "Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance."[4] That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see, a point made so well by Senator Robert C. Byrd in his classic lectures on Roman history delivered on the floor of the U.S. Senate.[5]

The issue is about access to justice and equal protection, but having the laws accessible and the rules known to all is also essential to the proper functioning of our market economy. Lord Bingham, in his essay on the rule of law, stated "The law must be accessible...the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations."[6]

The ability to know the law—to read the law—is essential to the functioning of our democracy. But the principle goes even further. Citizens must have the right to speak the law. The First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law.[7] By the same token, equal protection of the laws and due process are jeopardized if some citizens can afford to purchase access to the laws that all of us are bound to obey—with potential criminal penalties for non-compliance—but others cannot.[8] Access to justice should not require a Gold Card.

In the United States, the question of whether edicts of government are subject to copyright was first addressed in 1834 by the Supreme Court in the landmark case of Wheaton v. Peters.[9] Henry Wheaton served as the reporter of opinions of the court, a job he performed with great distinction. When he resigned to pursue a career in international diplomacy, he was succeeded by Richard Peters.[10] Peters started to publish a comprehensive set of reports of Supreme Court opinions. Among his innovations were the fact that his reports were significantly cheaper than those issued by Wheaton. Wheaton sued, claiming the reports issued under his tenure were subject to copyright and Peters should be prohibited from publishing.

The Court ruled that there could be no copyright in its opinions, because the law belonged to all of the people, not to the justices and certainly not to their clerks or reporters:

> It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.[11]

That matter of public policy has been repeatedly reaffirmed. In Banks v. Manchester, the Supreme Court ruled that:

> Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of Wheaton v. Peters, 8 Pet. 591, that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.[12]

Since the 1960s, our modern society has become increasingly more technical and our legal system has accelerated the use of technical public safety codes that are mandated by law. These public safety codes govern building, electrical, plumbing, fire, elevator, fuel and gas, mechanical, and plumbing safety. These laws touch our daily lives in ways that are often much more direct than many of the pronouncements of the courts or Congress.

In 2002 in Veeck v. Southern Building Code Congress, the U.S. Court of Appeals for the Fifth Circuit considered the issue of building codes and copyright, and firmly affirmed the principle that:

> Public ownership of the law means precisely that "the law" is in the "public domain" for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse.[13]

The principle is clear. The law must be available to all. But the principle—despite long-standing Supreme Court precedent—has increasingly been ignored in practice. This is why congressional action is needed.

2. State Laws

In 2013, Public.Resource.Org began publishing official state and municipal codes. In the case of municipal codes, our efforts have been greeted with open arms.[14] For example, we were able to make bulk data from the Chicago Municipal Code available, including quarterly snapshots of the code from 2007 onwards.

Once the data became available, the nonprofit OpenGov Foundation, on its own initiative, built a new web site. If you compare what this nonprofit built at ChicagoCode.Org with what was previously available from the city,[15] you will see how dramatic the difference is. The version built by the nonprofit is much easier to navigate, and there are permanent bookmarks for each section of the code so you can email somebody a link and they can see the same section you saw. The HTML code underlying ChicagoCode.Org is valid, which means it works properly on all browsers. ChicagoCode.Org is available in bulk so anyone can take this improved data and make their own even better web site. This flourishing of innovation was warmly welcomed by the Honorable Susana Mendoza, the City Clerk of Chicago.

Similar results happened in the District of Columbia when we made the bulk code available. Several volunteers worked with the bulk data and produced DCcode.Org, a site dramatically better than the official site provided by the vendor.[16] The site provided by the volunteers has valid HTML code, permanent bookmarks, and significantly better navigation and user interface. The site provided by the official vendor imposes major restrictions as part of its terms of service, and it is not based on valid HTML

code so it does not work properly in modern browsers and is even worse on tablets and smartphones. The official site suffers from a huge number of accessibility and validity issues.

It is clear that by making municipal codes available, innovation flourishes and citizens are able to access their laws in new and better formats. The same should be true for official state codes. As part of our efforts, we purchased and posted online the official codes from Arkansas, Colorado, Georgia, Idaho, and Mississippi. That effort has not been so well received by authorities.

On May 30, 2013, we posted the Official Idaho Code and sent a copy with a letter to the Honorable Scott Bedke, Speaker of the House of the Idaho State Legislature.[17] We posted the data on our site for bulk access, and also loaded the full code onto the nonprofit Internet Archive site.[18] Speaker Bedke never answered our letter, but he did hire an outside law firm, which sent a sternly worded takedown letter demanding the immediate removal of the Official Idaho Code from the Internet.[19]

The position of the State of Idaho is that the Official Idaho Code consists of two components: the statutes and annotations to the statutes. For the core statutes, the State of Idaho demanded that we first obtain a license before making any copies of its laws. Annotations to the statutes, which are prepared under authority of the Legislative Counsel of the State and for which copyright is claimed by the state, include the statutory history and statutory notes. For these annotations, the position of the State is that "reproduction and display...will not be tolerated."[20]

We should be very clear that if the publication of an annotated version of the Official Idaho Code were the independent endeavor of some commercial enterprise, we would fully support and embrace the idea that the work is copyrighted. However, if one goes to the site of the Idaho State Legislature and clicks on the Official Code links, one is directed to either the free vendor site, which is very poor, or sales literature attempting to extract $547 from Idaho residents.[21] The copyright is claimed by the State of Idaho, the work is produced under the direct supervision and control of the Idaho Legislative Counsel, and it is the "only official source" for the law of Idaho.[22] It is clearly an edict of government, not a private work.

In response to Speaker Bedke, we respectfully declined to comply with the sternly-worded letter from his outside counsel.[23] To date, the State of Idaho has not pursued legal action against us, but we live under a cloud fearing that any day the state may take us to court. Because of the 11th Amendment, we are prohibited from seeking declaratory relief in U.S. District Court to clear this threat that looms over us.[24]

We have received a similar threat of legal action from the General Assembly of Georgia for posting the Official Code of Georgia Annotated.[25] When we respectfully declined to remove the Official Code,[26] the State continued to pursue the matter with threats to "pursue all available remedies."[27] We received a similar threat from Mississippi.[28]

When a license is required to post the official laws of a state, innovation suffers. Civic-minded volunteers, such as those who built the beautifully improved municipal code sites for Chicago and the District of Columbia, are prohibited from working their magic. Volunteers who wish to provide sites that compare laws among the fifty states are prohibited from basing their work on the official code for fear of angry state officials anxious to "pursue all official remedies."

States such as Idaho, Georgia, and Mississippi are in the minority when it comes to state statutes.[29] Those states that have not exercised such misguided attempts at control have been able to see the results clearly. In Virginia, for example, a civic-minded volunteer named Waldo Jaquith put together a site at VaCode.Org with a markedly better version of the Code of Virginia than the official version provided by the State.[30]

Mr. Jaquith, a former aide in the Obama White House, developed the States Decoded format[31] and released all his tools as open source code with no rights reserved, supported by a small grant from the Knight Foundation.[32] Those tools were in turn used by the OpenGov Foundation, which is staffed by former senior aides to Congressman Issa, to develop the Chicago Decoded site.

The effort to make our laws available is nonpartisan, and we work across the aisles and across the country. There is a growing community of citizens eager to undertake this work, but states such as Georgia, Idaho, and Mississippi have spread fear, uncertainty, and doubt sufficient to throw a deep chill on their ardor.

While it is clear that the law has no copyright, a few states have evidently not received the memo. Their motives for asserting copyright are perhaps rooted in historical artifact, or are perhaps based on a desire to preserve the business models of their vendors. No matter what the motive, those who copy the official codes are subject to threats of prosecution. Those threats are clearly groundless and violate long-standing Supreme Court precedent, but the threats are real and they have a substantial chilling effect on efforts to speak the law to inform citizens of their rights and obligations.

3. Public Safety Codes

Some of the most important rules in our modern society are technical public safety codes with the force of law. These public safety codes cover fire, electrical, building, plumbing, mechanical, fuel & gas, elevator, and boiler safety and many other topics and are mandated by law by cities, counties, states, and the federal government.

When these public safety codes are ignored, the results are catastrophic. We saw those consequences when the Texas City refinery exploded in 2005 with such force that windows 3/4 mile away shattered from the impact. The explosion was the result of hundreds of violations of federal laws mandated by public safety codes.[33] We saw those consequences when a natural gas explosion in San Bruno, California, resulted in a wall of flame 1,000 feet high, an explosion caused by numerous violations of pipeline standards.[34] We saw those consequences in Bangladesh with the devastating and horrifying Tazreen Factory fire[35] and Rana Plaza collapse.[36]

Public safety codes touch us all. The codes are often developed by nonprofit organizations dedicated to developing standards in a particular area and having them incorporated by law. This public-private partnership is enshrined in federal policy. The National Technology Transfer Act of 1995[37] as implemented in OMB Circular No. A-119[38] "directs agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical." This policy is a recognition of the high quality of the technical standards produced by Standards Development Organizations (SDOs) in the United States. A similar policy operates at the state and municipal levels, where model codes developed by industry are incorporated into law.

In 2008, Public.Resource.Org began posting state-mandated public safety codes.[39] Although the model codes as developed by the SDOs had copyright restrictions, we based our actions on the ruling in the Veeck case, which stated:

> We emphasize that in continuing to write and publish model building codes, SBCCI is creating copyrightable works of authorship. When those codes are enacted into law, however, they become to that extent "the law" of the governmental entities and may be reproduced or distributed as "the law" of those jurisdictions.[40]

The Veeck court pointed to long-standing precedent, quoting Justice Harlan who said "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book"[41] and stressing that "the building codes of Anna and Savoy, Texas can be expressed in only one way; they are facts. Veeck placed those facts on his website in precisely the form in which they were adopted by the municipalities."[42]

We received no objections to our actions in posting these building and other public safety codes on our web site. In addition to posting high-quality scans "in the form in which they were adopted, " we invested considerable time and effort in rekeying select codes, such as the 2010 cycle of California's Title 24,[43] which includes the building, residential, electrical, mechanical, plumbing, energy, historical building, fire, existing building, and green building codes. Our work transformed these provisions into valid HTML documents so they worked across multiple browsers and on platforms such as mobile devices and tablets.[44]

We went a step further, recoding the mathematical formulas into the Mathematical Markup Language (MathML).[45] By coding the formulas properly, they can easily be resized or copied into a word processing program. Likewise, they become significantly more accessible to those who rely on assistive technologies, such as speaking text for those with visual impairments. Making government documents more accessible is a requirement for federal agencies and an important goal for all governments.[46] In addition to the formulas, most of the graphics in the 2010 Title 24 code cycle were carefully redrawn into the industry-standard Scalable Vector Graphics (SVG) format.[47] By recoding the graphics, they are significantly more usable than the bitmap images in the original scans.

Before Public.Resource.Org began posting state-mandated public safety codes, none of them were available on the Internet. We received no takedown notices, and were very pleased to see organizations such as the International Code Council follow our lead and create online reading rooms for citizens to read the codes on its site.[48] The mission of the ICC is to create model codes that are incorporated into law. Making the standards available have not hurt the ICC's bottom line in the least. The nonprofit corporation has leveraged its position to sell a number of lucrative services such as education, certification, and sophisticated electronic value-added systems such as CodesPlus, which includes not only the law but commentary on why changes were made in codes.[49] This central position in creating legal codes has resulted in a $52.5 revenue stream in 2011.[50]

In March, 2012, we expanded our work to include posting technical standards that are incorporated by reference into the Code of Federal Regulations (CFR). Incorporation by Reference (IBR) is the formal process by which an agency can make a model code or technical standard part and parcel of a regulation. Federal law specifies that the process include a series of determinations that the incorporation is in the public interest and requires the approval of the Director of the Office of the Federal Register. The rules state that two copies of the standard must be available for public inspection, one at the Office of the Federal Register reading room and a second at the facility of the agency requesting the incorporation.[51]

With the exception of copies in the two reading rooms in Washington, the standards have been unavailable to the public without paying substantial fees. Almost no university or public libraries in the United States have copies of these documents because the costs are prohibitive. When SDOs have offered copies of standards to read, with or without a fee, that access has come with significant limitations on use, and SDOs have jealously guarded against the right of anyone but themselves to communicate these provisions to others. That is, they have systematically sought to block others from speaking the law.

The lack of broader availability of these technical standards has been an issue of growing concern, particularly as access to electronic information has become a priority for successive Congresses and Presidents.[52] The Administrative Conference of the United States stated that "ensuring that regulated and

other interested parties have reasonable access to incorporated materials is perhaps the greatest challenge agencies face when incorporating by reference."[53]

The Congress was so shocked by the high cost of crucial, legally-mandated safety documents during the BP Gulf Oil Spill that it amended the Pipeline Safety Act of 2011 with a provision that "the Secretary may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site."[54] The Office of the Federal Register was so concerned by the lack of availability of standards that it turned an unsolicited petition by a Columbia University professor into a call for input and a subsequent Notice of Proposed Rulemaking.[55]

In March 2012, Public.Resource.Org began the process of making available technical standards incorporated by reference in the CFR. We started that effort by selecting 73 standards and sending print copies with a request for comment from 10 leading Standards Development Organizations.[56] Copies of this notice were also sent to seven key government officials. No comments were received from any of the SDOs, and in May 2012, we began the process of posting these standards on our web site.[57] We have posted a total of 969 standards that are required by federal law.

It may be tempting to dismiss technical standards incorporated by reference as being of only limited interest, so it is perhaps important to remind ourselves of the crucially important role these technical standards play in our daily lives:

- OSHA regulates the safety of our workplaces, and incorporates 262 technical regulations including safety codes for derricks, protective footware, industrial head protection, pressure piping, woodworking machinery, sound level meters, exhaust systems, and respiratory protection.[58]
- The Pipeline and Hazardous Materials Safety Administration incorporates 209 technical regulations including safety codes for the transport of uranium, welding pipelines, storage of liquified natural gas, the transport of hazardous materials by rail, and the International Maritime Dangerous Goods Code.[59]
- The National Highway Traffic Safety Administration incorporates 277 technical regulations governing the testing of automobile safety including standards for brakes, tires, lights, warning devices, and crash test dummies.[60]
- The U.S. Coast Guard incorporates 581 technical regulations including maritime safety codes for fire extinguishers, flotation devices, fuel tanks, cables, electrical installations, and explosive gas atmospheres.[61]
- The Department of Energy incorporates 184 technical regulations including energy efficiency standards for buildings and safety codes for central furnaces, boilers, lamps, air conditioners, dryers, freezers, and dishwashers.[62]

The issue is not whether or not you think there are too many regulations or not enough. The issue is whether people should know what the law is. As Joe Bhatia, the CEO of the nonprofit American National Standards Institute so clearly said:

> A standard that has been incorporated by reference does have the force of law, and it should be available.[63]

Letting people read the law is a threshold question. Only after the citizenry is informed, can we have the discussion as to what kind of regulations we should have.

Our efforts to make technical standards incorporated by law into the Code of Federal Regulations available to citizens in new and more convenient forms at first received no opposition from the Standards Development Organizations. We received a few random takedown notices. For example, an outside law firm wrote to us on behalf of the American Petroleum Institute on November 2, 2012 demanding removal of 24 documents.[64] We sent them our standard response explaining that the documents had been incorporated into federal law and politely declined to remove the documents.[65] We have not heard from them since.

Only one organization, the Sheet Metal and Air Conditioning Contractors National Association (SMACNA), persisted in objecting to our action, in this case over the posting of the HVAC Air Duct Leakage Test Manual, a 1985 document mandated by the Department of Energy.[66] This was a particularly egregious objection, because the standard at issue was no longer even the operative SMACNA standard; its only remaining function was as law. SMACNA no longer even sold the standard or otherwise made it available. Yet SMACNA insisted that Public.Resource.Org take the standard down anyway.

After SMACNA persisted in its objections, Public.Resource.Org filed for Declaratory Relief in the U.S. District Court for the Northern District of California.[67] Before the matter reached the presiding judge, the SMACNA offered to withdraw its copyright assertion and stipulated that it had no objection to our posting of the standard in dispute or the other three standards they had authored that had been incorporated into federal law.[68] We accepted that agreement, which firmly vindicated our rights to post standards incorporated into law.

Because our efforts to publish the law serves an important unmet public need and is firmly grounded in the public policies of the United States, we were surprised to be subsequently served papers to appear in the U.S. District Court for the District of Columbia by three prominent Standards Development Organizations.[69] The suit was filed by the American Society for Testing and Materials (ASTM) for posting federally mandated testing standards, the National Fire Protection Association (NFPA) for posting the National Electrical Code and other fire safety standards, and the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) for posting DOE-mandated energy standards.

The lead spokesman on this suit is Mr. Jim Shannon, the President of NFPA, who issued a statement accusing us of "massive copyright infringement."[70] In a blog post, Mr. Shannon said that our posting of documents such as the National Electrical Code "threatens our future, our ability to continue our work, and the whole system of standards development that the public and governmental agencies rely on."[71]

Let me be very clear. I am a big fan of the work that NFPA does as an organization and a huge admirer of Mr. Shannon and his leadership of the NFPA. Mr. Shannon has personally led the fight to make fire sprinklers more widespread in homes[72] and to mandate fire-safe cigarettes in state law.[73] He has made our country a safer place.

The National Electrical Code is a very good piece of work, one of the better standards I've come across in over 30 years of working with technical standards.[74] The NFPA has made an invaluable contribution to our nation's public safety. However, I vehemently disagree with its characterization of our efforts to make the laws of the United States available to the people of the United States.

4. Why Code Developers Demand a License Before You Can Read the Law

The objection advanced by the Standards Development Organizations to citizens posting codes mandated by law without their permission is two-fold. First, they argue that they need the money. As Mr. Shannon says:

> The development of quality standards requires substantial resources. The NFPA coordinates thousands of volunteers and provides them with meeting space, logistical and administrative support, as well as access to technical staff assistance, research, and analysis. In addition to the staffing and other costs of assembling, editing and preparing the standards for publication, NFPA staff must process, organize, and publish the thousands of technical comments submitted by interested members of the public throughout the code or standard revision cycle. Particularly for non-profit, mission driven organizations like the NFPA, the revenue derived from the sale of NFPA codes and standards allows the organization to provide these services while maintaining its independence, free from reliance on funds from either industry or government.[75]

The second objection is that only a few people really need to read these documents and they are highly technical. In other words, making the documents available for free serves no public purpose and simply allows those that do need the documents to get a free ride.

Let me dispose of the second argument, and then deal with the more serious objections posed in the first.

When I put the SEC's EDGAR database on the Internet,[76] the objection of the SEC was that the agency needed the money from selling public reports of public corporations and that giving these documents away served no useful purpose as the general public had no interest in these documents. The SEC was wrong, people flocked to those reports, and I donated my software and computers to the SEC so they could take over the service we built.

When I put the U.S. Patent database on the Internet,[77] Commissioner Bruce Lehman objected vigorously to my efforts, claiming that we would be depriving the Patent and Trademark Office of revenue from the sale of patent texts on a pay-per-view basis and that people on the Internet would have no interest in these highly technical documents. Commissioner Lehman was wrong and that database has been wildly popular.

Ignorance of the law is no excuse, and Americans are smart. Any homeowner should be able to easily and quickly check the National Electrical Code to verify their contractor did the right thing. Any parent should be able to check the safety specifications for the safety of toys, the safety of baby pacifiers, or the safety of strollers if they worry the item they bought might not be safe. Any journalist or member of Congress investigating the BP Oil spill ought to be able to read the federally-mandated pipeline safety standards without forking over $1,000 first. Any factory worker ought to be able to check the federal mandates for ventilation or the safety of machinery if they are worried about their personal safety.

It is clear that everybody should be able to read the law. It is also clear that anybody should be able to communicate, to transmit, to speak the law. Imagine the outrage if, for example, the Environmental Protection Agency promulgated a new regulation but insisted that nobody could make copies of that regulation without a license or that scholars or journalists were prohibited from quoting that regulation at length. Standards incorporated by reference have the force of law and are no different than text authored directly by the government.

The argument that Mr. Shannon of NFPA and Mr. Bhatia of ANSI make is that technical standards incorporated by law are different because they need the money. That argument is a red herring. They

need money, but they have lots of money already. The NFPA, for example, reported 2011 revenue of $80.7 million in 2011 and paid its non-profit CEO $1,044,035.[78] ANSI reported 2012 revenue of $36.5 million and paid its non-profit CEO $1,036,926 for 35 hours of work a week.[79] Indeed, when I surveyed the compensation for 10 leading Standards Development Organizations, all of them nonprofits, every one of their CEOs made more than the President of the United States.[80] The SDOs may need to adjust their business models to meet the realities of the Internet, but have not all organizations, including this House of Representatives, had to adjust their practices?[81]

When a document such as the National Electrical Code is incorporated by law in all 50 states and required by the federal government, the NFPA has received an invaluable endorsement, the Gold Seal of Approval of the United States of America. The NFPA can, and does, sell all sorts of value-added products such as training, certification, membership, handbooks, and annotated codes.

Incorporation into law is not an accidental taking of their work, it is the very purpose of their enterprise. The NFPA wants its standards to be required in all 50 states and hires full-time staff who do nothing but help convince states to require its codes.[82] NFPA lobbies vigorously for adoption of its codes, and when they are successful, they trumpet the news in press releases.[83] The NFPA is an active participant in coalitions such as Build Strong American which are urging governments to incorporate more of their codes into law and to always incorporate the latest revisions.[84]

Just as the International Code Council began posting model building codes in response to our efforts at the state level, the American National Standards Institute has recently announced its new "IBR portal." ANSI maintains that this should be the exclusive method for free access to standards and that any attempts to copy or distribute standards is subject to stringent license requirements.[85] The "legal reading room" requires all users to pre-register before accessing standards and to agree to strong terms of use. Users are required to install special Digital Rights Management (DRM) software on their computer, software that only runs on selected operating systems and does not support mobile or other platforms. Once a user has registered—and they are required to re-register on each day they wish to access standards—they are able to read the documents, but cannot print, save, search, copy, or even take a screenshot.

ANSI joins other organizations, including NFPA, ASTM, ASHRAE, Underwriters Laboratories, and the American Petroleum Institute, who have all recently added their own read-only reading rooms. Because most agencies incorporate standards from numerous sources, if one wants to read the law pertaining for example to an area such as hazardous material transport, one can only do so by registering on a half-dozen incompatible sites, each with their own technical requirements and unique restrictions on use.

Reading the law is one thing, but speaking the law is equally important. Activities that our organization undertakes—such as putting all the standards required by law in one location with common access methods or rekeying the texts in order to make them searchable and available on new platforms—are purportedly prohibited under this scheme.

Even more insidious under this scheme advanced by ANSI, your use of the law is carefully monitored. In a briefing to the International Electrotechnical Commission, for example, ANSI agreed to provide regular reports on usage of documents.[86] NFPA's reading room, as a condition for reading the law, requires that you agree to promotional messages and campaigns to up-sell you on other goods and services.

One of the arguments made by the Standards Development Organizations is that if they do not retain a monopoly on the right to license particular codes, the only alternative would be for the government to purchase rights and that this would be extremely expensive. For example, the American Society of Heating, Refrigerating and Air-Conditioning Engineers has stated in a submission to the Office of the Federal Register that:

> ASHRAE recommends that agencies should bear the cost of making IBR standards available for free online in read-only (non-downloadable) format, and should compensate standards development organizations (SDOs) accordingly for providing free-to-the-public online access to their referenced standards. This is consistent with the National Science and Technology Council's recommendation that federal agencies should consider providing monetary compensation to SDOs for the provision of their standards to all interested parties.[87]

Again, let us not forget that the goal of ASHRAE and their fellow Standards Development Organizations is precisely that their work become law. They lobby aggressively for that outcome and sell a number of products based on their position as one of the developers of energy codes required by law in our country. And, let us not forget that the government does spend considerable amounts of money on supporting this process.

In the case of ASHRAE, for example, over 100 U.S. government officials from organizations that include the Army, Air Force, Centers for Disease Control, numerous national laboratories, Department of Energy, Department of Housing and Urban Development, General Services Administration and even the National Gallery of Art play an integral part in the standards development process.[88] The government even pays a $74,872 salary for an ASHRAE member to spend a year at DOE headquarters as an "ASHRAE DOE Fellow."[89] Not only does ASHRAE lobby governments to incorporate its codes as law, they are greatly assisted in that effort by the National Institute of Standards and Technology, which recently published a study urging all states to upgrade their laws to require the latest version[90] of ASHRAE 90.1, the Energy Standard for Buildings.[91]

In addition to the costs of thousands of government employees participating in the standards development process, there are huge direct costs incurred by the government in purchasing copies of standards they must enforce. USASpending.Gov shows $7,659,842 in federal funds going to the National Fire Protection Association,[92]$88,706,506 in spending with the American Society for Testing and Materials,[93] and $36,474,899 in spending with the American National Standards Institute.[94] These are just federal costs. Every state, county, and municipal inspector and planning official spend considerable amounts purchasing codes from the SDOs. In Sonoma County, California, for example, the Chief Building Inspector has reported that he must spend $30,000 every code cycle on codes and because of the high cost, he is unable to give his inspectors sufficient copies to do their jobs properly.[95]

There is a tremendous amount of money in the standards development process, and those that have chosen to participate in that process have an explicit goal of making their work into law, a position they exploit with generous salaries and very large revenue streams. Making the law available to the public must be permitted as part of the bargain they have made with the American people to retain this privileged position. Having the law be available to the public is not a burden, it is a fundamental underpinning of the rule of law in our society.

5. Amending the Copyright Act

The idea that state statutes or their codification somehow fall outside of long-standing policy that the law must be available is a mistake a few states have made. The idea that the American National Standards Institute can require a license for people to read the law and prohibit anybody from speaking the law is a mistake.

Under the ANSI view of the world, the ruling in Wheaton v. Peters would have been reversed. In their scheme, Peters would have been prohibited from publishing the newer, cheaper version of the Supreme Court Reports because Wheaton needed the money to sustain his lifestyle. There is no dispute that Wheaton worked hard and produced a good product. There is no argument that Wheaton would have

liked the money. The Supreme Court rejected Wheaton's claim and held that the law belongs to the people.[96]

One result of Wheaton v. Peters was the creation of the National Reporter System, that magnificent edifice of American jurisprudence and the product that created the West Publishing Corporation, a distinguished provider of legal services to the bar for over 100 years.[97] The National Reporter System only exists because the courts were wise enough to insist that no individual or corporation would be given a monopoly on publishing the law. If there is a monopoly over the right to promulgate the Code of Federal Regulations, innovation will suffer along with democracy.

While our common law is very clear that edicts of government have no copyright, federal and state statutes have arisen that are sometimes ambiguous or conflicting. In Delaware, for example, we risk three months imprisonment for publication of the Delaware Code.[98] The State of Mississippi maintains that upon unauthorized publication of the Mississippi Code of 1972 "the person or entity shall be subject to a civil penalty of not less than One Thousand Dollars ($ 1,000.00) for each violation, and each day upon which a violation occurs shall be deemed a separate and additional violation."[99] Before even being allowed to read that provision of the Mississippi Code on the only public web site authorized by the state, the reader must agree to terms of use that say "you may not copy, modify, reproduce, republish, distribute, display, or transmit for commercial, non-profit or public purposes."[100]

This conflict also extends to the federal level. When the Office of the Federal Register accepted a public petition to increase availability of standards incorporated by reference, they ultimately responded that "we agree with the petitioners that our regulations need to be updated, however the petitioners proposed changes to our regulations that go beyond our statutory authority."[101] Likewise, the Administrative Conference of the United States, while giving a passing nod to the constitutional provisions of equal protection and due process noted that "there is some ambiguity in current law regarding the continuing scope of copyright protection for materials incorporated into regulations" and then declined to "attempt to resolve the questions of copyright law."[102]

The Administrative Conference of the United States, the Office of the Federal Register, the Office of Management and Budget, and the Department of Transportation have all wrestled with this issue, but their hands are tied by contradictory policies such as those advanced in OMB Circular A-119, which states "if a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations."[103] To be very clear, this policy does not preclude an agency and a standards development organization voluntarily making a standard available as required by law and public policy, but the clause has been seized upon by those wishing to protect their current mode of operation.

It is ironic that the Incorporation by Reference mechanism has been used as a way of keeping the law under wraps. IBR became part of federal law as part of the landmark 1966 amendments to the Administrative Procedures Act (APA) in a bill entitled "Clarifying and Protecting the Right of the Public to Information."[104] The bill was based on the fact that while the original 1946 APA was based upon "the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know" in reality, the APA had become an "excuse for withholding."[105]

Congressman Moss spent 11 years working tirelessly on these amendments, stating that "inherent in the right of free speech and of free press is the right to know."[106] Congressman Moss was joined in this bipartisan effort by Congressman Donald Rumsfeld, who stated that "it is our intent that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public."[107] Congressman Rumsfeld was joined by Congressman Bob Dole, who stated "in a

democracy, the public must be well informed if it is to intelligently exercise the franchise."[108] The legislation passed the House unanimously by a vote of 307 to 0.

This legislation had as part and parcel of disclosure a right to copy. The accompanying report stated "federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference."[109] When the Office of the Federal Register implemented these provisions, it stated copies of any materials incorporated by reference must be "readily obtained with maximum convenience to the user."[110]

A clear statement of these issues, and the overriding policy consideration that the law must be available to an informed citizenry, was published by the U.S. Copyright Office in its official statement of policy:

> Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.[111]

This clear and compelling statement reflects long-standing Copyright Office policy that "material as the laws and governmental rules and decisions must be freely available to the public and made known as widely as possible; hence there must be no restriction on the reproduction and dissemination of such documents."[112]

As this Committee considers revisions to the Copyright Act, there is one simple change that would make a world of difference to the functioning of our system of government, which is to specify, as the Copyright Office stated, that "edicts of government...are not copyrightable for reasons of public policy." This amendment to the copyright act was recently endorsed in a petition signed by 115 of the leading law librarians and law professors in the country, and is included as an appendix to this testimony.[113]

This simple change would make it clear that the law belongs to the people. If we give those without great means a substandard web site as their only access to the law, we have put a poll tax on access to justice.

When we require a license to speak the law, we have made a mockery of freedom of speech. When we deliberately restrict access to the law—including the public safety codes that protect our homes, families, and workplaces—we have violated the fundamental principle of the rule of law that underpins our democracy.

The Federal Register came about because regulations were being created but the public had no means of knowing what those regulations were.[114] In the 1936 hearings that led to the passage of the Federal Register Act, Congressman D.J. Driscoll reminded this Committee of the Emperor Caligula, "who tacked his edicts so high on the walls of the Forum that nobody could read them and then punished the people for violations of the edicts."[115]

Professor Erwin Griswold of Harvard Law School, at the prodding of Justice Brandeis, wrote the seminal paper that led to the passage of the act.[116] In his testimony,[117] he reminded this Committee of the words of Jeremy Bentham:

> We hear of tyrants, and those cruel ones; but whatever we may have felt, we have never heard of any truant in such thought cruel, as to punish men for disobedience of laws and orders which he has kept them from the knowledge of.[118]

In introducing the Senate version of the 1966 amendments to the Administrative Procedure Act, Senator Russell B. Long quoted the words of James Madison, who was chairman of the committee which drafted the First Amendment:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.[119]

That efforts to publish edicts of government in the United States have become the subject of threats, suits —and even the threat of jail—is a farce or a tragedy or perhaps both. Congress can make it clear that the law belongs to the people and we all have the right to read, know, and speak the law.

Thank you for the opportunity to appear before you today. I would welcome any questions you might have.

Petition for an Edicts of Government Amendment

Note that signatories to this petition have only endorsed the text that follows and have not reviewed nor have they endorsed the testimony of Carl Malamud before the House Judiciary Committee. Please note also that affiliations are listed for identification only and do not imply institutional endorsement.

Text of the Petition

To promote access to justice, equal protection, innovation in the legal marketplace, and to codify long-standing public policy, the Copyright Act of the United States, 17 U.S.C., should be amended as follows:

> *Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.*

This language comes directly from Section 206.01, Compendium of Office Practices II, U.S. Copyright Office (1984). It reflects clear and established Supreme Court precedent on the matter in cases such as Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) and Banks v. Manchester, 128 U.S. 244 (1888). The law belongs to the people, who should be free to read, know, and speak the laws by which they choose to govern themselves.

Signatories to the Petition

1. Jasmine C. Abdel-Khalik, Associate Professor, UMKC School of Law
2. Beth Adelman, Director of the Charles B. Sears Law Library, SUNY Buffalo
3. Julie Ahrens, Director of Copyright and Fair Use, Center for Internet and Society, Stanford Law School
4. John R. Allison, Spence Centennial Professor of Business and Professor of Intellectual Property, Univ. of Texas at Austin
5. Pat Aufderheide, University Professor, American University
6. Margo A. Bagley, Professor of Law, University of Virginia School of Law
7. Ann Bartow, Professor of Law, Pace Law School
8. Karen S. Beck, Manager, Historical and Special Collections, Harvard Law School Library
9. Yochai Benkler, Jack N. and Lillian R. Berkman Professor for Entrepreneurial Legal Studies, Harvard Law School
10. Melissa J. Bernstein, Library Director and Professor of Law, University of Utah
11. Robert C. Berring, Jr., Walter Perry Johnson Professor of Law, UC Berkeley Law School
12. Annemarie Bridy, Associate Professor, College of Law, University of Idaho
13. William J. Brutocao, Adjunct Professor of Intellectual Property Law, University of La Verne College of Law
14. Dan L. Burk, Chancellor's Professor of Law, University of California, Irvine

15. Michael A. Carrier, Professor of Law, Rutgers Law School
16. Michael W. Carroll, Professor of Law, American University, Washington College of Law
17. Brian W. Carver, Assistant Professor, University of California, Berkeley
18. Carol Chomsky, Professor of Law and Associate Dean for Academic Affairs, University of Minnesota Law School
19. Margaret Chon, Donald and Lynda Horowitz Professor for the Pursuit of Justice, Seattle University School of Law
20. Ralph D. Clifford, Professor of Law, University of Massachusetts School of Law
21. Julie E. Cohen, Professor of Law, Georgetown University Law Center
22. Kevin Emerson Collins, Professor of Law, Washington University School of Law
23. David G. Cowan, Vice President and Director of Library Services, South Texas College of Law
24. Susan Crawford, Professor of Law, Cardozo Law School
25. Catherine Crump, Staff Attorney, ACLU
26. Richard A. Danner, Rufty Research Professor of Law and Senior Associate Dean, Duke University School of Law
27. Estelle Derclaye, Professor of Intellectual Property Law, University of Nottingham
28. Pamela Edwards, Professor of Law and Director, Center for Diversity in the Legal Profession, CUNY
29. Michelle Vescio Evenson, Fellow, Center for Law and Intellectual Property, Thomas Jefferson School of Law
30. Thomas G. Field, Jr., Emeritus and Visiting Professor of Law, UNH School of Law
31. John Flym, Professor Emeritus, Northeastern Univ. School of Law
32. A. Michael Froomkin, Laurie Silvers and Mitchell Rubenstein Distinguished Professor of Law, Univ. of Miami School of Law
33. Jon M. Garon, Professor of Law, Northern Kentucky University Chase College of Law
34. James Gibson, Professor of Law, University of Richmond
35. Eric Goldman, Professor, Santa Clara University School of Law
36. Jerry Goldman, Research Professor of Law, IIT Chicago-Kent College of Law
37. Ellen P. Goodman, Professor, Rutgers University School of Law
38. Jennifer Stisa Granick, Director of Civil Liberties, Stanford Center for Internet and Society
39. James Grimmelmann, Professor of Law, New York Law School
40. David Halperin, Of Counsel, Public.Resource.Org
41. William D. Henslee, Professor of Law, FAMU College of Law
42. Laura A. Heymann, Class of 2014 Professor of Law, College of William and Mary

43. Kenneth J. Hirsh, Director of the Law Library and I.T. and Professor of Practice, University of Cincinnati College of Law
44. Cynthia Ho, Professor of Law, Loyola University of Chicago School of Law
45. Dan Hunter, Professor of Law, New York Law School
46. Todd T. Ito, Reference Librarian and Lecturer in Law, University of Chicago Law School
47. Conrad A. Johnson, Clinical Professor of Law, Columbia University School of Law
48. Janis L. Johnston, Associate Professor of Law, University of Illinois
49. Faye E. Jones, Director and Professor, Legal Research Center, Florida State University
50. Dennis S. Karjala, Jack E. Brown Professor of Law, Arizona State University
51. Melinda Kent, Manager, Research Services, Harvard Law School Library
52. Ian Kerr, Professor of Law, University of Ottawa
53. Minjeong Kim, Associate Professor, Colorado State University
54. Anne Klinefelter, Director of the Law Library, University of North Carolina
55. Amy Landers, Distinguished Professor of Law, Pacific McGeorge School of Law
56. Sarah Hooke Lee, Assistant Dean and Director, Information and Research Services, Northeastern School of Law Library
57. Richard Leiter, Director and Professor, Schmid Law Library, University of Nebraska College of Law
58. Mark A. Lemley, William H. Neukom Professor, Stanford Law School
59. Lawrence Lessig, Roy L. Furman Professor of Law and Leadership, Harvard Law School
60. Yvette Joy Liebesman, Assistant Professor of Law, Saint Louis University
61. Joseph P. Liu, Professor of Law, Boston College Law School
62. Lee Ann W. Lockridge, David Weston Robinson Professor of Law, Louisiana State University
63. J. Paul Lomio, Library Director and Lecturer in Law, Stanford Law School
64. Lydia Pallas Loren, Kay Kitagawa and Andy Johnson-Laird IP Faculty Scholar and Prof. of Law, Lewis & Clark Law School
65. Brian J. Love, Assistant Professor, Santa Clara University School of Law
66. Carl Malamud, President and Founder, Public.Resource.Org
67. Susan Nevelow Mart, Associate Professor and Director of the Law Library, University of Colorado at Boulder
68. John Mayer, Executive Director, Center for Computer-Assisted Legal Instruction
69. Mark P. McKenna, Professor of Law , Notre Dame Law School
70. Hiram Meléndez-Juarbe, Associate Professor, University of Puerto Rico Law School

71. Michael J. Meurer, Professor of Law, Boston Univ. School of Law
72. Courtney Minick, Attorney, Justia.com
73. Deirdre K. Mulligan, Assistant Professor, UC Berkeley School of Information
74. Ira Steven Nathenson, Associate Professor of Law, St. Thomas University School of Law
75. Charles R. Nesson, Weld Professor of Law, Harvard Law School
76. Beth Noveck, Professor of Law, New York Law School
77. Tyler T. Ochoa, Professor of Law, Santa Clara University School of Law
78. Harlan Onsrud, Professor, University of Maine
79. Sean Pager, Associate Professor of Law, Michigan State University
80. Michelle Pearse, Senior Research Librarian, Harvard Law School Library
81. Richard J. Peltz-Steele, Professor of Law, University of Massachusetts Dartmouth
82. Aaron Perzanowski, Associate Professor of Law, Case Western Reserve University School
83. Laura Quilter, Copyright Attorney and Information Policy Librarian, University of Massachusetts Amherst
84. R. Anthony Reese, Chancellor's Professor, UC Irvine School of Law
85. Blake Reid, Staff Attorney, Institute for Public Representation, Georgetown Law
86. Michael Risch, Associate Professor of Law, Villanova University School of Law
87. Matthew Sag, Professor, Loyola University Chicago School of Law
88. Zahr Said, Assistant Professor of Law, University of Washington School of Law
89. Pam Samuelson, Richard M. Sherman Distinguished Professor of Law, UC Berkeley Law School
90. Sharon K. Sandeen, Professor of Law, Hamline University School of Law
91. Joshua D. Sarnoff, Professor of Law, DePaul University College of Law
92. Arundhati Satkalmi, Senior Research Librarian, St. John's University School of Law
93. Roger E. Schechter, Professor of Law, George Washington University Law School
94. Jason M. Schultz, Assistant Clinical Professor of Law, UC Berkeley School of Law
95. Wendy Seltzer, Fellow, Berkman Center, Harvard University
96. Jessica Silbey, Professor of Law, Suffolk University Law School
97. Joshua M. Silverstein, Professor of Law, University of Arkansas at Little Rock
98. David A. Simon, Fellow, Project on Law and Mind Sciences, Harvard Law School
99. Christopher Jon Sprigman, Class of 1963 Research Professor, University of Virginia School of Law
100. Tim Stanley, Attorney, Justia.Com
101. Katherine Strandburg, Professor of Law, New York University School of Law

102. Peter Suber, Professor, Earlham College
103. Barbara Gellis Traub, Head of Reference and Instructional Services, St. John's University School of Law
104. Samuel E. Trosow, Associate Professor, University of Western Ontario
105. Geertrui Van Overwalle, Professor of Law, University of Leuven
106. Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA School of Law
107. Erika V. Wayne, Deputy Director and Lecturer in Law, Stanford Law School Library
108. Beth Williams, Director of the Library and Information Technology Services, Louisiana State University Law Center
109. Cicely Wilson, Librarian, Justia.com
110. Jane K. Winn, Charles I. Stone Professor, University of Washington School of Law
111. Suzanne Wones, Executive Director, Harvard Law School Library
112. Richard W. Wright, Distinguished Professor of Law, IIT Chicago-Kent College of Law
113. Alfred C. Yen, Professor of Law, Boston College Law School
114. Sue Zago, Director of Law Library, University of New Hampshire
115. Jonathan Zittrain, Professor of Law and Vice-Dean for Library and Information Resources, Harvard Law School

[1] John Adams, *Thoughts on Government* in Revolutionary Writings, 1775-1783 (Library of America: 2011), p. 48.

[2] The doctrine of *ignorantia legis neminem excusat* has been repeatedly affirmed. *See, e.g.,* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.")

[3] *See* Carl Malamud, 12 Tables of Code, January 7, 2013. https://law.resource.org/pub/12tables.html

[4] Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge Univiversity Press, 2004), p. 34. The classic statement of the doctrine is A.V. Dicey, Introduction of the Law of the Constitution (1885, reprinted by Liberty Fund: 1982).

[5] Robert C. Byrd, The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism (U.S. Government Printing Office, 1995), pp. 33, 128, 135. Public.Resource.Org has also made these lecture available on YouTube. http://www.youtube.com/playlist?list=PL1E1633114E0E358F

[6] Thomas Henry Bingham, The Rule of Law (Penguin Press: 2011), pp. 37–38.

[7] *Cf.* Nieman v. VersusLaw, Inc., No. 12-2810 (7th Cir. Mar. 19, 2013). ("The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed.")

[8] *Cf.* Harper v. Va. State Bd.of Elections, 383 U.S. 663, 666 (1966). (A state violates the Equal Protection Clause "whenever it makes the affluence of the voter or payment of any fee an electoral standard"); *See also* Magna Carta cl. 29 (1297). ("We will sell to no man, we will not deny or defer to any man either Justice or Right.")

[9] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). https://law.resource.org/pub/us/case/reporter/US/33/33.US.591.html

[10] Craig Joyce, *Reporters of Decisions of the Supreme Court of the United States*, University of Houston Law Center No. 2005-A-11. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=800884

[11] Wheaton v. Peters, *op. cit.*

[12] Banks v. Manchester, 128 U.S. 244 9 S.Ct. 36 32 L.Ed. 425 (1888) quoting Nash v. Lathrop, 142 Mass. 29, 35, 6 N. E. Rep. 559 (1886). https://law.resource.org/pub/us/case/reporter/US/128/128.US.244.html

[13] Veeck v. Southern Building Code Congress International, Inc., 293 F.3d 791 (5th Cir. 2002). https://law.resource.org/pub/us/case/reporter/F3/293/293.F3d.791.99-40632.html

[14] *See* Cory Doctorow, *City of Chicago and Public-Spirited Hackers Unveil the Chicago City Code,* Boing Boing, November 17, 2013, http://boingboing.net/2013/11/17/city-of-chicago-and-public-spi.html *See also* Tom Lee, *The D.C. Code is Open —Come Hack on It!,* Sunlight Foundation, April 4, 2013, http://sunlightfoundation.com/blog/2013/04/04/the-dc-code-is-open-come-hack-on-it/

[15] The official web site is maintained for the City of Chicago by American Legal Publishing. http://www.amlegal.com/library/il/chicago.shtml *Cf* Chicago Decoded. http://chicagocode.org/

[16] The District of Columbia contracts with LexisNexis for its codification services, who provide a primitive web site. http://www.lexisnexis.com/hottopics/dccode/ *Cf.* DCcode. http://dccode.org/

[17] Letter from Carl Malamud, Public.Resource.Org, to Hon. Scott Bedke, Idaho State Legislature, May 30, 2013. https://law.resource.org/pub/us/code/id/id.gov.20130530.pdf

[18] Internet Archive, Official State Codes Collection. https://archive.org/details/govlaw

[19] Letter from Bradlee R. Frazer on behalf of the Idaho State Legislature to Carl Malamud, Public.Resource.Org, July 12, 2013. https://law.resource.org/pub/us/code/id/id.gov.20130712.pdf

[20] *Ibid.*

[21] Public.Resource.Org paid $913.31 on April 9, 2013 for the Official Idaho Code. https://law.resource.org/rfcs/lexis.com.20130409.pdf

[22] LexisNexis, Idaho Code, ("Smart Idaho practitioners turn to LexisNexis' Idaho Code as the only official source in Idaho for primary law.") http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?prodId=6981

[23] Letter from Carl Malamud, Public.Resource.Org, to Hon. Ben Ysura, Secretary of State of Idaho, July 15, 2013. https://law.resource.org/pub/us/code/id/id.gov.20130715.pdf

[24] U.S. Const. Amend. XI. (The 11th Amendment establishes sovereign immunity and prohibits "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.")

[25] Letter from Hon. Josh McKoon, Georgia State Senate, to Carl Malamud, Public.Resource.Org, July 25, 2013. https://law.resource.org/pub/us/code/ga/ga.gov.20130725.pdf

[26] Letter from Carl Malamud, Public.Resource.Org, to Hon. Josh McKoon, Georgia State Senate, July 30, 2013. https://law.resource.org/pub/us/code/ga/ga.gov.20130730.pdf

[27]Letter from Hon. Josh McKoon, Georgia State Senate, to Carl Malamud, Public.Resource.Org, August 15, 2013. https://law.resource.org/pub/us/code/ga/ga.gov.20130815.pdf

[28]Letter from Larry A. Schemmel, Special Assistant Attorney General of Mississippi, to Carl Malamud, Public.Resource.Org, October 7, 2013. https://law.resource.org/pub/us/code/ms/ms.gov.20131007.pdf

[29] While a few states assert copyright over state statutes, at least 25 states attempt to assert some kind of copyright control over legal materials such as state regulations or court opinions. See Tina S. Ching and Emily Feltren, Update on the National Inventory of Legal Materials, American Association of Law Libraries, February 1, 2012. http://blog.law.cornell.edu/voxpop/2012/02/01/protecting-access-one-entry-at-a-time-an-update-on-the-national-inventory-of-legal-materials/

[30] State of Virginia, Legislative Information System, Code of Virginia. http://lis.virginia.gov/cgi-bin/legp604.exe?000+cod+TOC *Cf* Virginia Decoded. http://vacode.org/

[31] Waldo Jaquith, The State Decoded: Legal codes, for humans. http://www.statedecoded.com/

[32] Knight Foundation, The State Decoded, 2011 Knight News Challenge. (Amount: $165,000) http://www.knightfoundation.org/grants/20110158/

[33] U.S. Chemical Safety and Hazard Investigation Board, *Investigation Report: Refinery Explosion and Fire,* Report No. 2005-04-I-TX, March, 2007. http://www.csb.gov/assets/1/19/CSBFinalReportBP.pdf

[34] National Transportation Safety Board, *Pacific Gas and Electric Company Natural Gas Transmission Pipeline Rupture and Fire,* NTSB/PAR-11/01, PB2011-916501. http://www.ntsb.gov/doclib/reports/2011/PAR1101.pdf

[35] Julfikar Ali Manik and Jim Yardley, *Bangladesh Finds Gross Negligence in Factory Fire,* New York Times, December 17, 2012. http://nytimes.com/2012/12/18/world/asia/bangladesh-factory-fire-caused-by-gross-negligence.html

[36] Julfikar Ali Manik and Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead,* New York Times, April 24, 2013. http://nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html

[37] Pub. L. No. 104-113, March 7, 1996. http://www.gpo.gov/fdsys/pkg/PLAW-104publ113/pdf/PLAW-104publ113.pdf

[38] Office of Management and Budget, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,* Circular No. A-119 Revised, February 10, 1998, http://www.whitehouse.gov/omb/circulars_a119

[39] Public.Resource.Org, Public Safety Codes Incorporated by Law, Last updated July 31, 2012. https://law.resource.org/pub/us/code/safety.html

[40] Veeck v. Southern Building Code Congress International, Inc., 293 F. 3d 791 (5th Cir. 2002), ¶ 36.

[41] Quoting Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898).

[42] Veeck at ¶ 35.

[43] Title 24, California Code of Regulations. https://law.resource.org/pub/us/code/bsc.ca.gov/

[44] For a comparison of scanned images with the transformed versions see Public.Resource.Org, 12 Tables of Code, Table 10, Table of Transformative Use, January 7, 2013. https://law.resource.org/pub/table10.html

[45] World Wide Web Consortium, *Mathematical Markup Language (MathML) Version 3.0,* October 21, 2010. http://www.w3.org/TR/MathML3/

[46] *See* Section 508 Amendment to the Rehabilitation Act of 1974, 29 U.S.C. § 749d.

[47] World Wide Web Consortium, *Scalable Vector Graphics (SVG) 1.1*, Second Edition, August 16, 2011. http://www.w3.org/TR/SVG11/

[48] http://www.iccsafe.org/content/pages/freeresources.aspx

[49] http://shop.iccsafe.org/ecodes/codes-plus

[50] International Code Council, *Return of Organization Exempt from Income Tax,* Form 990, 2011. https://archive.org/download/IRS990-2012_11_EO/36-3999004_990O_201112.pdf

[51] Incorporation by Reference is governed by 1 CFR 51 and 5 U.S.C. § 552(a).

[52] *See, e.g.,* E-Government Act of 2002, 44 U.S.C. § 101 ("To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government.") and President Obama's *Open Government Directive,* M10-06, December 8, 2009 ("each agency shall take prompt steps to expand access to information by making it available online in open formats").

[53] Administrative Conference of the United States, *Incorporation by Reference,* Administrative Conference Recommendation 2011-5, December 8, 2011. http://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference.pdf

[54] Pipeline Safety Act of 2011, Pub. L. No. 112-90, January 3, 2012, § 24.

[55] Office of the Federal Register, *Incorporation by Reference,* 78 FR 60784, October 2, 2013.

[56] Public.Resource.Org, Notice of Incorporation, May 15, 2015. https://law.resource.org/pub/us/cfr/notice.sdo.20120315_to.pdf

[57] https://law.resource.org/pub/us/cfr/manifest.us.html

[58] 29 CFR 1910 *et. seq.*

[59] 49 CFR 172 *et. seq.*

[60] 49 CFR 571 *et. seq.*

[61] 46 CFR 111 *et. seq.*

[62] 10 CFR 430 *et. seq.*

[63] Joe Bhatia, *ANSI's New IBR Portal Provides Access to Standards Incorporated by Reference,* Administrative Conference of the United States Blog, November 4, 2013.

[64] Email from B. Brett Heavner on behalf of the American Petroleum Institute to the Internet Archive, November 2, 2012. https://law.resource.org/rfcs/api.20121102.pdf

[65] Email from Carl Malamud, Public.Resource.Org, to B. Brett Heavner via the Internet Archive, November 3,2012. https://law.resource.org/rfcs/api.20121103.pdf

[66] Email from Eraj Siddiqui on behalf of SMACNA to Carl Malamud, Public.Resource.Org, January 10, 2013. https://law.resource.org//rfcs/smaccna.20130110.from.pdf *See* SMACNA, HVAC Air Duct Leakage Test Manual (RS-35) (1985) as required by 10 CFR 434.403.2.9.3. https://law.resource.org/pub/us/cfr/ibr/005/smacna.hvac.1985.pdf

[67] Public.Resource.Org v. Sheet Metal and Air Conditioning Contractors' National Association, Inc., 3:13-cv-00815, March 22, 2013, https://archive.org/details/gov.uscourts.cand.263568/

[68] Stipulated Judgement, Public.Resource.Org v. SMACNA, July 9, 2013. https://archive.org/download/gov.uscourts.cand.263568/gov.uscourts.cand.263568.39.0.pdf

[69] American Society for Testing and Materials et. al. v. Public.Resource.Org, Inc., 1:13-cv-01215, August 8, 2013. https://archive.org/details/gov.uscourts.dcd.161410/

[70] National Fire Protection Association, *Media Statement Regarding Lawsuit Against Public.Resource.Org,* August 6, 2013. http://www.nfpa.org/press-room/news-releases/2013/media-statement

[71] NFPA Insider, *NFPA President Jim Shannon Talks About Copyright Lawsuit,* October 8, 2013. http://nfpatoday.blog.nfpa.org/2013/10/nfpa-president-jim-shannon-talks-about-copyright-lawsuit.html

[72] NFPA, *Fire Sprinkler Initiative: Bringing Safety Home*, http://www.firesprinklerinitiative.org/

[73] NFPA, *Coalition for Fire-Safe Cigarettes,* http://www.firesafecigarettes.org/

[74] *See, e.g.,* Eight professional reference books that make heavy use of standards. https://www.google.com/search?q="Carl+Malamud"&btnG=Search+Books *See also* Seven Internet RFCs. http://www.rfc-editor.org/search/rfc_search_detail.php?author=malamud

[75] Statement of Jim Shannon on behalf of the National Fire Protection Association, June 1, 2012 submitted to the Office of the Federal Register, Request for Comments, Federal Register, Vol. 77, No. 38, February 27, 2012, NARA 12-0002. https://law.resource.org/pub/us/cfr/regulations.gov.docket.01/0900006481025751.pdf

[76] John Markoff, *Plan Opens More Data to Public,* N.Y. Times, October 22, 1993. http://www.nytimes.com/1993/10/22/business/plan-opens-more-data-to-public.html

[77] John Markoff, *U.S. Is Urged to Offer More Data On Line*, N.Y. Times, May 4, 1998. http://www.nytimes.com/1998/05/04/business/us-is-urged-to-offer-more-data-on-line.html

[78] National Fire Protection Association, *Report of Organization Exempt From Income Tax,* Form 990, 2011. https://archive.org/download/IRS990-2012_10_EO/04-1653090_990_201112.pdf

[79] American National Standards Association, *Report of Organization Exempt From Income Tax,* Form 990, 2012. https://archive.org/download/IRS990-2013_07_EO/13-1635253_990_201212.pdf

[80] Public.Resource.Org, 12 Tables of Code, Table 3, Table of Revenue and Renumeration, January 7, 2013. https://law.resource.org/pub/table03.html

[81] Letter from Speaker John Boehner and Chairman Darrell Issa to Carl Malamud, January 5, 2011. https://law.resource.org/rfcs/gov.house.20110105.pdf

[82] National Fire Protection Association, *Website Provides Resources for National Electrical Code Adoption,* June 11, 2013. http://www.nfpa.org/press-room/news-releases/2013/electrical-code-coalition-launches-website

[83] *See, e.g.,* NFPA, *NFPA 101 Life Safety Code now required by Dept of Vet Affairs in state homes nationwide,* March 29, 2011. http://www.nfpa.org/press-room/news-releases/2011/latest-from-nfpa-101-life-safety-code-now-required-by-dept-of-vet-affairs-in-state-homes-nationwide

[84] BuildStrong Coaltion, Making America Stronger. http://www.buildstrongamerica.com/

[85] ANSI, *ANSI Launches Online Portal for Standards Incorporated by Reference,* October 28, 2013. http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3771

[86] United States National Committee of the IEC, *Meeting Minutes,* USNC Council 576, August 13, 2013. http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/International%20Standardization/IEC/USNC%20COUNCIL/USNC%20COUNCIL%20576%20Minutes.pdf

[87] Statement of ASHRAE, March 30, 2012, submitted to the Office of the Federal Register, Request for Comments, Federal Register, Vol. 77, No. 38, February 27, 2012, NARA 12-0002. https://law.resource.org/pub/us/cfr/regulations.gov.docket.01/0900006480fe4f55.pdf

[88] Based on an analysis of published ASHRAE technical committee rosters on December 15, 2013. Note that not all technical committees publish their rosters and not all that do publish affiliations of their members. http://www.ashraetcs.org/

[89] ASHRAE DOE Washington Fellowship, last viewed 12/1/2013. https://www.ashrae.org/government-affairs/ashrae-doe-washington-fellowship

[90] Joshua Kneifel, Benefits and Costs of Energy Standard Adoption in New Commercial Buildings, NIST Special Publication 1147, February 2013. http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1147.pdf

[91] ANSI/ASHRAE/IES Standard 90.1-2010, Energy Standard for Buildings Except Low-Rise Residential Buildings as incorporated by law in 34 Tex. Admin. Code Tit 34, Part 1, Chapter 19, Rule 19.32. https://law.resource.org/pub/us/code/ibr/ashrae.90.1.ip.2010.pdf

[92] http://usaspending.gov/explore?recipientid=001963206&recipientname=NFPA&fiscal_year=all

[93] http://usaspending.gov/explore?contractorid=557163081&contractorname=ASTM&fiscal_year=all

[94] http://usaspending.gov/explore?contractorid=073294837&contractorname=ANSI&fiscal_year=all

[95] Interview with Head Building Inspector Shems Peterson in Show Me the Manual, available on YouTube at https://www.youtube.com/watch?v=2tOJdGaMvVw

[96] Craig Joyce, *'A Curious Chapter in the History of Judicature': Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic),* Houston Law Review, Vol. 42, 2005, p. 325. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=801226

[97] Ross E. Davies, *West's Words, Ho! Law Books By the Million, Plus A Few,* Green Bag, Vol. 14, p.303. http://www.greenbag.org/v14n3/v14n3_from_the_bag_davies_sm.pdf

[98] 8 Del. C. 1953, § 397. ("Penalty for unauthorized publication of chapter. Whoever prints or publishes this chapter…shall be fined not more than $500 or imprisoned not more than 3 months, or both.") http://delcode.delaware.gov/title8/c001/sc18/index.shtml#397

[99] Miss. Code Ann., §1-1-9(3)(a). ("Copyright; use of code material.") If Mississippi were successful in establishing jurisdiction in state courts and were to invoke the minimum penalty, we face potential damages of $17,010,000 for posting 81 volumes for 210 days in 2013. Alternatively, Mississippi filed registrations at the U.S. Copyright Office in apparent violation of Copyright Office policies and in an apparent attempt to qualify for statutory damages of $150,000 per work, which if a judge were to invoke such damages in federal court, could be $12,150,000 for the 81 works. *See* U.S. Copyright Registration TX0007617042, Mississippi Code of 1972 2012 Edition, November 1, 2012.

[100] Lexis Nexis, Terms & Conditions of Use, January 7, 2013. http://www.lexisnexis.com/terms/

[101] Office of the Federal Register, *Incorporation by Reference,* Docket Number OFR-13-0001, RIN 3095-AB78, October 2, 2013, 78 FR 60784. http://www.regulations.gov/#!docketDetail;D=OFR-2013-0001

[102] Administrative Conference of the United States, *Incorporation by Reference, op. cit.*, pp. 2-3.

[103] Office of Management and Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Circular No. A-119 Revised, Question 6j, February 10, 1998, http://www.whitehouse.gov/omb/circulars_a119

[104] H.R. Rep. No. 1497, 89th Congress, 2d Session (Government Printing Office: 1966), p. 1.

[105] H.R. Rep. No. 752, 79th Congress, 1st Session (Government Printing Office: 1946), p. 198.

[106] 38 Cong. Rec. 13008, 89th Congress, 2d Session, June 20, 1966.

[107] *Ibid.* at 13020.

[108] *Ibid.* at 13021.

[109] H.R. Rep. No. 1497, *op. cit.*, p. 8.

[110] Office of the Federal Register, *Incorporation by Reference,* 37 Fed. Reg. 23614, November 4, 1972.

[111] U.S. Copyright Office, *Edicts of Government,* Compendium of Office Practices II, §206.01, 1984.

[112] U.S. Copyright Office, *Copyright in Government Publications,* Study No. 33, Prepared for the Committee on the Judiciary, United States Senate, Government Printing Office, 1961.

[113] The Petition for an Edicts of Government Amendment was circulated by Public.Resource.Org in collaboration with Pam Samuelson, Richard M. Sherman Distinguished Professor of Law, UC Berkeley Law School and Jonathan Zittrain, Professor of Law and Vice-Dean for Library and Information Resources, Harvard Law School. The petition was circulated May, 2013. https://law.resource.org/pub/edicts.html

[114] *See* United States v. Smith, 292 U.S. 633 (1934). *See also* Panama Refining Company v. Ryan, 293 U.S. 388 (1935). https://law.resource.org/pub/us/case/reporter/US/293/293.US.388.135.260.html

[115] Hearings Before Subcommittee No. II of the Committee on the Judiciary, House of Representatives, Serial 16, February 21, 1936, p. 23.

[116] Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation,* Harvard University Law Review, Vol. 48, December 1934, p. 204.

[117] Hearings Before Subcommittee No. II, *op. cit.*, p. 19.

[116] Jeremy Bentham, *Petition for Codification,* in The Works of Jeremy Bentham (W. Tait: 1839), p. 547.

[119] Sen. Rep. No. 1219, 88th Congress, 2d Session, July 22, 1964, quoting Letter of James Madison to W.T. Barry, August 4, 1822.

Mr. COBLE. Thank you, Mr. Malamud.

I want to commend the witnesses, you have not—you have complied with the 5-minute rule and I thank you for that. And we will try to respond accordingly.

Mr. Schultz, what changes to U.S. law would you recommend to address broadcaster concerns about signal theft, A? And, B, would these changes be to our copyright law or our communications law?

Mr. SCHULTZ. Thank you. That is an excellent question.

The law, as it currently stands, serves well. As I testified, it serves both the public interest and serves the broadcasters well.

There are current developments that could change that, notably the AEREO case, regulatory proceedings and a number of other court cases. But, as things stand, the law works remarkably well. And indeed even conceivably joining a new broadcast treaty would not require us to change the law. And thus, the current statutory scheme works well. And I am not aware, although I don't speak on behalf of the broadcasters, I am not aware, in fact, of the broadcasters seeking new rights.

Thank you.

Mr. COBLE. I thank you.

Now, let me ask you another question, Mr. Schultz. In your work on copyright issues, what other issues of concern do you believe are of interest to copyright owners generally?

Mr. SCHULTZ. Thank you.

I think, indeed, the subject of this hearing is an important one, including the making available right. It is important that creators are able to secure the return on their investment and their labor. And that is currently the challenge. The quite obvious challenge in front of all of us. And so, I think in the long run that will need to be addressed.

Mr. COBLE. Thank you, sir.

Professor Lunney, do you believe that an explicit making available right would significantly broaden the scope of copyright protection beyond what it is today?

Mr. LUNNEY. A making available right, if we used the language of the WIPO Treaty, would not change the law in the file-sharing context, by any measurable degree in the litigated cases. It would, however, open up potential issues in the public performance and public display areas, linking retransmission and issues of that sort for cloud computing and social networking sites. I think it would reopen some of those issues.

Mr. COBLE. Now, does your lack of concern for the impact of file sharing reflect the view that Congress should reduce copyright protection in other areas?

Mr. LUNNEY. I think one of the things that has sort of slipped in, almost by accident, to copyright law is that we have shifted over the last 20 years or we have expanded copyright over the last years to get the individual consumer involved as copyright infringers. I think that is a bad development. For its first 200 years, copyright was directed solely at other commercial entities. I think it works best when it works in that fashion. When you start getting the individual consumers in the mix, either as an infringers of one sort or another, you get the privacy concerns and other concerns. And I think that has created real problems for copyright law.

Mr. COBLE. Mr. Love, do you believe that other nations are close to a conclusion, at WIPO, in drafting broadcast treaty?

Mr. LOVE. Could you repeat that?

Mr. COBLE. Yes. Do you believe that other nations are close to a conclusion, at WIPO, in drafting a broadcast treaty?

Mr. LOVE. In 2007, we thought that the treaty was essentially stopped and there wasn't going to be any further progress on it. After the Marrakesh Treaty was adopted by WIPO, in June of 2013, it opened up a lot of space in the negotiations at WIPO. And it was, I think, quite surprising that in September of last year, country after country took the microphone, at the general assembly of WIPO, to call for a diplomatic conference in 2015. I think the Secretariat of WIPO is looking for a hat trick. They would like to have three treaties in hand in the copyright field, having concluded the Beijing Treaty in 2012 and the Marrakesh Treaty in 2013. And I think they are focused on that.

We would prefer that there is no broadcast treaty. We are opposed to the proposal. But I wouldn't really—I think people are wrong if they don't think that this thing is moving forward. At this point, there is a large number of countries that are calling for a diplomatic conference. Once you go into diplomatic conference, it is very difficult to predict what the outcome will be.

Mr. COBLE. Thank you, sir.

Let me try to beat that red light, Ms. Griffin.

How does one respond to the statements of some that citizens deserve full access to the laws and rules that they are—by which they are required to live.

Ms. GRIFFIN. Yes, thank you for the question.

I think that the answer to that depends upon an analysis of many dimensions. The first dimension is the recognition that standards and codes are original works of authorship and are entitled to copyright protection. And, even at times when they are incorporated by reference into legislation, both the Second and the Ninth Circuit have held that those standards and codes do not necessarily lose their copyright protection by virtue of that. Another dimension of the issue is OMB A-119 and the NTTAA. They encourage and demand that Federal agencies incorporate standards into Federal regulations, when they are able to do so. A final dimension of the issue is the one that Mr. Malamud raises and that is the one that says that the citizenship should have the right to see what the law is.

The way that those three dimensions have been bridged, over the course of the years, is through a tool that is contained in the Freedom of Information Act. And that tool is called incorporation by reference. And that provides that Federal agencies can incorporate into Federal regulations extrinsic standards, as long as those standards are reasonably available to the class of persons that are affected by it. And that tool has permitted the Federal agencies to comply with their obligations, under OMB A-119, while at the same time respect the copyrights of the standards that are so incorporated.

Recently, that has been challenged by Mr. Malamud and others. And they have gone to NARA and they have questioned whether the reasonably available standard ought not be changed to make

the standards for free. And NARA has concluded, as has ACUS, that the current process continues to be the best one, the one that is best designed to ensure that high quality standards are developed and incorporated by reference into Federal regulation.

Mr. COBLE. Thank you, Ms. Griffin.

Thank you all.

I see the red light has illuminated. So, I now recognize the gentleman from Michigan for his questioning.

Mr. CONYERS. Thank you very much.

Professor Nimmer, we appreciate you being with us today. And I would like to discuss with you what you see as the key issue facing copyright industries and the public today, when it comes to the current copyright system.

Mr. NIMMER. Thank you, Representative Conyers.

It is obviously a very broad question and I will have to give a broad answer. I think the answer is that we are governed by a statute written essentially in 1965, passed in 1976, and now here in existence 50 years later with technologies that were not remotely contemplated then. And we see each of the rights of the copyright owner coming under strain.

Today we have been talking about the distribution right and its making available component. You have already mentioned that the United States Supreme Court granted certiorari in the AEREO case. That is a case about the performance right. And we see, because of the Internet, a convergence of all of those rights.

So, classically, back in 1965, there was a great difference between reproducing a book, publishing it, then distributing it, and then a performance, which would be a play. Today, when the bits flow over the Internet, sometimes it is conceptualized as an act of reproduction, sometimes it is conceptualized as an act of distribution, and it has been argued in cases that it is equally a performance.

So, a very forward-thinking approach to copyright law would be to look at exploitation, not within the prism of those five categories that are half a century old, but instead to try to formulate the ideal rules of the road going forward, which might be one unitary right or it might be broad under the rubric of two rights or perhaps three rights. I am not prepared, as I sit here today, to offer that answer. But, I think it is exactly the right question to ask. And I would be pleased to work with the Committee on a going-forward basis.

Mr. CONYERS. We appreciate that. Do you think the courts have struggled to apply the making available right in the United States even though Congress and government experts agree that the existing law should cover the right?

Mr. NIMMER. Yes, I do think the courts have struggled with that issue. I think one of the main reasons is that some of the individuals targeted have uploaded thousands of copyrighted works. And unfortunately, the result under our law is that somebody who has uploaded thousands of works might be liable for hundreds of millions, possibly even a billion dollars' worth of damage. That is why I think, at the same time that Congress confronts the making available component of the distribution right, Congress should also rationalize the award of statutory damages.

Right now, the scheme was set in 1999. The law happened to be passed right before the invention of a service called Napster. So, our law is trying to keep pace with developments on the ground. And that is why I think a unified approach would be best, where we look at the making available right and statutory damages and a small claims court, all in one unitary point of view.

Mr. CONYERS. And finally, I wanted to get an explanation of why you changed your mind on the making available right which was not encompassed by the distribution right in previous editions.

Mr. NIMMER. Good. Thank you.

It is a challenge writing a treatise because any one sentence can be taken out of context and applied in a way that is was not intended. In particular, in 1995, there was a Second Circuit case in which somebody who owned Laurel and Hardy Videos said his rights had been violated by CBS because they had broadcast his videos. And he was correct. But, he said his distribution right had been violated by the performance of those videos and the district court tended to agree with him. So, the Second Circuit reversed. And I wrote up that case to say, it is not enough that the works have been made available to the public in some sense, by virtue of being broadcast. To violate the distribution right there has to be actual distribution of their works, namely a physical copy passing hands. I wrote that in 1995, 3 years before Napster was formulated, so I did not have peer-to-peer services in mind. And, unfortunately, that sentence was taken out of context later.**

Mr. CONYERS. Thank you so much.

I will yield back the balance of my time, Mr. Chairman. Thank you.

Mr. COBLE. Thank you, Mr. Conyers.

The Chair recognizes the distinguished gentleman from Virginia for his statement. Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Nimmer, I would like to follow up on the Ranking Member's question. Professor Lunney has raised concerns that making—that adding a making available right would change longstanding jurisprudence. I take it you don't agree with that perception. Would you elaborate on your view? And does that view imply that Congress should never update the law for any reason?

Mr. NIMMER. Thank you, Representative Goodlatte.

Yes, Mr. Chairman, I do disagree with that point of view. It all depends what type of law Congress were to pass. If Congress were to pass a standalone making available right, that would be a large change to copyright law. The way the cases have arisen to date, concerning making available, it has been as an aspect of the distribution right. So, cases construing the copyright owners' distribu-

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**Addendum:

In addition, there is a deeper answer to Rep. Conyers' question. The treatise's full treatment of this issue was the product of important research that a colleague shared with me. In response to the courts' conflicting making-available rulings, Prof. Peter Menell of UC Berkeley investigated the roots of copyright law's distribution right. As detailed in my Written Statement, I was not sufficiently attentive to those roots until I was given the chance to review his pathbreaking scholarship. His findings were so important that I invited him to co-author the next treatise revision, in order to include the comprehensive analysis of the proper interpretation of copyright law's distribution right, as set forth in that landmark article. It is for this reason that the current treatise version differs so markedly from the old version.

tion right have come down on both sides of the making available issue.

My testimony today, if we keep our narrow focus, is that Congress should clarify that the distribution right is violated when works are made available. In other words, when an individual uploads a copyrighted work to a share folder, it has thereby been made available to the world and the act of copyright infringement is complete. It is not necessary to show a subsequent individual downloaded that work.

And I believe that, therefore, a properly tailored amendment does not call into question existing cases that were rendered under the performance right or under the display right.

Mr. GOODLATTE. Thank you.

Let me give everyone on the panel—it is a great panel, by the way, I thank all of you for your testimony—a jump ball here. Since this hearing has covered three separate topics, are there any of you who would like to comment on any of the other two topics that you didn't get to testify in your opening statement?

Mr. Love?

Mr. LOVE. On the issue of copyright and the law, I think it—there is this distinction between whether the State laws and regulations in the United States can be copyrighted—and with the Federal. I think that U.S. laws, works of Federal employees, Federal laws, Federal regulations are not subject to copyright. There are—I think it would be good to extend that rule to laws at the State level, in everything from court opinions to regulations to statutes.

And I also mentioned that the Berne Convention itself has a special provision that really gives country—governments extra flexibility in the area of testimonies, legislation, of anything that basically spacks of law-type proceedings.

And so, I think that it is good that you focused on this issue. And I think that—I certainly agree with what Carl was saying, which was that, you know, if you are expected to—you know, my father was a judge—if you are expected to abide by the law, I think you have a right to know what the law is. And I think that is—it is good that this Committee is looking at that issue.

Mr. GOODLATTE. Thank you.

Professor Schultz?

Mr. SCHULTZ. Thanks, I will briefly speak to standards.

I think many of the principles I have discussed apply equally to standards that we need to ensure that the authors' standards can be compensated for their work. And I think Ms. Griffin did an excellent job testifying. But, we should all keep in mind that standards are incredibly diverse. And some standards have thousands of parts and thousands of subparts in those parts, in the case of things like technical standards. So, standards should not all be treated the same. And there should be due regard to the complexity and incredible expense and incredible public value that is created in standards.

Thank you.

Mr. GOODLATTE. Thank you.

This is another one for all of you. As the Committee continues its work, reviewing copyright law, are there topics in copyright law that you would recommend that the Committee review?

I will start with Professor Lunney.

Mr. LUNNEY. I agree with David on this, that statutory damages is going to need to be revisited, particularly in the individual consumer context. It is a real problem to treat them as we are now. And hundreds of thousands of dollars in damages against a mom and a student, just not appropriate.

Mr. GOODLATTE. Point well taken.

Professor Schultz?

Mr. SCHULTZ. The Digital Millennium Copyright Act's notice and takedown provisions are broken. They are based on an updated paradigm that seems almost naive now, that you could actually contain a file and stop it from spreading. It is no longer working for creators.

Mr. GOODLATTE. I noticed a piece, just recently, that said that Google had received its hundred-millionth takedown notice.

Mr. SCHULTZ. Yes. And that goes both ways. Costs are symmetrical, right? That means hundreds of millions of notices have to be sent.

Small creators, creative upstarts, individuals, thousands—tens of thousands of people who make a good middle-class living can't afford to spend all of their time trying to chase people around the Internet. This system is not working for them. It needs to be revisited.

Thank you.

Mr. GOODLATTE. Mr. Love?

Mr. LOVE. I think that revisiting the issue of formalities is quite important. I think that the decision to introduce formalities in the United States has created a wasteland of cultural works, which are essentially inaccessible to people. I don't think anybody can go back very far before you realize it is impossible to identify who the owners of a lot of works are and in some cases who the authors are; photographs; old, old pamphlets; literature. There is—a variety of proposals that have been made to deal with orphaned works. But one of which is to consider the flexibility you have on formalities. Certainly for the post-TRIPS requirements of 20 years on photographs and 50 years on copyright, you can introduce formalities for that extended period. And there is a proposal in the TPP negotiation to do that very thing, actually. But the U.S. is actually opposing it. And I think the U.S. is on the wrong side of that issue.

Another thing is that on sound recordings, which are not protected by the Berne Convention, there is no obligation to have formalities. And so, for—not all things that are considered copyrighted in the United States are actually required under, you know, international obligations, the Berne Convention and formalities. So, I think a deep and technical look on where you can introduce formalities.

Some people, like in the recording industry, have expressed some openness to the idea that it was maybe—would be a good idea to sort of give more protection to people—I am sorry, I am going to have to wind this up.

And the final thing is that the Treaty for the Blind provides an opportunity for the United States to share its collections of works under copyright exceptions with blind people in other countries. And I think that needs to be fixed.

Mr. GOODLATTE. Mr. Chairman, my time has expired. But, I know Mr. Nimmer wanted to jump in on that as well, if I may.

Mr. COBLE. Without objection.

Mr. NIMMER. Thank you, Mr. Chairman.

The written statement that I submitted put two other matters into the hopper. One is the United States Supreme Court, last year, ruled that gray-market goods can be freely purchased abroad and imported into this country. Justice Breyer's opinion said, "We think that this is what Congress intended. If Congress did not intend it, then Congress can come back and tell us." So that is something that is very alive now.

And there is a parallel issue in the domestic front, which is cloud computing. It introduces wholly new rules of the road. It essentially eliminates the safeguard of the first sale doctrine. And Congress needs to look at what rules it wishes to have for the road of this uncharted territory of the cloud.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman's time is expired.

Ms. Chu from California?

Ms. CHU. Thank you, Mr. Chair.

As the co-chair of the Creative Rights Caucus along with Chairman Coble, I believe that a making available right is engrained in our current statute as an essential part of our copyright framework. Congress has repeatedly concluded that no change to the U.S. copyright law was necessary because existing law already includes a making available right. Our Federal appellate courts have also arrived at the same conclusion. And this is also the case in very international agreements, such as WIPO and the WIPO Copyright Treaty. I believe that the making available right is an inherent exclusive right that gives the creators the freedom to express themselves and more importantly to decide how and when they choose to distribute and publicly perform their own works.

So, Professors Nimmer and Lunney, what, if any, impact would carving out a separate making available right to the Copyright Act, what effect would that have on online theft? Would explicitly creating a making available right help lessen the burden for individual creators or make the process easier for them to prove their works have been infringed upon?

Mr. NIMMER. Thank you, Representative Chu.

I believe it would streamline the cases. Instead of having a large Federal case about every activity of peer-to-peer sharing, there could be an expeditious proceeding, particularly if Congress also adopted my suggestion of having small claims court proceedings. And I think it would be a salutary change to streamline those procedures and get quick and fair and expeditious justice in them.

Mr. LUNNEY. Well, as you might guess, Representative Chu, I disagree with Professor Nimmer. It used to be, under Napster, that you would go on and find one user who had the file and you would download it from that particular user. That sort of file sharing protocol has long—largely faded away. Most file sharing today is with BitTorrent. The file is divided up into separate segments and it is sent out in a swarm of people who are all simultaneously uploading and downloading the work. So, the issue of whether you have to prove a download, as part of your prima facie case, is essentially

irrelevant under the BitTorrent protocol whether we have the making available right or the existing distribution right.

As a practical matter, almost all of these instances where file sharing is found, what happens is the investigator identifies the person, the IP address. They go to court. They get the subpoena to the ISP to get the consumer's information. They send a threat letter and that is as far as it goes. It is either settled or the consumer can present some sort of evidence that they were not the person who did the downloading. And that is it. Only a relative handful, maybe 20, 30, 40, a few hundred, actually ever go any further than that. And, if it actually goes to trial, they get a copy of your hard drive. And, at that point, it is relatively trivial to prove the file sharing activity you have engaged in.

So, I don't see how this would really facilitate or help sort of small creators.

Ms. CHU. Professor Schultz, you look like you have an opinion on this.

Mr. SCHULTZ. Oh, no. No, thank you. [Laughter.]

Ms. CHU. Then, okay.

Professor Schultz, then let me turn to a different issue, which is I would like to ask specifically about the Aereo case. Of course we know that the Supreme Court agreed to hear the Aereo case to determine whether online streaming of live broadcasts constitutes an infringement of a copyright holder's exclusive right of public performance. Given the economic importance of intellectual property in our country and the constant evolution of modern technology, in which more people are viewing content over the Internet, is this an appropriate question for the courts to determine or should Congress legislate and settle this area of law? And how would a decision, favorable to Aereo, change the landscape of how broadcast content would be delivered to consumers in the future?

Mr. SCHULTZ. Thank you. That is an excellent question.

I think I will begin with the second part of it: how would it change the landscape of broadcast. So, you know, Aereo's not the only court case that the broadcast and television creators—broadcast industry and television creators face. We have one court saying that, essentially, intercepting signals and aggregating them and sending them to their customer and Aereo, does not require payment of retransmission fees. We have another court saying that stripping commercials out of broadcasts is perfectly okay. We have another court, in cablevision, essentially saying that a virtual on-demand service is permissible. And when all this is said and done, you have to ask where the revenue is going to come from; how these companies will get their—get compensated for their work.

So, I think the—an Aereo decision that comes out in favor of Aereo would undermine the very premise on which the system is based, that local broadcasters can be compensated for the tremendous investment they have in broadcasting and content creators can be compensated for their work. So, I think that this in an appropriate topic for the courts. But, if the courts act—if the courts interpret the Copyright Act in a way that undermines these fundamental policies, this Congress will have to act.

Thank you.

Ms. CHU. Thank you.

I yield back.

Mr. MARINO [presiding]. Thank you, Congresswoman.

The Chair now recognizes the gentleman from North Carolina, Congressman Holding.

Mr. HOLDING. Thank you, Mr. Chairman.

Professor Nimmer, maybe this is best directed toward you. But could you take a minute or two and explain further how U.S. copyright law compares to that of other nations, particularly distinguishing features?

Mr. NIMMER. Okay.

The theory of Anglo-American copyright law is basically instrumental that it is there for a purpose, to promote the progress of science. On the Continent, in Europe, the underlying theory is much more based on natural rights that there is an intrinsic connection between the author and the author's creation. And so, therefore, there is a natural right to compensation just by virtue of having created, regardless of the social policy that will come out of that activity of copying. That is the broadest answer to your question.

The philosophical underpinnings, that I have just outlined, obviously play through with practical implications. We see in Continental jurisprudence a very strict recognition of moral rights, which is something that is alien to the U.S. way of copyright and was only put in grudgingly and only with respect to works of visual art, in 1990 and plays out in other ways as well.

That is a very brief answer to an extremely interesting and broad-ranging question.

Mr. HOLDING. Well, maybe we could dive down on some specifics in the context of, you know, we are negotiating some trade agreements, TTIP in particular. And I am thinking of, you know, what type of copyright issues might be brought up in that context and—before we see any divergences which could cause particular arguments?

Mr. NIMMER. Let me ask you, Representative Holding, are you talking about the Free Trade Agreements that are being treated——

Mr. HOLDING. Right. Correct.

Mr. NIMMER. Okay.

Insofar as I am aware, the U.S. Government has had great success in reaching agreement with other countries with respect to those Free Trade Agreements. There are 20 countries now with whom the U.S. has bilateral relations. Those treaties do, I think, every single one of them possibly with one or two exceptions that I am not aware of, include a making available right. And so, notwithstanding the philosophical differences between countries with differing roots of copyright, there has not been disagreement, insofar as I am aware, with those Free Trade Agreements.

Mr. HOLDING. And I would like to open it up to the panel, if anyone else would like to chime in with, you know, particular issues, you know, having to with our copyright laws versus other nations' and problems there.

Yes, sir.

Mr. Love?

Mr. LOVE. The U.S. has high norms as far as damages are concerned. A lot of the foreign countries have lower norms, as far as damages. But, the U.S. has broader fair use rights. And so, the combination is such that our technology companies which are really dominant in a lot of the Internet areas have been able to operate.

What the U.S. is doing in the Free Trade Agreements is sort of cherry picking the parts of the U.S. law that the—in some cases, that the publishers like. So, they sort of pick really aggressive standards, as far as damages. To the extent they are even requiring countries consider the full retail value as the basis for damages, for example, which isn't even found in U.S. law and is contrary to U.S. law.

On the one hand, and then—as kind of a halfhearted way of looking at the fair use thing of the thing. So, what you have got is sort of a shift of increased liability for U.S. technology companies operating overseas. U.S. has, you know, it has strong damages. But we have more exceptions in our domestic law than most foreign countries do, which is kind of this paradox. I think that the problem in trade policy is also that, you know, the negotiations are completely secret. You know, we help leak September of the TPP negotiation, a negotiation involving something like 40 percent of the world's GDP in that negotiation. We don't know what the current version is and neither do you.

Now, I don't see how you can possibly expect a trade agreement with Japan and Mexico that, you know, basically NAFTA-squared, -tripled, -triple-squared with that much GDP on the table. And, like, not even know what is going on and not even have that thing transparent. So, I think that the Congress has fallen down by allowing copyright policy to be made in secret, you know, through these trade agreements.

Mr. HOLDING. Thank you.

Mr. Chairman, I yield back.

Mr. COBLE [presiding]. I thank the gentleman from North Carolina.

Mr. Deutch, the gentleman from Florida?

Mr. DEUTCH. Thanks, Mr. Chairman.

Professor Lunney, I wanted to pursue, in a little more detail, some of the assertions that you make in your written testimony. All of this, sort of to support your assertion that there is no need for a making available right, you say, "The unauthorized copying, distribution and streaming of copyrighted works across the Internet are not the problem that copyright owners would have us believe." You talked about the purpose of copyright is, "Not to maximize revenue, but to make the works more widely available." You said here today that the measures of music output is what we should look at, not the money made, the goal is for more and better works and file sharing encourages that. And you went on to say, even while formally illegal, "File sharing has provided much broader access to existing works than the preexisting market mechanisms had accomplished."

And there are a few things I am trying to wrap my arms around. First, you had said earlier that the copyright laws in this area had always focused on—never on individuals, but always on corporations. And I wonder, if you draw the distinction at the individual

who downloads a song or a movie illegally, and what happens when that individual starts—creates an opportunity to share hundreds and thousands and tens of thousands and millions of songs and movies and other copyrighted work that can then be shared with others. Clearly, in that instance, file sharing goes beyond what you are prepared to accept?

Mr. LUNNEY. Thank you for the question.

It is a hard area to get our hands around. And it is counterintuitive to suggest, at some point, that less revenue could lead to more works. It would be a surprising result. I was surprised by the result when I did the empirical work myself. And, of course, from my perspective, I am sort of an ivory-tower academic. I don't expect my work to have any real world significance. I am not sure I want it to have real world significance. I want to sit and explore issues and try and figure things out. And so, you get a result like this and you publish it and all of the sudden you are the center of a bit of controversy.

Obviously, copyright is not a never ending spigot, you can't simply add more and more and more and more and expect to get more works out the other side. There has got to be diminishing returns at some level.

Mr. DEUTCH. Professor Lunney, I am not asking you to restate your testimony.

Mr. LUNNEY. Okay.

Mr. DEUTCH. I understand it. I am just asking, when you say that file sharing, that the sharing of copyrighted material is okay, is it okay just for an individual or is it okay for an individual to share tens of thousands of songs or films?

Mr. LUNNEY. Well, if there is file sharing, there is the potential, at least, for sharing tens of thousands songs to tens of thousands of people. And we have assumed——

Mr. DEUTCH. Right.

Mr. LUNNEY [continuing]. That that has the same effect as if a competing commercial publisher came along and offered competing copies in the marketplace.

Mr. DEUTCH. Well, except——

Mr. LUNNEY. That is an assumption.

Mr. DEUTCH. How is it different—how is it—here is what I really don't understand with the argument that file sharing—illegal file sharing is somehow okay. If the goal is to spread the amount of music and creative works and film and all of this great intellectual property and to spread it as far and as wide as possible, why is it different, in the computer, in the setting of technology, to share files that way than it would be for the Big Box retailer to have someone come in through the backdoor, scoop up all the CDs and DVDs and take them out on the street corners, after they have copied them tens and hundreds of thousands of times, or gone into business on their own? Why is different with a physical product than it is online?

Mr. LUNNEY. Well, it is different when consumers are doing it than when a commercial entity is doing it, I was——

Mr. DEUTCH. Yeah, right.

Mr. LUNNEY [continuing]. Arguing.

Mr. DEUTCH. And I am not—I am suggesting to you that that individual who breaks in to the Big Box retailer and scoops up maybe only one or two, takes a couple of CDs and DVDs and makes copies of those him- or herself and then goes ahead and shares those, spreads this information far and wide, gets all this intellectual property out there. Why is it different? Why should it be acceptable for that to happen online, but not on the streets?

Mr. LUNNEY. So, is this individual, who is breaking in to the Big Box, are they offering those copies for free or are they——

Mr. DEUTCH. Is that the distinction? Is that the distinction then?

Mr. LUNNEY. I think it is an important distinction, whether it is for profit or not for profit.

Mr. DEUTCH. And so—right. And so, if we had just someone whose goal was really just to spread the great American intellectual property that we are all so proud of by making copies and distributing it out of his or her own good will——

Mr. LUNNEY. Right.

Mr. DEUTCH [continuing]. Thousands of copies, tens of thousands of copies, millions of copies, that is perfectly acceptable?

Mr. LUNNEY. I think we do have such individuals. I think they are called libraries.

Mr. DEUTCH. And——

Mr. LUNNEY. And they have coexisted with the commercial market for hundreds of years without undermining it. That is——

Mr. DEUTCH. Right. They have libraries that operate and have operated, as you point out, for hundreds of years. Not the setting of people who are going to make millions of copies to then freely distribute to be used without any regulation. I don't see the difference. And your example—and this is what is also confusing to me. When you talk about the fact that, as you explain, you said, you know, the question isn't whether file sharing has caused the decline of record sales, but the decline of record sales affected the creation of new music. And you talk about other ways that creators can be compensated, separate and apart.

Then you go through all of them and conclude yourself—you reach your own conclusion, that all of those other areas are not enough to make up for the amounts that are lost as a result of the theft of all of this intellectual property that you think do-gooders are certainly capable of doing to spread this intellectual property, which makes the performers better off and makes the songwriters better off and makes the actors and actresses and everyone involved in the production of any film or TV show.

And you seem to refute your own argument and ultimately your conclusion is, yes—you do acknowledge in a footnote that, yes, there is less money going to the industry, but that it is not fair to point out that that may mean there may be fewer creators willing to engage in their work. All that means is that if you had tougher enforcement that the dollars that flow to that—those industries, are dollars that would have otherwise been in other industries. The—your rationalization doesn't seem to make sense. Ultimately, the conclusion that you reached, that somehow it is in the best interest of creators in our country for their creative works to be spread far and wide without compensation.

And, as you have now acknowledged, not just a couple of kids trading songs that hopefully they purchased. But, in fact, the spread of tens of thousands or millions that ultimately the goal is just to spread that and that the diminishment in the amount of compensation to those creators will have no impact, you say, on their ability to continue to do their job. It just doesn't—it is inconsistent with what all of those, that I talk to, who rely on copyright to protect their intellectual property, it is inconsistent with what they tell us they need in order for us to continue to uphold this great American intellectual property that we value so much.

And I yield back, Mr. Chairman, thank you.

Mr. COBLE. Thank you, gentleman.

The gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

Lady and gentlemen, I wish I had 3 or 4 hours to sit and discuss these matters with you. It has been very enlightening.

Ms. Griffin, you made a statement concerning standards and how they apply to life in general. Do you think that we could be served by the industry itself setting standards? Or, do you believe that we need to legislate more?

Ms. GRIFFIN. Thank you for the question.

I think that the way that the—clearly the way the system works now is a public-private partnership with standards developing organizations who have technical expertise working with the Federal regulators who are in their space. And together and through that partnership they develop, you know, regulations that best meet the requirements of the regulated, whatever that may be. And in this country that is a very diverse group of people and there are very many groups that do that.

But, what the standards developers organizations bring to that is providing the administrative support that permits the group that sits at that table to be open and balanced and transparent——

Mr. MARINO. Okay.

Ms. GRIFFIN [continuing]. And not dominated by any one group. And they provide the administrative support for having consumers sit at the table and provide input that would not otherwise be provided if it was just a government-driven event. So, I think that balance is what makes it fulsome and it makes it the system that it is.

Mr. MARINO. Thank you.

Professor Schultz, you talked about notice of take down. Let us have a little example here. I have a search engine. I create a search engine, name it after my son, Victor's Search Engine. And you are a musician and a writer. You chose whether you want to be the singer, the writer or the musician. But, at this point, you have a record out. You have a CD out. You have music out. And I do not buy it from you. You are paid no compensation from me. But, when people put your name in my search engine, your music comes up and you send me a notice. And I do nothing about it. Your music comes up because I am the guy who is illegally selling music to people and you are not getting paid for it. And you keep sending me notice and notice and notice. What do you think should be done about that?

Mr. SCHULTZ. Thank you for the question.

I think, indeed, that there are two difficulties you identify here. One is that the current notice and takedown system is based on identifying a particular file rather than a work. And, as I said, it is based on an old paradigm that, you know, what we had to do, back in 1998, was stop a file that had escaped onto the Internet, quarantine it and pull it back. It is naive now. And now, every time somebody's work is infringed, they have to send a separate notice for every file, no matter how——

Mr. MARINO. Do you think I should be held responsible, even though you are not sure how many people are downloading that music? Because every time someone gets on my search engine and pops your name in there, your music comes up and I am selling it to somebody for 10 cents a pop.

Mr. SCHULTZ. Yes, absolutely. If you are the site hosting and profiting from somebody else's work, whether it is through advertising or——

Mr. MARINO. Do you think it should be—do you think I should be held criminally liable?

Mr. SCHULTZ. Criminally liable. That is a more challenging question.

Mr. MARINO. I am stealing from you.

Mr. SCHULTZ. So——

Mr. MARINO. As a—I am a—I was a prosecutor for 18 years. So, I am stealing something from you and selling it and making a profit off of it. Do you think that I should be charged criminally?

Mr. SCHULTZ. There—of course, we are going beyond the scope of that in these hearings today. But, yes, I think criminal law can be a useful tool. But, it has to be very carefully applied to instances——

Mr. MARINO. Okay.

Mr. SCHULTZ. Where the——

Mr. MARINO. Good.

Mr. SCHULTZ [continuing]. User is at a great——

Mr. MARINO. Thank you.

Mr. SCHULTZ [continuing]. Disadvantage. Thank you.

Mr. MARINO. Professor Lunney, let us have another example. Instead of a brilliant attorney, you are a poet—struggling poet. You live in a one-room apartment above a factory. You don't even have heat in the winter. And you write—I am looking through—I am a songwriter and I am looking through your book of poetry and I find this magnificent poem that you wrote. And I take that and I put it to music and I make $10 million on it. Do you have a problem with that?

Mr. LUNNEY. The issue of derivative arts is a difficult one. And I personally would not have a problem with that.

Mr. MARINO. Would you personally, for struggling——

Mr. LUNNEY. No.

Mr. MARINO [continuing]. Hardly eating, you write this book of poetry and you don't have a problem with it?

Mr. LUNNEY. I feel that, in a lot of the derivative work contexts, it is the inventive effort and creativity of the second-comer, of the musician——

Mr. MARINO. Okay, let us go back. Now your father is a great poet—struggling, though, and trying to keep a family. And, again,

I use his poetry and I make $10 million on it and he can't feed his children. Should anything be done about that? Do you have a problem with that?

Mr. LUNNEY. Well, I am not sure exactly what you are doing with this poetry. But, if you were just——

Mr. MARINO. I am selling it and making a lot of money on it, because I am putting it to music. Do you have a——

Mr. LUNNEY. Are you selling it in music, right?

Mr. MARINO. Yeah.

Mr. LUNNEY. So, it is a derivative work.

Mr. MARINO. Do you have a problem with that?

Mr. LUNNEY. Not the market he originally exploited. He was just a poet.

Mr. MARINO. He was just a poet.

Mr. LUNNEY. And so, nothing——

Mr. MARINO. And he wrote a book and he really wanted to sell it and it is not making good. But, I took a poem out of that book and now I made $10 million and he can't feed his kids.

Mr. LUNNEY. Right. My perspective on a lot of derivative works is that we shouldn't require necessarily license in all those contexts because it is really the derivative author who adds the real value to that.

Mr. MARINO. I would tend to disagree. And I would think I would be a little angry, if my father said that, you know, "We are not eating here today, folks. But, you know, I think this guy should be able to take my work."

I yield back, thank you.

Mr. COBLE. I thank the gentleman from Pennsylvania.

The gentlelady from California, Ms. Bass—Ms. DelBene, I stand corrected.

Ms. DELBENE. Thank you. Thank you, Mr. Chair.

Mr. Nimmer and Professor Lunney, if we were to clarify the making available right in the law, would that—do you think that would raise any First Amendment or free speech issues? And, if so, what do you think we might be able to do to avoid those challenges?

Mr. NIMMER. I believe that a simple clarification that the copyright owners' distribution right includes making the work available does not implicate any First Amendment special interests that do not arise automatically in copyright law anyway. And so, I believe we do not need to pay special attention to that. It could be that if Congress wished to have a special surgical intervention in the peer-to-peer domain—for instance because of the spate of pornography lawsuits, if Congress wished to limit the protection for pornography, that might be a way to redress the problem that would then raise the question of what level of First Amendment scrutiny would apply and is there sufficient governmental interest to satisfy that? But the straight making available aspect of the distribution right I believe does not raise any special First Amendment concerns.

Ms. DELBENE. Professor Lunney?

Mr. LUNNEY. I actually agree with Dave exactly on this issue. If you had passed a very narrow amendment, perhaps creating the presumption that a work made available in a sharing folder could be presumed to have been downloaded, so that it would be infringe-

ment under either interpretation of the existing distribution right. I don't believe that would raise any First Amendment problems. If you pass a general making available right, raising questions about whether a link might be an infringement of a public display right, or whether cloud computing or social networking, you are going to get into some First Amendment issues there.

And I also agree that, if you try and go after copyright trolls by differentiating the copyright protection for porn versus other types of audiovisual works that may raise First Amendment issues.

Ms. DELBENE. So, if we feel that the making available right is implied in the law today, why do you think that the courts are having so much difficulty with this right now?

Mr. Nimmer?

Mr. NIMMER. I believe the elephant in the room is the amount of statutory damages. So that, when the young single mother is clearly culpable of copyright infringement and yet she could be held by the jury liable for $100 million in statutory damages, the courts are reluctant to apply the law as written. So, that is why I am urging Congress to have a global solution. At the same time that it reaffirms the making available aspect of the distribution right, that it would cabin statutory damages to a reasonable extent.

Ms. DELBENE. And, do you agree with Professor Lunney's statement earlier, that making the—or having explicit reference to a making available right would cause economic harm?

Mr. NIMMER. I am not positive which aspect of Professor Lunney's statement you are looking at. But, I come at the economics very differently than he does. So, suffice it to say that it is a very interesting study. But, what it does not illuminate is how much music would there have been created in the last 10 years of lowering studio costs, had there not been peer-to-peer illegal file sharing.

Ms. DELBENE. And, Professor Lunney, do you think there is any way to define a making available right more specifically that wouldn't cause old cases to be reopened and the uncertainty that you talked about earlier?

Mr. LUNNEY. Yeah, there certainly would be. If you just want to affect it in the distribution, the peer-to-peer file-sharing context, you could create a presumption that a work that is made available in a share folder has been downloaded. You could even make it a rebuttable presumption if the defendant wants to come forward with evidence. But it will never get that far. It never gets that far in any of the existing cases. In the one case where it was raised, the Jammie Thomas-Rasset case, she was found guilty of copyright infringement the first time with a making available instruction on the distribution right that was retried after the district judge said, "No, that is not right." She was still found guilty.

Ms. DELBENE. Thank you.

I yield back my time, Mr. Chair.

Mr. COBLE. I thank the gentlelady.

The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

And, Ms. Griffin, I asked a lot of documents be placed in the record earlier. And most of them are related to the gentleman next to you, Mr. Malamud.

It is an amazing thing to me that I came from a standard setting organization, Electronics Industries Association and CEA. And you couldn't have a high definition television, if we hadn't figured out what the standards were going to be. We wouldn't be arguing over capturing over digital broadcast, if we didn't have digital broadcast. Standards are extremely important.

But, standards and laws are different. And I would like to concentrate somewhat on this end of the table.

Mr. Malamud, I am going to read, just a shortest part of the Constitution for a moment, where it says to establish Post Offices and Post roads, Post Offices are next door. And it says, "To promote progress," and I will skip over, "of science and useful arts," for a moment. And limit it to—and of limited times, and I am just going to read how it relates to copyright, "To promote the progress, for limited times, to authors." Okay? That is it. That is the Constitution. It is only a paragraph, "To promote progress of science and useful arts by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discoveries." But that short one, "To promote," "to authors." Who authors a law?

And that is my point. And it is the point of all of the documents I put in. If the State of Idaho, the State of Georgia, the State of Mississippi, if they produce a law, every single person who voted for it is an author. It doesn't belong to some entity, by definition. Isn't every law, in fact—and, I have got to tell you, Obamacare has people who do not want to be authors and others who, a few left, who do. But, on the day that it passed we were all authors.

So, my question—and I am going to concentrate on this end and then open it up to the rest—is, in its rawest form, isn't, in fact, every single person who participates in the creation of a law or the inclusion, by association, of a standard in fact an author. And, therefore, if I am willing to have it released to everyone, as an owner of that copyright and an undivided owner, don't you ultimately have no possibility of protection? In other words, the State of Idaho is inherently wrong if they consider any part of a law required or mandated to be, in fact, eligible for copyright.

And my point here—and Carl I am going to go to you first—I have been in Congress for 13 years and about 8 days. The one thing I know is I don't need a copyright to promote politicians making laws. So, by definition, the "promote" being the basis for copyright, don't we inherently have a decision to make about whether or not laws or anything else which is included in a law by mandate has any right to a copyright at all? A fundamental—forget about what we do with this copyrighted material, is it really eligible for copyright?

Mr. MALAMUD. Congressman Issa, thank you for that question.

I think that is the crux of the matter. The VEC Corp., when it looked at whether the building code of Texas had the law, said that there is no incentive needed for the——

Mr. ISSA. Politicians will make laws, whether you——

Mr. MALAMUD. Absolutely.

Mr. ISSA [continuing]. You just have to pay them per diem and they will show up.

Mr. MALAMUD. And the standards bodies, I have never seen a standards body object to one of their documents becoming incor-

porated by law. That is often the case. I think that is especially crucial on public safety laws. Now, we may incorporate by reference too many things. And perhaps the guidance of this Committee could be used on that topic. But, for those that are crucial, for example the laws on testing the toxicity of water, is something that every citizen in West Virginia today wants to know, what those laws are and were they carried out properly.

And I think that is the key point. You can't have it both ways. If the document is in fact the law, it has to be available. And I respect the rights of the standards bodies to develop a wide range of standards, but once one of those has become the law, then it needs to be available. Now, again, a standards body can say, "Please do not incorporate this into law. We would prefer that this document not become the law." And that is perfectly acceptable. There are multiple standards bodies. There are several fire codes, several building codes, several plumbing codes and you will find immediately a group standing up and saying, "Please designate mine to be the law."

Mr. ISSA. And, Ms. Griffin, I am going to ask you the follow up that goes along this line, quickly.

What Mr. Malamud just said is what I am trying to make a point on. If it is a voluntary standard, in fact it is available for copyright. I understand that. But, if it is incorporated into law, at that point, shouldn't you object to it being incorporated or recognize that you are waiving any copyright objections from the public having free and fair access to, essentially, a law that they must comply with?

Ms. GRIFFIN. Thank you, Congressman.

I think the answer is incorporated into OMB, the policy of OMB A-119 and the NTTAA. And those policies and those laws dictate that a government agencies, Federal agencies incorporate voluntary consensus standards in lieu of government-unique standards whenever they are able to do so.

Mr. ISSA. Okay. But, OMB is nowhere enshrined in the Constitution. And it does not have explicit legislative authority. This is the Committee that must decide what can or cannot be covered under the promote and exclusive element of copyrighting. The rest of the panel is extremely important and we work on it all the time. But, in a digital age, narrowly, Mr. Chairman, the law and people's access to laws which they must comply with. Inherently this Committee has to decide whether that should be stripped of any and all copyright, to the extent that we have authority, which has nothing to do with what OMB thinks because, quite frankly, they think they can make laws without Congress getting up in the morning ever again. So, constitutionally, on what basis would you say that that has any grounding? Not what OMB thinks.

Ms. GRIFFIN. Well, let me tell you what the Second Circuit in the 19——

Mr. COBLE. Ms. Griffin, if you could be brief—as briefly as possible, his time is expired.

Ms. GRIFFIN. Yes, but allow me to tell you what the Second Circuit and the Ninth Circuit said on that very point. In the PMI case that the Ninth Circuit said that, "The due process requirement of free access to the law may be relevant, but does not justify termination of, and in this case it was the American Medical Associa-

tion's copyright. There is no evidence that anyone wishing to use those standards at issue in that case had any difficulty in obtaining it." And that was the PMI case in the Ninth Circuit.

The Second Circuit, in a similar case in CCH Info, said, "We are not prepared to hold that a State's reference to a copyrighted work is a legal standard for valuation results in loss of copyright. With—while there are indeed policy considerations that support CCC's argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a State legislator or administrative body deprived the copyright owner of its property would raise very substantial problems under the Taking Clause of the Constitution. Although there is, and I am jumping to the last sentence of that paragraph, "Although there is scant authority for CCC's argument, Professor Nimmer's treatise opposes such a suggestion as antithetical to the interests thought to be advanced by the Copyright Act."

So, at the end of the day, it is a balance. It is a balance between the rights of copyright holders and the value that those copyrights bring to Federal regulations. As——

Mr. ISSA. Okay.

Ms. GRIFFIN [continuing]. I said earlier——

Mr. ISSA. Thank you.

And, Mr. Chairman, I appreciate your indulgence. And I just want to go on the record that, in the copyright reform that we are considering as a Committee, in order to have my vote on final passage, we will have to rectify the ambiguity in the law so that every American has free access to every law that he or she must live under.

Mr. COBLE. I thank the gentleman from California.

I thank the witnesses.

There will be ample time, after the hearing, for exchanges between the witnesses and Members of the Subcommittee. So, nobody is being shoved off abruptly. Shoved off, perhaps, but not abruptly.

I thank the gentleman from California.

Mr. Jeffries, the gentleman from New York.

Mr. JEFFRIES. Thank the distinguished Chair and thank the witnesses for their testimony.

I want to start with Professor Lunney and try and get some clarity from or as it relates to some of your written testimony on pages 6 and 7. Bottom of page 6 you state that, as has been previously discussed, "The purpose of copyright is not to maximize the revenue of the music industry or copyright owners more generally," is that correct?

Mr. LUNNEY. Yes, sir, I do take those statement from Supreme Court decisions setting that forth.

Mr. JEFFRIES. Right.

Mr. LUNNEY. Repeat them.

Mr. JEFFRIES. Now, is it fair to say that copyright owners or content creators are entitled to reasonable compensation?

Mr. LUNNEY. I think we would have to sit down and define what "reasonable" is and that would be a more difficult task than you might imagine.

Mr. JEFFRIES. So, you don't think—is it your view that copyright owners or content creators are entitled to any compensation whatsoever?

Mr. LUNNEY. No, it is not my view of that sort at all. And I would be happy that they would be very well paid. My only perspective is that, in terms of the constitutional purpose, our focus should be on the production of output. Now, obviously, a well-compensated artist and musician class is probably important for long-run copyright output of creative works——

Mr. JEFFRIES. Okay. Let us focus on the Constitution. I appreciate that observation you just made. So, the relevant provision, obviously, is Article 1, Section 8, Clause 8, which reads, "To promote the progress of science and useful arts by securing, for limited times, to authors and inventors exclusive right to their respective writings and discoveries." Now, the progress of science part of that provision obviously gives Congress, I believe, the ability to create a robust patent system. Is that correct?

Mr. LUNNEY. It is actually, "To promote the progress of the useful arts," is for patent. Science is for copyright.

Mr. JEFFRIES. So, you have defined the—and what would be the basis of that conclusion? Does that stem from your evaluation of writings from the Founding Fathers? Or——

Mr. LUNNEY. The Supreme Court has said that on a number of occasions. The clause has a parallel structure, "To promote the progress of science and the useful arts, for authors and inventors, their writings and discoveries." Each of those three pairs of words the first word is for the copyright, the second word or phrase is for patent.

Mr. JEFFRIES. And so, the Supreme Court has defined this standard, I believe, to encompass to legitimate ends, correct? The first would be encouraging the creation of new works, is that right?

Mr. LUNNEY. That is correct.

Mr. JEFFRIES. And then the second would be to encourage the dissemination of existing works, correct?

Mr. LUNNEY. That is what the court said.

Mr. JEFFRIES. So now, as it relates to encouraging the creation of new works, is it fair to say that providing artists, content creators, with the opportunity to benefit from the fruits of their labor in some meaningful way serves the purpose of encouraging the creation of work?

Mr. LUNNEY. As a general proposition, I have no disagreement with that statement.

Mr. JEFFRIES. Okay. And what would you disagree with, as it relates to that statement?

Mr. LUNNEY. Well, it is always a question of how many rights and how broad the rights need to be. Do we need to address every specific instance? In the academy we talk about leakage in the copyright system. That is instances where individuals or companies copy and yet they are not sued or it would not constitute copyright infringement. And this leakage is a fairly important part of the system.

So, trying to determine whether any given instance of copying, some are reasonably straightforward—I would agree, I think we would all agree, that a commercial competitor who takes a copy

and sells it for less in the same marketplace is a copyright infringer. I think we would all equally agree that someone who takes Shakespeare's Romeo and Juliet and creates West Side Story, would probably ought not be a copyright infringer.

Mr. JEFFRIES. And am I correct that, you know, it is your position, as it relates to determining the measure of what happens when meaningful or reasonable compensation is not provided, is that we should just simply allow for the illegal dissemination or reproduction or sharing of works and then evaluate whether content production has decreased? Is that your position?

Mr. LUNNEY. No, I am not advocating sort of randomly changing the law to see what happens. As a social scientist I might be interested in that experiment.

But file sharing gave us an opportunity to see what might happen. It was formally illegal, but it never the less happened and revenue to the music industry, even considering all the revenue sources they have, definitely went down. So, what happened to output? And what does that tell us about whether we had not enough copyright, too much copyright or just the right amount? And, if revenue goes down sharply and your copyright protection effectively falls and yet you seem to get as much or more creative output, for me that suggests that we may have had too much copyright to begin with.

Mr. JEFFRIES. Should we be concerned about the impact on the economy, in that scenario?

Mr. LUNNEY. Well, that depends on what you mean by the impact to the economy. For me as an economist, the fact that some money doesn't flow to the music industry, it is going to remain in the consumers' pockets, it is going to be spent elsewhere in the economy. Jobs lost in the copyright sectors will presumably be picked up, if consumers spend that money on education or employment or healthcare, in those sectors of the economy.

Mr. JEFFRIES. Lastly, Professor Nimmer, you referenced earlier in your testimony that facts change on the ground. And I believe you may have mentioned it in the context of misinterpretation of a line in a treatise that you had prepared, which preceded the development of Napster. We have also seen the advent of streaming, cloud computing as another example. Technology changes over time. That is a wonderful thing. I think many of us would agree.

The issue is, you know, how do we accommodate technological changes as they move forward but also create the certainty in the law and the copyright protection for the creative community? Do you have any words for us, on the Committee, in terms of how to strike that appropriate balance, if that is the balance we should be seeking?

Mr. NIMMER. I certainly do agree that it is the right balance. At the end of my written statement I reproduced one page from 50 years ago. It is from the Register of Copyrights written in 1965. And it said, "We don't know what the law will be 10 or 20 or 50 years from now," and they are writing 49 years ago, but they said, "It is becoming increasingly apparent that transmission of works by linked computers may be among the most important means." And the final statement was, "We believe the day has passed when any particular use of works should be exempted for the sole reason

that it is not for profit." So, those are very wise words to guide us as we go forward. This was written at the culmination of 10 years of study. And I think it beautifully encapsulates much of the philosophy that needs to go in. So, that would be my watch word for Congress on a going-forward basis.

Mr. JEFFRIES. Thank you.

My time is expired. I yield back.

Mr. COBLE. Well, I thank the gentleman from New York.

Professor Lunney, I owe you a belated apology. I previously mispronounced your surname. You are not looney. I stand corrected.

Mr. LUNNEY. I always tell my students it rhymes with funny and I am not crazy. [Laughter.]

Mr. COBLE. And we will—and hold me harmless for my mistake.

The gentleman from Georgia, Mr. Collins is recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate that.

And, Mr. Lunney, I think inadvertently you may have summed up this entire discussion. From my perspective, and many in this room know this, I believe that copyright protections and other protections not only, at the proper balance, strike innovation and help innovation, but also protect innovation and grow apart.

And you made a comment in the midst of an exchange when you said in—with my gentleman from Pennsylvania, you said, "It is just a poet." And that struck me and it might come strangely to others. "Just a poet"— poets have changed the world. And their words mean something. And their copyright protections have meant something. And I think, for me, I think that sums up this entire hearing, that there needs to be a proper balance struck. But, when you just say, "It is just a poet," "it is just a writer." Was Hemmingway just a writer? Was Dickens just a writer? Was Clancy, even new, just a writer? That is the heart of what we are talking about here today. And it was not meant any way except you just sort of summed it up in an offhanded way. But I think that is really where we are at today. But, I am not with you. I am down here with Mr. Malamud.

I want to continue off the discussion that my friend from California discussed, that is the definition of law. And we do have an interesting complement here because I am from Georgia and you have let us just say a difference. And I appreciate all of what you do. I think what you do is really a service, a public service.

I have a problem with where we are at right now, a little bit, with what we are defining. And, in your letter to the Senator McCune, Speaker Ralston approached him; Schaefer in my State of Georgia, you said, "The official code of Georgia annotated, every component of it, is the official law." I want to explore that a little bit. And I just have some short questions so we can get to it a little bit more. What is an annotation?

Mr. MALAMUD. An annotation can be anything from some freelance editorial comment by some commercial provider to the comments by the legislative counsel or the State itself as to the import of the code.

Mr. COLLINS. Thank you.

Is an annotation a statute?

Mr. MALAMUD. Well, now, I am really glad you asked that question because that actually comes to the crux of one of the problems that we face and why I think this Committee might want to deal with this issue.

I am just a computer guy. I am a law school dropout. I want to put all 50 State laws online. If you go to the official——

Mr. COLLINS. Well, let us stop right there.

Mr. MALAMUD. Okay.

Mr. COLLINS. I have no problem there, the law itself. I think the problem we are getting into is the definition. That is why I said, "What is an annotation?" And, if you go to the free public website, it took three clicks to get there on the Georgia legislative page, of which I was a member for 6 years. All you got to do is go. And you actually get the free Georgia code annotated, in which it says the annotated code is copyrighted. But, it makes specific reference to say that law or any other recognized by the law is not copyrighted. It is the work of the annotation, which is more than the law.

Mr. MALAMUD. But, Congressman, the terms of use of that free site prohibit me from making a copy of that. They—it specifically prohibits all public and nonprofit——

Mr. COLLINS. Well, what it prohibits you from doing is taking a book and copying it and turning it in as your own work. And when I was in school that was called cheating or plagiarism or however else you want to describe it.

And so, I mean, I think that—look, the questions are coming here—the annotation part is really where we are getting here. And you make the claim, and I have read your book here, and you made a comment. It says that, "States such as Georgia, Idaho and Mississippi," with all due respect to Idaho and Mississippi I am not as concerned with them right now, "Have spread fear, uncertainty and doubt sufficient to throw a deep chill on their order." Now, that makes great prose. And you are a good author. And if you wrote the part of this, then you should have it protected. [Laughter.]

Mr. MALAMUD. Although this is——

Mr. COLLINS. But if——

Mr. MALAMUD [continuing]. I actually copyrighted it.

Mr. COLLINS [continuing]. You put it out to everybody that is your choice. Okay?

But you are not—and frankly, I believe you are being disingenuous here, "to throw a deep chill," when you can go three steps and get it for free? I think that the part that I am concerned about here is really it is the bigger step of taking part of—which we all recognize the law, okay, the statute—"Does the gentleman from California make," what we vote on—that code, that actual non-annotated, non-commented on. I mean, to say that an annotation is the law would be about like taking this Committee memo and saying it is a part of the Federal code. That is just not true. It is written by someone else. It is input by someone else.

So, the question really comes, from me, is the way that it was handled. You are just taking off—it is already free. The issue was there. We have already discussed that. But there is a part that is copyrighted because it actually was the work of someone else. You are right. We need to make sure that copyright laws, and as all these others have discussed, and in the issues there needs to be a

proper balance. I just believe here, in this issue, especially taking the State of Georgia and others and claiming that they are chilling innovation, they are chilling this, I think is over the top to make a point about something that is not really true. And that being that the law itself we will not negotiate, that is part of the public record. But, if I have somebody that if I have wrote my annotation and I have done the work, then we respect the work. We don't go out and say, "Well, I have got the book. Let us copy it. Send it up," just simply because I don't want to do the work of annotation. And I think that is the problem I have.

And with that—we will have many more conversations. I appreciate your work. I appreciate the rest of them being here. But, I think that goes back to the heart of it here. If you do the work, the protection is there, not taking a shortcut because you just simply don't want to do the work.

Mr. Chairman, I yield back.

Mr. COBLE. I thank the gentleman from Georgia.

The gentleman from New York, Mr. Nadler?

Mr. NADLER. Thank you, Mr. Chairman.

Let me start by thanking the witnesses for their testimony and the Committee Chair for bringing these issues before the Committee because I do believe that we have to do a better job of protecting content owners, artists, musicians and creators in making sure they are appropriately compensated for their work.

But I want to ask more broadly about protecting copyright today. Mister—Professor Lunney, you mentioned there is no need to make explicit the make available right and that it would not have an effect on curbing online theft. You mentioned that with BitTorrent users, users are uploading and downloading simultaneously and they are making thousands of illegal copies. The law has already made this practice illegal, but it has not stopped it, as we all know. Content owners have tried to chase their works across the Internet, which is not practical, not effective.

We heard Chairman Goodlatte mention that Google has now received its hundred millionth takedown notice. And obviously someone observed that the millennium—the Digital Millennium Copyright Act is broken. What would you suggest, without reprising SOPA or getting into that, as an alternative way to protect copyrighted works on the Internet? Is there any?

Mr. LUNNEY. Well, I mean, a number of us in the academy have explored the idea of having a levy where you——

Mr. NADLER. What?

Mr. LUNNEY [continuing]. A levy would be a system where you authorize consumers to file share as much as they would like, and then you add a charge to their Internet bill each month and that money goes into a pot and it is redistributed to the copyright owners whose works are being file shared. I am not certain there is any other solution that is going to——

Mr. NADLER. Wait. Now, let me just explore that for a second.

Mr. LUNNEY. Sure.

Mr. NADLER. You set up an ASCAP-type system, in effect, like as we do for songs.

Mr. LUNNEY. Yes.

Mr. NADLER. Where you can download it, Google doesn't get a takedown notice, but does note that you downloaded it. And you pay into—well, who pays into this fund, anybody who goes on the Internet?

Mr. LUNNEY. In a—it would basically be a surcharge added to your Internet bill, would be one approach.

Mr. NADLER. I never listen to music, let us say——

Mr. LUNNEY. Well——

Mr. NADLER [continuing]. Why should I——

Mr. LUNNEY [continuing]. This is one of the central concerns with the levy approach. It is unfair to people who do not file share. But, it would be a mechanism for compensating authors and copyright owners for the file sharing that is going to go on.

Mr. NADLER. So, anyone who accesses the Internet would pay a levy, which would be administered by some new organization or old organization. And the funds would go, based on someone's assessment of how many people listen to my song?

Mr. LUNNEY. Well, how the funds would be distributed would have to be decided. But, we could use a—some sort of sampling system, similar to ASCAP or BMI or the investigators that currently tracks downloads in order to sort of bring actions to get a subpoena——

Mr. NADLER. It is a very interesting—let me ask mister—Professor Nimmer, what would you—how—what is your reaction to this interesting suggestion?

Mr. NIMMER. My reaction——

Mr. NADLER. Besides saying that it is an interesting suggestion. [Laughter.]

Mr. NIMMER. Yeah. Well, in that case, you have preempted my first sentence. [Laughter.]

I put in footnote 69 of my written statement the citation to Mr. Netenal's article called Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing, and that is one of many solutions Professor Lunney himself has written on the issue.

The problem with these proposals, there are feasibility problems, there are treaty compliance problems. So, I do not wish to prejudge it at the outset. It is a fascinating vehicle. It requires a lot of study. The devil is in the details, as always. But, it is a completely different way of looking at the issue and it deserves to be investigated.

Mr. NADLER. You said there are a number of others. Are there other major suggestions available?

Mr. NIMMER. Yes, I think——

Mr. NADLER. Again, without getting into the whole mess we had with SOPA.

Mr. NIMMER. Professor Fischer at Harvard has proposed something that I will basically call an "entertainment tax," where the government could decide how much money has been made through all the arts and allocate that and allow free sharing of culture. I am almost lampooning his book-length proposal. But, in essence, that is what it is.

Mr. NADLER. It might be interesting, if you take out the word "tax," Professor—— [Laughter.]

Mr. NADLER [continuing]. Which has a certain ring around here.

Professor Schultz would you comment on any of this?

Mr. SCHULTZ. Yes. I think the levy idea is just a terrible one.

Mr. NADLER. You said what?

Mr. SCHULTZ. It is a terrible idea.

Mr. NADLER. Okay, because?

Mr. SCHULTZ. You have the government—you are inviting the government to set prices. And a fundamental concept in copyright law, in any property right, is that the one—the owner gets to decide the terms on which it is alienated. And, when you take away that liberty, you take away, first of all, the value of the price signal. We no longer——

Mr. NADLER. And this, your comment now, would apply to a private ASCAP-type thing as well as to the——

Mr. SCHULTZ. No, not to a private ASCAP thing, because to a system like that people enter it voluntarily.

Mr. NADLER. Well, what would your comment on that be?

Mr. SCHULTZ. So, in a system like that, sure. There are plenty of collective rights organizations, when they are privately entered into, they solve a lot of problems. But, it is essential they remain private otherwise the government——

Mr. NADLER. Okay.

Mr. SCHULTZ [continuing]. Determines the price——

Mr. NADLER. Before my——

Mr. SCHULTZ [continuing]. A file——

Mr. NADLER [continuing]. Before my——

Mr. SCHULTZ [continuing]. Might receive.

Mr. NADLER. Okay.

Mr. SCHULTZ. It——

Mr. NADLER. No, no, no.

Mr. SCHULTZ. Yeah.

Mr. NADLER. Mr. Love or Professor Love wanted to comment.

Mr. LOVE. I mean, we have had a long history of use of compulsory licenses where markets aren't really functioning very well and often connected with new technologies. So, I don't think it is really beyond pale that you move to some kind of a compulsory licensing. And this is—the twin issues, you touched on the issue of how you pay the money out. I think that the first instance people look at is the sort of sampling thing that Professor Lunney has referred to, in terms of distributing. A different approach is to have the consumers be able to pick the collection society that they think rewards the artist in the way that they prefer. So that, in effect, the consumer is, in a way, becoming kind of a patron of the arts. Mandated to be a patron, but——

Mr. NADLER. We have several operations doing similar things and the consumer chooses one.

Mr. LOVE. Yeah, you would pick. Like, perhaps, one would give all of their money to Madonna and Britney Spears, and another one would sort of do it a little bit differently. And you would be able to pick the entity that you thought supported the art in the way that you preferred. That is called the Burn Bland model, which is a different model than the sort of sampling model. But there are these alternatives and they are usually connected with some kind of——

Mr. NADLER. These sound like things, you know, to explore. But, I see my time is expired.

I thank you all.

Mr. COBLE. I thank the gentleman from New York.

The distinguished gentleman from Texas, Mr. Farenthold?

Mr. FARENTHOLD. Thank you very much.

And, let me ask Professor Lunney, if we were to codify a make available right, what would it do that we can't do already?

Mr. LUNNEY. Well, in the file sharing context, as I said, I don't think it would change what is going on in that arena at all. If it makes it marginally easier to pursue file sharers, I don't think it is the business decisions a new round of——

Mr. FARENTHOLD. Well, let me ask Professor Nimmer. Other than making it easier for a plaintiff, what other protection are we going to provide creators?

Mr. NIMMER. It would—I think it would—the essence is to make it easier for the plaintiff and thereby to comply with the U.S.'s treaty obligations——

Mr. FARENTHOLD. So——

Mr. NIMMER [continuing]. And to resolve conflict in the case law.

Mr. FARENTHOLD. So, how many bad-guy infringers are getting away now that wouldn't be getting away, if we were to do this?

Mr. NIMMER. Obviously, I don't have the empirical figures with me.

Mr. FARENTHOLD. I mean, do you realistically think there are any?

Mr. NIMMER. Well——

Mr. LUNNEY. No one who has been sued or brought into the legal process that has gotten out, as far as I am aware, because a download could not be proven.

Mr. FARENTHOLD. All right and let us talk a little bit about make available. We talk about it in a traditional upload context. We say, alright you put it in a shared folder, you have made it available. Well, have you made it available if you link to it? Say you are Google and you are a search engine and you haven't posted anything yourself, but you link to it. I mean, a broad definition of make available—obviously, we could craft the statute however we want. I mean, you could potentially get, you know, non-—what I would consider, non-guilty parties there.

Professor Lunney?

Mr. LUNNEY. Well, the worst part in my mind is we wouldn't know. If you adopt a broad, general making available right, we wouldn't know until we litigated it whether linking would be infringing or the——

Mr. FARENTHOLD. Yeah. And so, would a broad making available right, if I took my copy of, you know, the latest Brad Thor novel I bought and read and donated it to the library, would I be making that available? And have we completely undermined the first sale doctrine there?

Mr. LUNNEY. In both the treaties and in the distribution context, and I think Professor Nimmer would agree with me, there is an exception where the making available right can still be limited by the first sale doctrine or exhaustion.

Mr. FARENTHOLD. And what about making available on a less public basis? I have iTunes in my house and there is a shared folder on there that I have made available to my television set and to my other computer and probably my daughter's television set and my wife's computer. You know, where do you draw the lines within there?

Mr. NIMMER. Good.***

The danger here is in a standalone make available right. And if Congress were to pass a new seventh right under copyright, which is making available, all the dangers that you have cited would face us. However, I believe we can avoid all those dangers, including the danger of sharing with your wife and daughter, if we simply define the copyright owners' public distribution right to include making available. When you include your wife and daughter, that is not an act of public distribution, so you don't need to worry about the——

Mr. FARENTHOLD. All right. I have got to—I want to hit each of the topics here. So, I need to go to Professor Schultz.

You know, I am a former broadcaster and I understand how tough it is for local broadcasters. But you look at something like is going on with the Aereo case, don't the broadcasters want as many eyes as possible viewing their newscast so they have more value to sell to advertisers?

Mr. SCHULTZ. Well, that is a good question. The advertising revenue is one component of how they make a—how they constitute their business. But, there are other components, including the retransmission fees that are essential to supporting local broadcasting.

Mr. FARENTHOLD. And, you know, so I guess the other issue then becomes, at what point to I have to negotiate a deal with all of my local television stations to put a sling box at my house so I can watch the Corpus Christi newscast when I am in Washington, D.C.?

Mr. SCHULTZ. You absolutely don't have to negotiate.

Mr. FARENTHOLD. I just want to make sure it doesn't go that far.

And then let us—let me go down here to the other end of the table, real quickly speaking. And I am going to have to agree that once something is enacted and is in a law, the public ought to have a right to get to it free. Don't the standards setting organizations, Ms. Green, collect membership dues and generate revenue from the members who participate?

I mean, I understand, in the old days, it cost money to print up the books and distribute it. But, now the marginal cost of making this information available over the Internet is basically none. And there is zero value to some of these—to a light bulb that doesn't fit the light bulb standard, to use your analogy. Shouldn't the private sector that benefits from these, pay for them, and the public should have them free. Why shouldn't I be able to print out a copy

***Addendum:

The question posed relates to linking. Congress was concerned about linking in 1998, when it drafted the Digital Millennium Copyright Act. For that reason, it set up a special safe harbor for online service providers, to immunize their linking activity from liability. **See** 17 U.S.C. § 512(d). Clarifying the scope of the distribution right, and its making-available component, would in no way affect the operation of that safe harbor. Furthermore, addressing the statutory damages issue could provide added insulation against disproportionate liability.

of the electric code to make sure the electrician hooked the green wire up to ground in my house?

Ms. GRIFFIN. Well, a couple of things. Thank you for the question.

First, the SDOs have different business models. Many do base their revenues on membership fees, but many don't. And those that don't are largely not-for-profit, mission-generated organizations that keep their barriers to entry low. That is, they have low entry fees, they have low membership——

Mr. FARENTHOLD. Right.

Ms. GRIFFIN [continuing]. Fees for the very reason that they can use the sales derived from—they use the revenues derived from the sale of——

Mr. FARENTHOLD. I see my time is expired. I would love to sit down with you and we could probably debate this for an hour. And it is actually something I would like to do, because I do think it is important. That, you know, I think you may waive your right to that, once you fight to get it enacted into law or it gets enacted into law. It is something we can talk about when we have more time.

So, Mr. Chairman, I will yield back.

Mr. COBLE. I thank the gentleman.

There will be ample time for us to revisit this time and again, I am sure.

Mr. Johnson, the gentleman from Georgia?

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Chairman, I started practicing law about—well, back in 1980. And, in going into the law libraries of Georgia State University to get ready for cases and to represent various folks in my general practice, I recall coming upon doctor—or Mr. Nimmer's books. And I can't believe that he is sitting here looking as young as he looks. I thought he would be probably about 90 years old by now.

But thank you for your contributions, sir.

And I have long supported strong copyright protections as the backbone of innovation, creativity and public good. But, materials created by the U.S. Government and State governments do not deserve copyright protection, nor have they ever received it. In 1980—in 1888, the Supreme Court held, in *Banks v. Manchester*, that there has always been a consensus that judicial opinions are in the public domain because the work of judges binds every citizen, and is and should remain free for publication to all. Since then, courts have continuously upheld this understanding that the law, be it State or Federal, is in the public domain. Section 105 of the Copyright Act reflects this view, specifically denying copyright protection to statutes and regulations.

At its core, this issue touches on the American ideal for justice that we must know the laws that govern us. This right is fundamental to the rule of law that underpins our democracy, particularly when that concept of ignorance is no excuse pervades our process. It is also central to upholding our system of checks and balances, by holding Congress accountable for the legislation it passes or fails to pass. As we review copyright protection, in anticipation of the next generation—or, excuse me, the next great Copyright Act, we must continue to protect American's access to laws

and justice by protecting access to public materials in the public domain.

Mr. Malamud and thank you for appearing here today before us. I want to take this moment to thank you for your work making public law accessible and known. It is easy to take for granted how important public databases are in our increasingly digital democracy. Unless public documents are digitized and available, they are often out of reach of many.

In your written testimony, sir, you note that you are currently publishing official State and municipal codes. As a former commissioner in DeKalb County Georgia, I appreciate the importance of private citizens working to improve local communities. What is the benefit of making bulk public data available for municipal governments? And, I will add to my comments the fact that, when you want to, if you are a citizen of the State of Georgia and you want to go and look up a code for a local political subdivision, it is very nice to be able to go online and be able to get that information. But, what is the benefit of making bulk public data available for municipal governments?

Mr. MALAMUD. Thank you for your comments, Congressman Johnson.

The issue we have with the Georgia code, as it currently is, is you can't get the bulk data. You cannot go to the free Web site and download the whole thing and make it better. What happens when bulk data becomes available is volunteers, some commercial operations, but often simply citizens will go in and make the codes significantly more accessible, work on modern platforms. This happened in the District of Columbia just recently, in which the copyright was waived on the District of Columbia code. Several volunteers came in and they have developed a vastly better version of the D.C. code that informs citizens in a better way. So, by having the bulk data available, we encourage citizen participation in the process of informing each other. And that is why we care so much about, for example, the official code of Georgia.

Mr. JOHNSON. How have local governments responded to making municipal codes widely available?

Mr. MALAMUD. We have had significant pushback at the State level. At the city level they are welcoming us with open arms. The City of Chicago, I recently stood up with some former staff members from Congressman Issa, former Obama White House officials, both volunteers. We stood up with the city clerk of Chicago and unveiled a new Chicago code. San Francisco has recently revamped their municipal code. There are about 2,000 municipalities that are about to have better municipal codes available because of the efforts of these volunteers.

Mr. JOHNSON. Thank you.

My time is expired, so I will yield my remaining time back.

Mr. COBLE. I thank the gentleman from Georgia.

I am told, folks, that there will be an imminent House vote before—imminent, whatever that means. I hope we won't have to detain our witnesses.

So, with that in mind, I recognize the gentleman from Florida, Mr. DeSantis?

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Malamud, I am assuming you agree with the *Veeck v. Southern Building Code* case?

Mr. MALAMUD. Absolutely.

Mr. DESANTIS. I will come to that. What about the two cases, the circuit cases, that—we have the amicus brief here in our stuff that were discussed involving, one was the AMA codes and the other was the used car Red Book. And, in those instances, the courts found that there were copyright protections. So, what is your opinion on those cases? Do you agree with the outcome in those cases?

Mr. MALAMUD. So, I am not a lawyer. I am just a citizen. But, my take on that is that the *Veeck* decision was about a crucial public safety code that had been incorporated into the law. Whereas the other cases were about like medical codes that needed to be used by doctors. And it, to me, was—the distinguishing factor was the extent that the public safety was at stake. And also, if you look at the building code, they all begin with a sample ordinance of incorporation, "We the people of—insert name of jurisdiction here—do hereby adopt this code." So this was meant to be the law. And, to me, that is the difference between those cases.

Mr. DESANTIS. And so, you think that it does—just the fact that government may have some type of administrative scheme or program, that something is referenced, whether it is a Red Book or something, you do see the distinction between those situations and one in which the law is adopted verbatim from one of the publications?

Mr. MALAMUD. When I post a public safety standard, I look for one that has been explicitly and specifically incorporated by reference, as opposed to casually. And, in fact, we look at State codes and often they will mention something in passing and we keep our hands off those. But, when it becomes part and parcel of the law then, to me, the fact that it happened to be an external document is no different than if the State had authored that themselves.

Mr. DESANTIS. And, Ms. Griffin, I guess, what is your position on *Veeck v. Southern Building Code*? Do you think that was incorrect?

Ms. GRIFFIN. I think there is a sharper distinction to be drawn between *Veeck* on the one hand and the two circuit court cases that I cited on the other. *Veeck* was a very unique situation and it was a case that was limited to very unusual facts. In that case, the model code writer wrote the code with the specific intent that it be incorporated word for word into the law. It was, in fact, incorporated word for word into the law. And the defendant in that case copied the law, qua law, and not the model code. Under those circumstances the Fifth Circuit said that the—as the law, that these—this content loses its copyright protection. But, the court was quick to point out that it was a very limited case, that it did not apply to what they called "extrinsic standards," that those are standards that are incorporated by reference into law, like the standards in the Second Circuit and Ninth Circuit cases. And so, I think that that makes *Veeck* a very limited holding and limited to its facts. How that might be decided today, it is unclear to me.

Mr. DESANTIS. Well, how—and I know they use these model code in different areas of the law. How often do they just adopt completely verbatim, like what happened with the *Veeck* case, versus—

I mean, obviously, legislators can use some of these model codes as guidance. They don't have to adopt it all. I mean, is that—that is more of a unique case, you are saying, when you are adopting everything wholesale?

Ms. GRIFFIN. Personally, I am not—you know, my organization is not a standards developing organization. And I don't have statistics at hand as to how it works. I know that some code developers enter into cross licensing agreements, for example with the governmental entity, such that the code could be adopted but there is a cite in the regulation back to the standards developing organization's Web site for the sale of that. I think there are very different kinds and multiple opportunities for dealing with that situation.

And I think that is one reason why NARA has said, in the context of its recent evaluate of this, "let us leave this to the Federal regulators and the SDOs to come up with a way to make access reasonable." Because, at the end of the day, it is about access. And it is about whether the public has access to the standards, not how much they cost or if they cost something, but if they have access.

Mr. MALAMUD. May I very briefly, when the *Veeck* decision was appealed to the Supreme Court, the Solicitor General came in and suggested that the *Veeck* decision was good law and that the Supreme Court should deny cert and the Supreme Court followed the Solicitor General's recommendation.

Mr. DESANTIS. Right.

So, Ms. Griffin, just in terms of, as these standards and codes are developed by different associations or whoever is involved with that, I guess what is the risk for the viability of that without copyright protection?

Ms. GRIFFIN. Oh, it is a huge risk to the standards developing organization. If they were not permitted to derive revenues from the sales of standards, then they would not be able to fund operations. And those operations include, as I said earlier: providing the administrative support for the development of standards to ensure that all reasonably and materially interested parties are sitting at the table, to make sure that consumers are at the table. No one will pay for that but the standard developing organizations who are mission-related and not-for-profit organizations. And they are able to do that how? By selling the standards and using the revenues.

If, by contrast, the government was to take that process away, the government would have to provide that expertise. The government would have to provide that administrative support. And ultimately, the taxpayers would pay for that. So, I think it would—the change would result in a very profound and detrimental change to the way that standards are developed in this country.

Mr. DESANTIS. Thank you.

I think my time is expired and I will yield back.

Mr. COBLE. I thank the gentleman.

The distinguished lady from California, Ms. Lofgren?

Ms. LOFGREN. Thank you, Mr. Chairman.

I will be brief, because I want to make sure that my colleague, Ms. Jackson Lee, also has an opportunity to participate.

You know, as I have listened to some of these proposals, it seems to me kind of interesting that people seem to have forgotten our

experience with SOPA just a year ago. I don't think—and, I mean, if someone feels differently, please speak up—that the American public's attitude toward SOPA has done a U-turn in the year, you know, that has happened since then. And the idea of the performance make available proposal really just goes in the same direction we were going there. That is a non-starter, in my opinion. I certainly value getting viewpoints and academic discussion, but it is not going to happen.

I think one of the things that has been raised, that we should review, is the issue of statutory damages. And when you take a look at some of the really outrageous things that have happened with statutory damages, I think of the case of the single mother. The RIAA brought a case where a jury awarded $1.5 million against this woman for downloading 24 songs with no indication that she had ever even shared them, as a matter of fact. Now that was reduced to 54,000 because of the disproportionate nature of the statutory by the judge. But, to have that kind of statutory scheme is irrational and it needs to be changed.

And I think back also at the orphaned works discussion. And I spent a long time trying to work on that and finally gave up along with the other Members of the Committee because of the intransigence of some of the participants. But, I think one of the things we ought to take a look at, you know, is what the damage that we did by extending the term, the copyright term. We now have a copyright term that basically is a century and a half. And we have aggravated the issue of orphaned works by doing so. Unfortunately, you know, you wish you could go back in time and undo some votes. And that is one I was convinced as a, I think I was a freshman, that the WIPO Treaty required that vote. And I now know that that was not the case. I wish I could undo my "yes" vote on the Sonny Bono Copyright Term Extension Act.

Finally, I think the real value of this hearing is the issue raised about a standards and public law. I was going to ask unanimous consent to put into the record the standard test methods for lead in water, I don't need to do that because my colleague, Mr. Issa, has already done so. But, it seems to me very clear that you cannot have secret law. If you are going to require people to adhere to a standard, that has to be in the public domain. And I am sympathetic, I understand, you know, there is a business model set up. But you can't allow the business model to trump the rule of law.

And, you know, I am mindful of the discussion that we had about publicly funded research. And we had a hearing here a couple of years ago. And the nonprofit societies that are basically funded by the—for their peer review process, which is essential, by the publisher. And yet—and that is a business model that actually was deleterious to the public's right to have publicly funded research made available publicly. We have now changed that. And I think, over time, the way we fund nonprofit science societies is going to have to follow along and change as well, because they do provide a useful model. But you cannot allow that current business model to dictate the end result, which is: if you incorporate by reference a document that has to be part of the public record.

And the—and, if there is a fee for example, I mean that assumes that the public doesn't have an interest. If I am a contractor, you

know, maybe I can afford to pay the fee because I am going to make money, you know, on that. But there is a public interest in this. It is not just the people in the business. It is the public's right to know. Is this a sufficient standard? Well, the only way you are going to find out, is to have free access to it. And to put up a screen to that, if it is a part of the law, is completely, wholly inappropriate. I agree with Mr. Issa that there is no copyright reform that we should support that doesn't resolve this issue.

And I have listened with great interest, as I say. I think, although there is academic interest in this, certainly the public spoke very loudly about SOPA and I don't believe we are going to have the appetite to revisit that, either in our copyright laws or, frankly, in the TPP negotiations that are underway. You are right, we don't know what they are negotiating. But, the leaks to WikiLeak are SOPA. And if SOPA is in TPP, it is dead in my judgment.

With that, I see my time is expired and I yield back.

Mr. COBLE. I thank the gentlelady.

The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chairman and the Ranking Member for the generosity of time.

And I want to associate myself with my colleagues. This is an excellent panel and well-committed in this area and with a lot of history in this area, as well.

Not enough time for our questions. I just want to go across to every one. I know that you spoke to different issues, and my colleague mentioned SOPA. I just want to get in this question a yes or no. Do you feel that Congress should wade into your particular issue of testimony today?

Dr. Nimmer—Mr. Nimmer?

Mr. NIMMER. Yes.

Ms. JACKSON LEE. Professor Lunney?

Mr. LUNNEY. No.

Ms. JACKSON LEE. Professor Schultz?

Mr. SCHULTZ. Not yet.

Ms. JACKSON LEE. Mr. Love?

Mr. LOVE. You should pay attention to the WIPO negotiation on the Broadcast Treaty.

Ms. JACKSON LEE. Is that yes or no?

Mr. LOVE. Okay, well——

Ms. JACKSON LEE. I just——

Mr. LOVE [continuing]. Should you legislate—should you change U.S. law in that area?

Ms. JACKSON LEE. Yes or no?

Mr. LOVE. We don't even know what the treaty is yet.

Ms. JACKSON LEE. All right.

Mr. LOVE. It is a——

Ms. JACKSON LEE. Thank you.

Ms. Griffin?

Ms. GRIFFIN. No, in the sense that has been suggested by Mr. Malamud.

Mr. MALAMUD. Absolutely, yes.

Ms. JACKSON LEE. Thank you very much.

Professor Nimmer, now Of Counsel, but I will always call you Professor. In your testimony, you note a scenario where a P2P user

who goes to trial is helped somewhat by the fact that a judge would feel that an award disproportionate with actual damages would be inappropriate and thus making—might be inclined to not construe the making available right in accord with their actual feelings about the law. Could you please elaborate on this? And I do have one or two other questions, so I am going to go quickly. And what would be a just recalculation of the statutory damages, so that Jammie Thomas-Rasset does not face a multi-billion-dollar judgment?

And I want to ask Professor Lunney, could you expound on your view of the broken window parable presented in Frédéric Bastiat's parable in English, "that which is seen and that which is unseen," if you can think of that?

And I do want, Professor Schultz, I know that my colleague from Texas asked about Aereo, but if you could just expand on it a little bit.

Professor Nimmer?

Mr. NIMMER. Yes. When Jammie Thomas-Rasset was—went to trial, as has been noted, the award against her was at one point $1.5 million. She had the option of settling. The plaintiffs offered her a settlement that she could pay several thousand dollars to a charity designed for musicians and she turned it down. Because she had committed perjury and because the trial was so egregious, the jury came and hammered her. But, the question now, as I understand it, is what should be a reasonable measure——

Ms. JACKSON LEE. Right. That's the——

Mr. NIMMER [continuing]. Of statutory damages. And, it did make sense, back in 1999 when Congress calibrated statutory damages, to look at how many works had been infringed because, at that point in time, it was not possible to infringe a hundred or ten thousand works. It just was physically impossible. Today with peer-to-peer, it is possible. And so, Congress needs to look at what level of damage would be—would cause deterrence and would compensate and would be somewhat related to the harm. So, I don't—I did not come here with a ready metric, but it could be several hundred dollars for each and every copyrighted work that was implicated or it could be $100,000 in any given lawsuit that is brought or another measure that is somewhere within reason and does not get us to the hundreds of millions of dollars.

Ms. JACKSON LEE. Thank you. Some criteria. So, refinement, clarity and determining how someone could be made whole.

Professor Lunney on your question please?

Mr. LUNNEY. Thank you for the question.

So, Frédéric Bastiat writing in 1850 was explaining that when the government creates a subsidy program for the arts, it is not new money in the economy. They are taking that money from consumers, through taxes, they are giving it to the arts. There is going to be new employment in the arts. That is what we see. What we don't see is that, by taking the money from the consumers who go through taxes, those consumers won't have that money. They can't spend it on something else. And so, the jobs that are lost in those other sectors, because consumers no longer have the money to spend in those other sectors, is not seen and we tend to ignore it. But we shouldn't.

If you are just moving money in the economy from one jar to another, creating jobs here, losing them there, there is no net gain for the economy. So, if we could come up with a magic formula, wave our wand and stop file sharing and restore to the music industry some of the money it has lost, perhaps as a result of file sharing, that would not be a net gain in jobs for the economy. We would simply be forcing consumers to pay more for music, they would have less money to pay for everything else. And so, whatever jobs we gained from that revenue in the music industry, we would lose elsewhere in the American economy.

Ms. JACKSON LEE. That is—let me just let Professor Schultz go on the Aereo. Thank you very much for that Professor Lunney.

Professor Schultz, just a little bit more expansion on the Aereo case.

Mr. SCHULTZ. Absolutely. So, in Aereo you have a company that—a single company distributing a TV signal to many customers. That would seem to fit the definition of a public performance. However, Aereo, through what they perceive as I would suppose it is a loophole in copyright law, are using really antiquated technology building an array of antennas for each of their users and distributing the signal. And they are not paying copyright royalties. They are not paying retransmission fees. And you have to ask yourself, as between the broadcasters and the creators versus Aereo, who has the moral and economic right to distribute those signals and profit from them. And I hope the Supreme Court rejects the interpretation of the law that allows Aereo to do this. But, if they don't, I hope this Congress will address that.

Ms. JACKSON LEE. Mr. Chairman, you have been gracious in your time. I think there are a lot of competing issues here. And I think we have a great respect for our artists, a great respect for broadcasters and a great respect for the posture that Professor Nimmer has taken and many of you have taken. And so, I thank you and look forward to more hearings on these important issues.

I yield back my time.

Mr. COBLE. I thank the gentlelady from Texas.

Mr. Conyers and I and other Members want to express our thanks to the witnesses who have prevailed during this marathon today. But, it has been a very worthwhile, balanced presentation, it seems to me.

And as I said at the outset, I appreciate those in the audience who have remained in its entirety. Your presence indicates more than a casual interest in this very, very significant issue.

This concludes today's hearing.

Thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing stands adjourned.

[Whereupon, at 12:41 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

CERTIFICATE

By Authority Of
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Legally Binding Document

By the Authority Vested By Part 5 of the United States Code § 552(a) and Part 1 of the Code of Regulations § 51 the attached document has been duly INCORPORATED BY REFERENCE and shall be considered legally binding upon all citizens and residents of the United States of America. *HEED THIS NOTICE*: Criminal penalties may apply for noncompliance.

Document Name: ASTM F2413-2005: Standard Specification for Performance Requirements for Protective Footware

CFR Section(s): 29 CFR 1910.136

Date of Action: 74 FR 40447, Aug. 11, 2009

APPROVED

Official Incorporator:
THE EXECUTIVE DIRECTOR
OFFICE OF THE FEDERAL REGISTER
WASHINGTON, D.C.

Designation: F 2413 – 05

$55.00 Original Sale Price

Standard Specification for Performance Requirements for Foot Protection[1]

This standard is issued under the fixed designation F 2413; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

INTRODUCTION

For more than sixty years, the predecessor to this specification, ANSI Z41, established the performance criteria for a wide range of footwear to protect from hazards that affect the personal safety of workers.

The value of these standards was recognized early in the history of Occupational Safety and Health Administration (OSHA) and incorporated as a reference standard in the Code of Federal Regulations (CFR) 1910.

The specification contains performance requirements for footwear to protect workers' feet from the following hazards by providing: (*1*) impact resistance for the toe area of footwear; (*2*) compression resistance for the toe area of the footwear; (*3*) metatarsal impact protection that reduces the chance of injury to the metatarsal bones at the top of the foot; (*4*) conductive properties which reduce hazards that may result from static electricity buildup; and reduce the possibility of ignition of explosives and volatile chemicals; (*5*) electric shock resistance, to protect the wearer when accidental contact is made with live electric wires; (*6*) static dissipative (SD) properties to reduce hazards due to excessively low footwear resistance that may exist where SD footwear is required; (*7*) puncture resistance of footwear bottoms; (*8*) chain saw cut resistance; and (*9*) dielectric insulation.

1. Scope

1.1 This specification covers minimum requirements for the design, performance, testing, and classification of footwear designed to provide protection against a variety of workplace hazards that can potentially result in injury.

1.2 The objective of this specification is to prescribe fit, function, and performance criteria for footwear that is intended to be worn to reduce injuries.

1.3 This specification is not intended to serve as a detailed manufacturing or purchasing specification, but can be referenced in purchase contracts to ensure that minimum performance requirements are met.

1.4 Controlled laboratory tests used to determine compliance with the performance requirements of this specification shall not be deemed as establishing performance levels for all situations to which individuals may be exposed.

1.5 The values stated in SI units are to be regarded as the standard. The values given in parentheses are for information only.

1.6 *This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.*

2. Referenced Documents

2.1 *ASTM Standards:* [2]

B 117 Practice for Operating Salt Spray (Fog) Apparatus

F 1116 Test Method for Determining Dielectric Strength of Dielectric Footwear

F 1117 Specification for Dielectric Footwear

F 1818 Specification for Foot Protection for Chainsaw Users

F 2412 Test Methods for Foot Protection

2.2 *Federal Standards:*[3]

CFR 1910.132 Personal Protective Equipment–General Requirements

CFR 1910.136 Personal Protective Equipment–Occupational Foot Protection

[1] This specification is under the jurisdiction of ASTM Committee F13 on Pedestrian/Walkway Safety and Footwear and is the direct responsibility of Subcommittee F13.30 on Footwear.

Current edition approved March 1, 2005. Published March 2005.

[2] For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

[3] Available from U.S. Government Printing Office Superintendent of Documents, 732 N. Capitol St., NW, Mail Stop: SDE, Washington, DC 20401.

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2.3 *Canadian Standards Association Standard:*[4]
CAN/CSA Z195 Protective Footwear

3. Terminology

3.1 *Definitions:*

3.1.1 *footwear, n*—wearing apparel for the feet (such as shoes, boots, slippers, or overshoes) excluding hosiery.

3.1.1.1 *Discussion*—This term can refer to either left foot or right foot units or pairs.

3.1.2 *insert, n*—footbed normally made of a foam product with leather or fabric cover shaped to cover the entire insole which can be inserted between the foot and insole board.

3.1.3 *insole, n*—foundation of the shoe; the inner sole of the shoe which is next to the foot, under the sock liner or the insert, onto which the upper is lasted.

3.1.4 *last, n*—solid hinged form, in the general shape of a foot, around which footwear is constructed.

3.1.5 *lasting, v*—building of footwear around a specific foot form.

3.1.6 *lining, n*—term used to describe all components that can be used to construct the interior of the upper part of the footwear.

3.1.7 *outsole and heel, n*—exterior bottom platform of the footwear; the bottom surface.

3.1.8 *product category, n*—description for a type of footwear designed and manufactured for a specific hazard or hazards.

3.1.9 *product classification, n*—footwear manufactured to meet a minimum performance requirement for a specific hazard or hazards.

3.1.10 *protective footwear, n*—footwear that is designed, constructed, and classified to protect the wearer from a potential hazard or hazards.

3.1.11 *protective toe cap, n*—component designed to provide toe protection that is an integral and permanent part of the footwear.

3.1.12 *quarter, n*—entire back portion of the footwear upper.

3.1.13 *shall, v*—mandatory action.

3.1.14 *should, v*—advisory comment.

3.1.15 *size, n*—length and breadth measurements of footwear determined by using a specific grading; the American system of footwear grading.

3.1.16 *sockliner, n*—material placed over the insole which is imprinted with a brand name or other designation.

3.1.17 *upper, n*—parts of a shoe or boot that are above the sole.

4. Significance and Use

4.1 This specification contains requirements to evaluate the performance of footwear for the following:

4.1.1 Impact resistance for the toe area of footwear,

4.1.2 Compression resistance for the toe area of footwear,

4.1.3 Metatarsal protection that reduces the chance of injury to the metatarsal bones at the top of the foot,

4.1.4 Conductive properties which reduce hazards that may result from static electricity buildup, and reduce the possibility of ignition of explosives and volatile chemicals,

4.1.5 Electric shock resistance,

4.1.6 Static dissipative (SD) properties to reduce hazards due to excessively low footwear resistance that may exist where SD footwear is required,

4.1.7 Puncture resistance of footwear bottoms,

4.1.8 Chain saw cut resistance, and

4.1.9 Dielectric insulation.

5. Performance Requirements and Workmanship

5.1 *Impact Resistant Footwear:*

5.1.1 Impact resistant footwear shall also meet the requirements of 5.2 for compression resistant footwear.

5.1.2 Footwear shall be designed, constructed, and manufactured so that a protective toe cap is an integral and permanent part of the footwear.

5.1.3 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.1.4 Classification shall be determined by evaluating three specimens in accordance with Test Methods F2412. The product classification for impact resistance represents the minimum force required for each classification that results in the toe area of the footwear having a minimum interior height clearance of 12.7 mm (0.50 in.) in men's footwear and 11.9 mm (0.468 in.) in women's footwear.

5.1.4.1 Impact resistance of footwear shall be classified as follows:

(1) Class 75 product classification men's footwear shall demonstrate a minimum interior height clearance of 12.7 mm (0.50 in.) during exposure to impact energy of 101.7 J (75 ft-lbf).

(2) Class 75 product classification women's footwear shall demonstrate a minimum interior height clearance of 11.9 mm (0.468 in.) during exposure to impact energy of 101.7 J (75 ft-lbf).

(3) Class 50 product classification men's footwear shall demonstrate a minimum interior height clearance of 12.7 mm (0.50 in.) during exposure to impact energy of 67.8 J (50 ft-lbf).

(4) Class 50 product classification women's footwear shall demonstrate a minimum interior height clearance of 11.9 mm (0.468 in.) during exposure to impact energy of 67.8 J (50 ft-lbf).

5.1.4.2 Any specimen that does not meet the minimum impact performance requirements for the product classification constitutes failure for the product category.

5.1.4.3 Protective toe footwear specimens or samples shall be retested for classification for any of the following changes:

(1) Change in material used to make protective toe cap, change in protective cap manufacturer, or changes in the design of the toe cap.

(2) Change in construction method used to make footwear.

(3) Change in the upper or insole material thickness greater than 25 %, change to the soling system, or a change in the hardness of the outsole.

(4) Shape of last used in the manufacturing of footwear.

[4] Available from Canadian Standards Association (CSA), 178 Rexdale Blvd., Toronto ON Canada M9W1R3.

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5.2 *Compression Resistant Footwear:*

5.2.1 Compression resistant footwear shall also meet the requirements of 5.1 for impact resistant footwear.

5.2.2 Footwear shall be designed, constructed, and manufactured so that a protective toe cap is an integral and permanent part of the footwear.

5.2.3 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.2.4 Classification shall be determined by evaluating three specimens in accordance with Test Methods F 2412. The product classification for compression resistance represents the minimum force required that results in the toe area of the footwear having a minimum interior height clearance of 12.7 mm (0.50 in.) in men's footwear and 11.9 mm (0.468 in.) in women's footwear.

5.2.4.1 Compression resistance of footwear shall be classified as follows:

(1) Class 75 product classification men's footwear shall demonstrate a minimum interior height clearance of 12.7 mm (0.50 in.) during exposure to a compressive force of 11 121 N (2500 lbf).

(2) Class 75 product classification women's footwear shall demonstrate a minimum interior height clearance of 11.9 mm (0.468 in.) during exposure to a compressive force of 11 121 N (2500 lbf).

(3) Class 50 product classification men's footwear shall demonstrate a minimum interior height clearance of 12.7 mm (0.50 in.) during exposure to a compressive force of 7784 N (1750 lbf).

(4) Class 50 product classification women's footwear shall demonstrate a minimum interior height clearance of 11.9 mm (0.468 in.) during exposure to a compressive force of 7784 N (1750 lbf).

5.2.4.2 Any specimen that does not meet the minimum compression resistance requirements for the product classification constitutes a failure for the product category.

5.2.4.3 Compression resistant footwear shall be retested for classification for any of the following changes:

(1) Change in material to make protective toe cap, change in protective toe cap manufacturer, or changes in the design of the toe cap.

(2) Change in construction method used to make footwear.

(3) Change in the upper or insole material thickness greater than 25 %, change to the soling system, or a change in the hardness of the outsole.

(4) Shape of last used in manufacturing of footwear.

5.2.4.4 *Classifications*—Protective footwear shall be classified in accordance with the tables below for its ability to meet compression resistance and impact resistance. The proper classification shall be determined by the test results of three specimens for each requirement.

5.2.4.5 The lowest recorded compression or impact resistance of the three test specimens will determine the footwear classification. If the product fails to meet the class for which it is intended, you must retest. For example, if a product test results meet Class 50 for compression resistance and Class 75 for impact resistance, the rating of the footwear will be I50/C50.

Classification Table Impact
I75 = 75 ft-lbs (101.7 J)
I50 = 50 ft-lbs (67.8 J)

Classification Table Compression
C75 = 2500 lb (11 121 N)
C1 = 1750 lb (7784 N)

Minimum Clearance (all classifications)
Men = 0.500 in. (12.7 mm)
Women = 0.468 in. (11.9 mm)

5.3 *Metatarsal Protective Footwear:*

5.3.1 Metatarsal protective footwear shall first meet the requirements of 5.1 for impact resistant footwear and 5.2 for compression resistant footwear.

5.3.2 Footwear shall be designed, constructed, and manufactured so that a metatarsal impact guard is positioned partially over the protective toe cap and extended to cover the metatarsal bone area. The metatarsal protection shall be an integral and permanent part of the footwear.

5.3.3 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.3.4 Classification shall be determined by evaluating three specimens in accordance with Test Methods F 2412. The product classification for metatarsal protection shall be made after the footwear has been classified for impact resistance and compression resistance.

5.3.4.1 Class 75 product classification metatarsal protective footwear for men shall first meet the performance requirements for Class 75 Impact Resistant and Class 75 Compression Resistant footwear. Subsequent to meeting these performance requirements, the height of the wax form used to measure metatarsal protection shall be a minimum of 25.4 mm (1.0 in.) after exposure of impact energy of 101.7 J (75 ft-lbf).

5.3.4.2 Class 75 product classification metatarsal protective footwear for women shall first meet the performance requirements for Class 75 Impact Resistant and Class 75 Compression Resistant footwear. Subsequent to meeting these performance requirements, the height of the wax form used to measure metatarsal protection shall be a minimum of 23.8 mm (0.937 in.) after exposure of impact energy of 101.7 J (75 ft-lbf).

5.3.4.3 Class 50 product classification metatarsal protective footwear for men shall first meet the performance requirements for Class 50 Impact Resistant and Class 50 Compression Resistant footwear. Subsequent to meeting these performance requirements, the height of the wax form used to measure metatarsal protection shall be a minimum of 25.4 mm (1.0 in.) after exposure of impact energy of 67.8 J (50 ft-lbf).

5.3.4.4 Class 50 product classification metatarsal protective footwear for women shall first meet the performance requirements for Class 50 Impact Resistant and Class 50 Compression Resistant footwear. Subsequent to meeting these performance requirements, the height of the wax form used to measure metatarsal protection shall be a minimum of 23.8 mm (0.937 in.) after exposure of impact energy of 67.8 J (50 ft-lbf).

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5.3.4.5 Any specimen that does not meet the metatarsal impact resistance performance requirement constitutes a failure for the product category.

5.3.4.6 Metatarsal impact resistance protection shall be retested for classification for any of the following changes:

(1) Change in material used to produce the metatarsal impact resistant protection device, change in manufacturer, or design of the product, or a combination thereof.

(2) Change in construction method used to make footwear.

(3) Change in the upper or insole material thickness greater than 25 %, a change to the soling system, or a change in the hardness of the outsole.

(4) Shape of last used in manufacturing of footwear.

5.4 *Conductive Protective Footwear:*

5.4.1 Conductive footwear shall also meet the requirements of 5.1 for impact resistant footwear and 5.2 for compression resistant footwear.

5.4.2 Footwear shall be designed, constructed, and manufactured to provide protection for the wearer against hazards that may result from static electricity buildup and to reduce the possibility of ignition of explosives or volatile chemicals.

5.4.2.1 Footwear shall dissipate static electricity from the body to reduce the possibility of ignition of volatile compounds.

5.4.2.2 Footwear shall be of a construction that facilitates a stable electrically conductive path. All external components shall be made of nonferrous materials.

5.4.2.3 Conductive footwear is not designed to be worn by personnel working near open electrical circuits.

5.4.3 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.4.3.1 The uppers shall be made of materials that facilitate the dissipation of static electricity.

5.4.3.2 The insoles, linings, outsoles, and heels of the footwear shall be made of any combination of materials and compounds which will facilitate electrical conductivity and the transfer of static electricity build up from the body to the ground.

5.4.3.3 The recommended design of the outsole and heel is a single unit. Where the outsole and heel are separate components, the following practices shall be used.

(1) Heel shall be attached to outsole to ensure no disruption in electrical conductivity.

(2) Non-ferrous heel nails shall be used to attach the heels when heel nails are used. These nails shall be recessed within the tread surface and then covered with conductive material. These nails shall not be either exposed or visible.

5.4.4 Electrical resistance shall be determined by evaluating the minimum number of specimens per lot size in accordance with Test Methods F 2412.

5.4.4.1 The specimens shall demonstrate resistance between 0 to 500 000 ohms.

5.4.4.2 Any specimen or sample of conductive footwear that does not meet the performance requirement constitutes a failure for the lot.

5.5 *Electric Shock Resistant Footwear:*

5.5.1 Electric shock resistant footwear shall also meet the requirements of 5.1 for impact resistant footwear and 5.2 for compression resistant footwear.

5.5.2 Electric shock resistant footwear shall be designed, constructed, and manufactured with non-conductive electric shock resistant soles and heels so that the footwear outsole can provide a secondary source of electric shock resistance protection to the wearer against the hazards from an incidental contact with live electrical circuits, electrically energized conductors, parts, or apparatus.

5.5.3 Footwear shall have an electrical shock resistant outsole and heel with an outer surface which is not penetrated by electrically conductive components, parts, or conductive materials.

5.5.4 Footwear outsole shall provide a secondary source of protection against incidental contact with live electrical circuits, electrically energized conductors, parts, or apparatus under dry conditions.

5.5.5 Electrical hazard protection is severely deteriorated in the following conditions: excessive wear on the outsole and heel or exposure to wet and humid environments, or both.

5.5.6 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.5.7 The outsoles and heels shall be made of materials designed to offer electrical insulative properties to provide electric shock resistance.

5.5.8 Electric shock resistance of the footwear shall be determined by evaluating the minimum number of specimens per lot size in accordance with Test Methods F 2412.

5.5.8.1 Protective footwear constructed or manufactured to be electrically shock resistant shall be capable of withstanding the application of 14 000 V (root mean square (rms)) at 60 Hz for 1 min with no current flow or leakage current in excess of 3.0 mA under dry conditions.

5.5.9 Any specimen that does not meet the performance requirement constitutes a failure for the lot.

5.6 *Static Dissipative (SD) Footwear:*

5.6.1 Static dissipative footwear shall also meet the requirements of 5.1 for impact resistant footwear and 5.2 for compression resistant footwear.

5.6.2 Static dissipative footwear shall be designed, constructed, and manufactured to provide protection to the wearer against hazards which may exist due to excessively low footwear resistance in a work environment, as well as maintain a sufficiently high level of resistance to reduce the possibility of electrical shock in work areas where SD footwear is worn.

5.6.2.1 Footwear shall reduce the excess static electricity by conducting the charge (from body) to ground while simultaneously maintaining a sufficiently high level of resistance (10^6 ohms) (1 megohm) to protect the wearer when exposed to hazards from incidental contact with live electric circuits.

5.6.2.2 Using human subjects, a pair of footwear shall have a lower limit of electrical resistance of 10^6 ohms (1 megohm) and have an upper limit electrical resistance of 10^8 ohms (100 megohms).

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5.6.3 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.6.3.1 The footwear shall use any combination of materials that facilitate static dissipation by a consistent path of resistance.

5.6.3.2 The inconsistency of certain hygroscopic materials can result in footwear not being able to consistently meet the performance requirements of static dissipative footwear.

5.6.3.3 Heels shall be attached using non-ferrous heel nails. These nails shall be recessed within the tread surface and then covered with conductive material. These nails shall be neither exposed nor visible.

5.6.4 Static dissipation shall be determined by evaluating the minimum number of specimens per lot size in accordance with Test Methods F 2412.

5.6.4.1 Any specimen that does not meet the performance requirement constitutes a failure for the lot.

5.7 *Puncture Resistant Footwear:*

5.7.1 Puncture resistant footwear shall also meet the requirements of 5.1 for impact resistant footwear and 5.2 for compression resistant footwear.

5.7.2 Footwear shall be designed, constructed, and manufactured so that a puncture resistant plate is positioned between the insole and outsole and is made an integral and permanent part of the footwear.

5.7.2.1 The puncture resistant components shall reduce the possibility of injury caused by sharp objects that can penetrate the bottom assembly of the footwear.

5.7.3 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.

5.7.3.1 The puncture resistant device shall cover the maximum area of the insole to include as much of the heel area that is allowed by the construction of the footwear and be an integral part of the footwear.

5.7.3.2 The preferred design of the puncture resistant device is a single unit.

5.7.4 Puncture resistance shall be determined by evaluating the minimum number of specimens per lot size in accordance with Test Methods F 2412.

5.7.4.1 The specimens shall demonstrate a minimum puncture resistance on each device of 1200 N (270 lbf).

5.7.5 Measure flex resistance to tracking using CAN/CSA Z195.

5.7.5.1 Puncture resistant devices shall show no signs of cracking after 1.5 million flexes.

5.7.6 Puncture resistant devices shall show no sign of corrosion after being exposed to a 5 % salt solution for 24 h, in accordance with B 117.

5.7.7 Each pair of puncture resistant protective devices shall bear the manufacturer's name, trademark or logo, or both, and month and year of manufacture. This information shall be permanently stamped or marked in a conspicuous location.

5.7.8 Any specimen that does not meet the performance requirements constitutes a failure for the lot.

5.8 *Chain Saw Cut Resistant Footwear:*

5.8.1 Footwear shall be designed, constructed, and manufactured so that it can provide protection to the wearer's feet against the hazards which may result when operating a chain saw.

5.8.1.1 Chain saw cut resistant footwear is intended to protect the foot area between the toe and lower leg when operating a chain saw.

5.8.2 The workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer. These practices shall also meet the requirements of the section on Materials and Workmanship of Specification F 1818.

5.8.2.1 The area of protection shall meet the requirements as stipulated in the section on Areas of Protection of Specification F 1818.

5.8.3 Chain saw cut resistant footwear shall meet the performance requirements of the section on Inspection and Performance Testing of Specification F 1818.

5.8.3.1 Any specimen that does not meet the performance requirements constitutes a failure for the product category.

5.9 *Dielectric Insulation:*

5.9.1 Footwear shall be designed, constructed, and manufactured so that it can provide additional insulation if accidental contact is made with energized electrical conductors, apparatus, or circuits.

5.9.2 Dielectric insulation shall meet the minimum insulation performance requirements of the section on Electrical Requirements of Specification F 1117 as tested in accordance with Test Method F 1116.

5.9.3 Any specimen that does not meet the performance requirements constitutes a failure for the product category.

6. Hazard Assessment

6.1 In conjunction with the advisory in CFR 1910.132 and CFR 1910.136, the user of this specification should conduct a hazard assessment to determine the specific requirements that are needed for the protective footwear to be worn for each specific work place hazard.

6.2 The classification system and minimum performance requirements for each hazard provide for a zero negative tolerance. Consequently, the assessment and determination of the specific hazards allows for choosing the specific combination of features that the footwear must demonstrate. For example:

6.2.1 One group of workers in a facility would need footwear that is:

Class 75 Impact Resistant
Class 75 Compression Resistant
Electric Shock Resistant

6.2.2 Another group of workers in the same facility would need footwear that is:

Class 50 Impact Resistant
Class 50 Compression Resistant
Class 50 Metatarsal Impact Resistant
Electric Shock Resistant

7. Labeling and Identification

7.1 Labeling and identification of protective footwear is essential to ensure the wearer that footwear meets the required minimum performance (see Table 1).

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TABLE 1 Examples of Marking and Identification

	Identification	Description
		Example A
Line 1	ASTM F 2413-05	Protective footwear which complies to the performance requirement of F 2413 issued in 2005.
Line 2	F/I/75/C/75/Mt75	Footwear worn by female worker which has Class 75 impact resistance; Class 75 compression resistance, and Class 75 metatarsal impact resistance.
Line 3	EH	The outsole and heel of this footwear is made with non-conductive materials, shock resistant.
		Example B
Line 1	ASTM F 2413-05	Protective footwear which complies to the performance requirement of F 2413 issued in 2005.
Line 2	M/I/50/C/50	Footwear worn by male worker which has Class 50 impact resistance and Class 50 compression resistance.
Line 3	PR	Puncture resistant footwear
Line 4	CS	Footwear which is chain saw cut resistant
		Example C
Line 1	ASTM F 2413-05	Protective footwear which complies to the performance requirement of F 2413 issued in 2005.
Line 2	M/I/75/C/75	Footwear worn by male worker which has a Class 75 impact resistance and a Class 75 compression resistance.
Line 3	CD	Footwear is conductive.

7.1.1 The label uses a specific four line format that identifies the type of footwear and the hazards for which it is designed to provide protection.

7.1.2 Print size on labels shall be clearly visual to the eye and shall measure 3.75 mm (0.125 in.) or larger.

7.1.3 *Line 1*—Identifies that the footwear is protective footwear that complies to an ASTM standard with a specific year of issuance. For example:

ASTM F 2413	05
(ASTM Standard No.)	(Year of issuance)

7.1.4 *Line 2*—Identifies the gender of user and the classifications for impact resistance, compression resistance, and metatarsal impact resistance. For example:

M/I/75/C/75				
M Male	I Impact Resistant Footwear	75 Impact Classification	C Compression Resistant Footwear	75 Compression Classification
F/I/75/C/75/				
F Female	I Impact Resistant Footwear	75 Impact Classification	C Compression Resistant Footwear	75 Compression Classification
M/I/50/C/50/Mt50				
M Male	I Impact Resistant Footwear	50 Impact Classification	C Compression Resistant Footwear	50 Compression Classification	MT Metatarsal Resistant Footwear	50 Metatarsal Classification

7.1.5 *Lines 3 and 4*—Identifies footwear made to offer protection from specific types of hazards. Section reference shall be in numerical order.

7.1.5.1 *CD*—Identifies protection against conductive hazards as discussed in 5.4.

7.1.5.2 *EH*—Identifies footwear with outsole and heel made of electrical insulation properties; shock resistant as discussed in 5.5.

7.1.5.3 *SD*—Identifies footwear designed to reduce the accumulation of excess static electricity as discussed in 5.6.

7.1.5.4 *PR*—Identifies footwear designed to be puncture resistant as discussed in 5.7.

7.1.5.5 *Mt*—Identifies footwear designed to be impact resistant to the top of the foot as discussed in 5.3.

7.1.5.6 *CS*—Identifies footwear which provides chain saw cut resistance as noted in 5.8.

7.1.5.7 *DI*—Identifies footwear which provides dielectric insulation as noted in 5.9.

7.1.6 *Line 4*—Shall only be used when more than three sections of this specification apply to any one pair of protective footwear.

8. Marking and Compliance Requirements

8.1 The marking as defined in this specification indicates that the protective footwear bearing this label meets the minimum requirements for the product category as defined within this specification.

8.2 *Responsibility of the Manufacturer or Supplier*—The manufacturer or supplier, or both, of the protective footwear bearing the marking shall maintain documentation to identify the product category sampled for testing, a report of tests performed, test results date of testing and identify of the independent testing facility used.

8.3 *Compliance Requirements*—The manufacturer or supplier, or both, of protective footwear bearing the marking label that is found to be in non-compliance with the requirements of this specification is liable for immediate disqualification from using the ASTM label for that product category.

8.4 The identification of all protective footwear as meeting the requirements of this specification shall follow a consistent pattern. One-half pair shall be clearly and legibly identified in letters and numbers not less than 0.125 in. (3.175 mm) high. The identification shall be either a stitched in, stamped, or pressure-sensitive label, or a combination thereof. The identification shall be enclosed in a border and be placed on either the surface of the tongue, gusset, shaft, or quarter lining.

9. Keywords

9.1 chain saw protection; conductive footwear; dielectric; electric shock resistance (EH); foot protection; impact resistance; metatarsal protection; protective footwear; puncture resistance; safety footwear electrical hazard; static dissipative (ESD)

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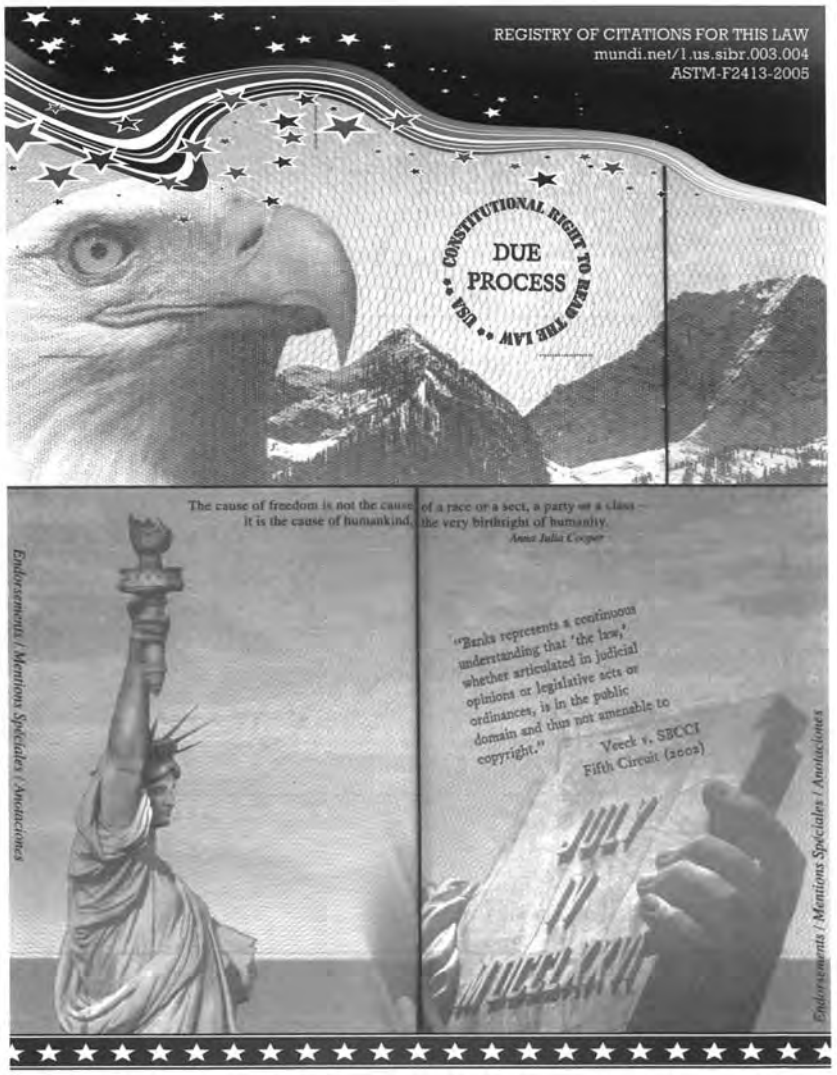
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ASTM-F2413-2005
CONSTITUTIONAL RIGHT TO READ THE LAW ** USA **
DUE PROCESS
The cause of freedom is not the cause of a race or a sect, a party or a class – it is the cause of humankind, the very birthright of humanity.
Anna Julia Cooper
"Banks represents a continuous understanding that 'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright."
Veeck v. SBCCI
Fifth Circuit (2002)
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ASTM INTERNATIONAL

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

▶ The organization may have to use a copy of this return to satisfy state reporting requirements

OMB No 1545-0047

2009

Open to Public Inspection

			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)	1,185,270	1,534,045
	9	Program service revenue (Part VIII, line 2g)	41,610,824	42,805,942
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	4,613,151	214,704
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	534,120	408,346
	12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	47,943,365	44,963,037

(A) Name		(B) Breakdown of W-2 and/or 1099-MISC compensation			(C) Retirement and other deferred compensation	(D) Nontaxable benefits	(E) Total of columns (B)(i)-(D)
		(i) Base compensation	(ii) Bonus & incentive compensation	(iii) Other reportable compensation			
James A Thomas	(i)	476,627	35,250	233,929	23,275	10,966	782,047
	(ii)	0	0	0	0	0	0
Margaret M Cassidy	(i)	139,707	10,413	0	14,218	5,644	169,982
	(ii)	0	0	0	0	0	0
Kenneth Pearson	(i)	248,668	16,407	0	19,832	6,956	293,863
	(ii)	0	0	0	0	0	0
Teresa Cendrowska	(i)	145,916	11,019	0	14,205	5,793	176,933
	(ii)	0	0	0	0	0	0
Jeffrey Grove	(i)	152,812	12,092	0	16,485	13,378	194,767
	(ii)	0	0	0	0	0	0
Philip Lively	(i)	163,505	12,684	0	17,309	13,033	206,531
	(ii)	0	0	0	0	0	0
Katherine Morgan	(i)	143,243	11,286	0	15,409	9,509	179,448
	(ii)	0	0	0	0	0	0
Thomas O'Brien	(i)	229,542	16,803	0	21,776	5,680	272,801
	(ii)	0	0	0	0	0	0
John Pace	(i)	223,419	17,075	0	19,685	13,806	273,984
	(ii)	0	0	0	0	0	0

Statement of ASME on January 14, 2014 Hearing on Copyright and Incorporation by Reference
Submitted to the Subcommittee on Courts, Intellectual Property and the Internet
House Committee on the Judiciary
United States Congress

January 21, 2014

ASME (American Society of Mechanical Engineers) appreciates the opportunity to provide comments for the record of the Subcommittee's January 14 hearing on "The Scope of Copyright Protection". Our comments focus on copyright protection for documents that are developed by the private sector, without government funding, and subsequently incorporated by reference by government agencies into their regulations.

Introduction

Founded in 1880, ASME is a not-for-profit scientific, educational, and technical organization for mechanical engineers, with over 125,000 individual members worldwide. A key element in fulfilling its mission to advance, disseminate, and apply engineering knowledge for improving the quality of life is the development and maintenance of over 500 voluntary consensus standards associated with the art, science, and practice of mechanical engineering. Our standards are heavily used by industry, and include standards for complex machinery such as boilers, pressure vessels, elevators, and escalators and items as ubiquitous as nuts, bolts, and plumbing fixtures. According to statistics maintained by the National Institute of Standards and Technology (NIST), there are over 600 references to 90 ASME standards in the U.S. Code of Federal Regulations, spanning 11 federal agencies.[1]

Many of ASME's standards development activities predate the establishment of the various regulatory agencies that now make use of them. The Boiler and Pressure Vessel Code (BPVC), for example, was first published in 1914. Because of ASME's track record of providing technical rigor and ensuring due process for all, the BPVC has become a resource not just for federal agencies, but for state and local jurisdictions and foreign governments in over 100 countries around the world.

For many years, federal, state, and local agencies have relied upon standards and other materials published by ASME and other private sector standards developing organizations (SDOs) to support regulation, procurement, voluntary programs, and policy activities. This practice – known as "incorporation by reference" (IBR) – allows agencies to use standards that are already recognized and accepted in commerce both in the United States and around the world.

IBR is a tool widely used by federal, state, and local regulatory agencies. According to NIST's statistics, over 50 federal agencies currently make use of IBR, incorporating thousands of standards by reference into the U.S. Code of Federal Regulations (CFR). The U.S. Coast Guard alone has over 2,000 references to private sector standards in the CFR.

Using IBR as a regulatory tool saves individual agencies the expense of developing and maintaining their own standards, saving taxpayers millions of dollars each year. Additionally, using IBR as a tool across agencies and jurisdictions helps drive down costs for producers and consumers by preventing the proliferation of duplicative and conflicting government-imposed standards. The inherent benefits to businesses and governments has resulted in a successful public-private partnership that enhances public safety and health while facilitating U.S. economic growth, innovation, trade, and competitiveness. This partnership is predicated on the continued creation of private sector standards that serve the needs of

[1] See http://standards.gov/sibr/query/index.cfm (Note: Some references designated as ANSI standards are ASME standards)

both industry and government – and without copyright protection, creators of such standards would have little incentive to continue to do so.

Developing and updating state-of-the-art technical standards is resource intensive and involves much more than simply publishing information. It entails developing, qualifying, and managing subject matter experts; the continuous aggregation and analysis of data; and abiding by rigorous policies and procedures to ensure that resulting standards are not only technically robust and commercially relevant, but reflect a true consensus of affected stakeholders.

While some trade associations, consortia, and other groups collectively underwrite the cost of standards development and have determined it is in their organizational interest to make their respective standards available for free, other models - such as that used by ASME - rely on the sale of standards in order to recoup the costs of standards development. ASME does not impose a participation fee on its members nor does it receive contributions from companies or government for the development and maintenance of standards. Companies in the relevant industries willingly purchase the standards to increase their competence and commercial relevance. The benefits that flow from adhering to sound engineering standards far exceed the cost of acquiring them. Likewise, by having access to products that are produced in accordance with state-of-the-art standards, members of the general public reap the benefit of increased efficiency, safety, and reliability and decreased costs.

This model strengthens ASME's ability to provide a neutral, inclusive, and transparent environment and precludes specialized commercial or political interests from dominating the standards development process. It results in a sustainable system in which costs are borne principally by the business entities utilizing the standard in the production of their products and work; burdens of government are lessened by the availability of sound technical standards; and the public derives the greatest benefit from enhanced safety.

Federal Laws and Policies in Support of Standards Development

Existing federal laws and policies regarding incorporation by reference explicitly protect the intellectual property of standards developing organizations, and play an essential role in ensuring the ongoing success of the public-private partnership in the area of standards development.

The most relevant federal law dealing with IBR, the National Technology Transfer and Advancement Act (NTTAA), was enacted in 1995.[2] This law, in part, directs all federal agencies and departments to "use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments" except where inconsistent with law or otherwise impractical. Recognizing that the vast majority of voluntary consensus standards were copyrighted works produced by private sector organizations, the NTTAA did not limit its directive to include non-copyrighted material.

The NTTAA itself was enacted to codify long standing and successful policies dealing with the use of private sector standards in the federal government, dating back to 1982, established by the Office of Management and Budget (OMB). OMB Circular A-119, "Federal Participation in the Development and

[2] Public Law No. 104-113 § 12(d), 110 Stat. 783, codified at 15 U.S.C. § 272

Use of Voluntary Consensus Standards and in Conformity Assessment Activities", which was updated in 1998 following the passage of the NTTAA, has several important goals, including to:

- eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation;
- provide incentives and opportunities to establish standards that serve national needs;
- encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and
- further the policy of reliance upon the private sector to supply Government needs for goods and services

Recognizing the importance of the sale and licensing of copyrighted works as a funding mechanism for the development of standards, the OMB Circular directs federal agencies to observe and protect the SDOs' copyrights – even if it is incorporated by reference - and agencies have done so successfully for decades.[3]

In addition to NTTAA and OMB Circular A-119, several recent reviews within federal government support the continued use of private sector standards by federal agencies, as well as the collective understanding that access and availability on a "reasonable basis"[4] may include monetary compensation. These reviews include an October 2011 report published by the National Science and Technology Council's (NSTC) Subcommittee on Standards (SoS); December 2011 recommendations issued by the Administrative Conference of the United States (ACUS); and a January 2012 memorandum jointly issued by the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB/OIRA), the Office of Science and Technology Policy (OSTP), and the Office of the U.S. Trade Representative (USTR).

The January 2012 OSTP/USTR/OMB Memo, "Principles for Federal Engagement in Standards Activities to Address National Priorities," underscores the importance of private sector engagement and leadership in standards setting activities:

> "The vibrancy and effectiveness of the U.S. standards system in enabling innovation depend on continued private sector leadership and engagement. Most standards developed and used in U.S markets are created with little or no government involvement. This approach – reliance on private sector leadership, supplemented by Federal Government contributions to discrete standardization processes as outlined in OMB Circular A-119, 'Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,' – remains the primary strategy for government engagement in standards development."

In developing rules governing the incorporation of standards by reference within the U.S. Code of Federal Regulations and published within the Federal Register, the Office of the Federal Register crafted rules consistent with existent laws and policies. They correctly did not interpret existing statues to

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[3] See Para 6j of OMB Circular A-119, which states in part, "If a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations."

[4] National Science and Technology Committee Subcommittee on Standards, "Background and Policy Recommendations on Federal Engagement in Standards Activities to Address National Priorities" (2011)

require incorporated standards to be free, but rather stipulate that such publications must be "reasonably available to and usable by the class of persons affected by the publication."[5]

Simply put, existing laws and policies intentionally recognize and support the fundamental concept that affords copyright protection for standards developed in the private sector that have been incorporated into regulation by reference; any change to the law should consider the reasons behind the current law and the impact of the proposed changes.

Standards and Open Government

Modern technology has provided tools that make access to and dissemination of information cheaper than ever. Computers, broadband, and the internet provide the potential for media of all types to be transmitted with virtually no cost to the consumer. This has played an important role in facilitating citizens' ability to access information related to government activities, and is a key enabler of the movement towards a more open and transparent government.

The challenges presented by such "free access" for producers of intellectual property outside of government have been well documented. Without protective controls in place, producers of intellectual property are at the mercy of anonymous entities that feel entitled to obtain access to all copyrighted works without compensation. Such "piracy" has a profound impact on a producer's ability to recoup expenses for development, and serves as a major disincentive for future productions. Entities that disrespect copyrights and other protections disregard the important fact that although electronic media can be easily accessed and cheaply distributed by virtual means, the work needed to create and maintain information – including technical standards - is resource-intensive and cannot be done without adequate funding. The availability of the internet as a vehicle for dissemination thus cannot be viewed as lessening the importance of copyright protection.

As this Subcommittee has heard, some believe that once incorporated into regulations by reference, a standard should no longer be eligible for copyright status. Such a narrow interpretation is contrary to long-standing federal law, policy, and practice, and severely undermines many of the benefits afforded by the current system of collaboration - including the tremendous cost savings reaped by the government's use of standards developed by independent, voluntary consensus SDOs like ASME.

The implications that flow from this misinterpretation of the intent of existing laws and policies regarding protection of copyrighted publications extend far beyond the ability of standards developers to sustain their important work. Policymakers should consider the full impact of any proposed changes to copyright law.

Insights on Unintended Consequences

While proponents for the elimination of copyright protection for private sector standards that have been incorporated by reference may think they are advocating for the public interest, they do not realize the destabilization that would result, and the consequences of that destabilization. **Eliminating copyright protection would jeopardize public safety and threaten this country's position as an economic leader.**

[5] 1 CFR 51.7

It is undeniable that the loss of copyright would result in a loss of revenue from the sale of standards, and thereby weaken SDOs like ASME. The impacts would vary from SDO to SDO, but one example of an unintended consequence would be a change in business model, whereby SDOs like ASME would need to charge fees to participate in committees that develop standards. This would result in an increased barrier to participation for small businesses, citizens groups, and other stakeholders engaging in standards development. Very likely, the resulting void in participation would be filled by special interests, and result in less robust standards.

Another possible outcome of IBRd standards losing their copyright would be for SDOs to deny agencies the ability to reference their standards as a necessary means of the SDO preserving ownership of their intellectual property. In this scenario, government agencies on all levels would be forced to either cover the cost of developing their own standards, or solicit a standard from an organization capable of providing a "free" standard. In the former scenario, it is likely that standards development would not only prove cost prohibitive or create a new burden on taxpayers, but would result in the proliferation of duplicative and conflicting standards and regulations. In the latter scenario, governments would have an increasingly limited source of private sector standards from which to choose. Further, being precluded from referencing widely recognized standards would throw federal and state agencies into a chaotic situation where they would be impeded from promulgating new or updated regulations.

A change in the law to deny copyright to IBR'd standards would not only have a massive impact on the U.S. standards community by disincentivizing the sustained development of its standards, discouraging the incorporation of their standards into regulations, and/or resulting in domination by special interests, it would also negatively impact manufacturers who rely on those standards as a means of complying with various regulations. Instead of complying with a single rule across industries and jurisdictions, businesses would likely be forced to comply with an increasingly divergent set of standards, rules, and regulations, and therefore lose the benefits standards provide in achieving economies of scale and providing access to global markets.

Additionally, in many cases, the success of a given product depends on having state-of-the-art technical standards that support its manufacture and use; recognizing this fact, the global promotion and alignment of technical standards is a key part of the U.S. strategy to benefit businesses, consumers, and society as a whole.[6] Without "best in the world" standards, U.S. businesses cannot build and market "best in the world" products.

For these reasons, representatives from across the federal government have consistently indicated their lack of appetite to assume the role of standards developer. In fact, the U.S. government has long recognized that the private sector, driven by innovators and market need, is ordinarily in the best position to drive standardization in a technology area.[7] This has resulted in a lasting and successful public-private partnership; however, this partnership is predicated on the support for copyright protection afforded to standards developed within the private sector – even those that have been incorporated into regulations by reference.

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[6] American National Standards Institute, "United States Standards Strategy" (May 2011)
[7] National Science and Technology Committee Subcommittee on Standards, "Background and Policy Recommendations on Federal Engagement in Standards Activities to Address National Priorities" (2011)

Copyright and Incorporation by Reference: Constitutionality and Case Law

Courts have on numerous occasions recognized that SDOs deserve copyright protection for the standards they develop, even when those standards are later incorporated by reference into statutes. Many existing U.S. standards are of the highest possible quality and, because of continuing advances in technology, must be updated on an ongoing basis. Developing and maintaining these standards requires not only time, research, and labor but also creativity and tremendous expertise - precisely the kind of authorship the Copyright Act seeks to encourage and reward. In other words, courts recognize that the U.S. Constitution allowed Congress to enact the Copyright Act for one reason: "To promote the Progress of Science and useful Arts." Standards do just that.

Courts have also recognized that depriving SDOs of their copyright interests in IBR standards may violate the "Takings Clause" of the U.S. Constitution. The Takings Clause prevents the federal government from taking property for public use without just compensation, and numerous courts have held that "property" in this context includes copyright interests. So, because every standard is a work of authorship protected by U.S. copyright law, SDOs own a constitutionally protected copyright interest - or "property" - in each standard they develop. If Congress takes that property for public use, it must justly compensate the SDO. Otherwise Congress violates the U.S. Constitution.

Both sides make policy arguments about why SDOs should or should not retain copyright in IBR standards. But the Takings Clause is not a policy argument—it is in the Fifth Amendment of the U.S. Constitution. In other words, just as the government can't quarter soldiers in a citizen's home, it can't take SDOs' copyrights for public use without just compensation. And that is what Public.Resource.Org and other like-minded organizations are asking Congress to do.

Conclusions

Incorporation by reference provides federal agencies with access to state-of-the-art knowledge and best practices while saving U.S. taxpayers from bearing the cost of development of technical documents used for commercial purposes by industry. ASME supports current laws and policies that foster a collaborative public-private partnership for federal agency use of private sector standards. Policies and practices that promote federal government use of private sector standards through incorporation by reference should:

- Continue to ensure that federal agencies observe and protect copyrights of SDOs. When standards are copyrighted, compensation to the copyright owner for access to the standards is appropriate, and indeed essential, to support on-going standards development. Congress should continue to support the current policy in OMB Circular A-119 and the NTTAA by clarifying that copyrighted materials incorporated by reference by a government agency does not cause the copyright owner to lose their copyright.

- Provide agencies with flexibility to work with SDOs to ensure that privately developed technical documents utilized by agencies are "reasonably available to the class of persons affected thereby." Agencies should work with SDOs in determining what material to reference and how to make materials "reasonably available", with a clear understanding that "reasonably available" does not preclude copyright holders from receiving monetary compensation.

INTERNATIONAL
Standards Worldwide

Office of the President

Address 100 Barr Harbor Drive
PO Box C700
W. Conshohocken, PA
19428-2959 | USA

Phone 610.832.9500
Fax 610.832.9555
e-mail jthomas@astm.org
Web www.astm.org

January 21, 2014

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2141 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on "The Scope of Copyright Protection"

Dear Subcommittee Chairman Coble, Ranking Member Conyers, and Members of the Subcommittee:

ASTM International submits these comments for the record to correct a misrepresentation of facts made in Mr. Carl Malamud's written testimony at the January 14, 2014, hearing on "The Scope of Copyright Protection".

ASTM is a not-for-profit organization that has successfully served society for over 115 years by developing and publishing voluntary consensus standards that protect public safety, health, and the environment. While ASTM standards are made available to the public on a reasonable basis in a variety of formats, ASTM also provides free on-line access to standards incorporated by reference in Federal regulations.

As a member of the American National Standards Institute (ANSI), ASTM would like to take this opportunity to associate ourselves with the testimony of Ms. Griffin of ANSI and agrees that changing existing copyright policy on standards incorporated by reference in Federal regulations would be disruptive to the effectiveness of the current system and would result in the scenario described in Ms. Griffin's testimony where "the government would have to step up, take over what is now a market-driven system, and somehow find the money, time, and expertise – for every single technology and industry area."

Mr. Malamud made a gross misrepresentation on page 41 of his submitted testimony where he stated that "there are huge direct costs incurred by the government in purchasing copies of standards they must enforce…." and suggesting that there has been "$88,706,506 in spending with the American Society of Testing and Materials…" Mr. Malamud's numbers are not factual. While ASTM receives some direct income when Federal agencies purchase ASTM standards and publications, the actual combined total of such purchases over the three-year period of FY2010 to FY2012 amounts to less than $2 million, less than three percent of what Mr. Malamud testified. Accordingly, ASTM requests the record to reflect this misrepresentation and correction.

Thank you for the opportunity to submit these comments for the record. We welcome any questions from you or your staff.

Sincerely,

Jim Thomas

James A. Thomas

Written Statement of Broadcast Music, Inc.

on the Scope of Copyright Protection

before the

Subcommittee on Courts, Intellectual Property and the Internet

Committee on the Judiciary

United States House of Representatives

113th Congress, 2d Session

January 14, 2014

Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee on Courts, Intellectual Property and the Internet (the "Subcommittee"), Broadcast Music, Inc.("BMI") hereby submits this written statement for insertion in the record for today's hearing on "The Scope of Copyright Protection."

The scope of copyright protection is grounded in two pillars: the first constitutional and the second statutory. First, copyright protects original works of authorship for limited times in order to promote the progress of science and the useful arts. To achieve this goal, Congress is constitutionally authorized to enact copyright laws that secure for authors certain "exclusive" rights. Second, since 1789, Congress has exercised its lawmaking prerogatives by identifying the various exclusive rights. As noted in a recent report issued by the U.S. Department of Commerce, "[c]opyright law grants exclusive rights to authors in order to encourage the production of creative works, to the benefit of society as a whole."[1]

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[1] THE DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (hereafter "Green Paper"), at 5 (July 2013).

In a seminal lecture calling for copyright law reform for the 21st century, Register of Copyrights Maria Pallante identified the current state of exclusive rights as a "major issue."[2] In a later statement to this Subcommittee, Chairman Goodlatte welcomed the Register's comments and solicited the views of interested parties.[3] In fact, it was the first issue on which she shined light. BMI submits that the House of Representatives Committee on the Judiciary (the "Committee") would benefit from a hard look at exclusive rights, particularly problems that have arisen about the public performing right.

I. Description of BMI

America's copyright laws provide a firm legal foundation to support a vibrant community of creative songwriters, composers and music publishers whose works fuel a robust entertainment industry. BMI is a performing rights organization that offers an easy and friction-free solution for clearing the public performing rights to more than 8.5 million musical works: the mechanism of a traditional blanket license (and in some cases, other forms of the blanket license that provide crediting of otherwise directly-licensed BMI music) for one modest annual license fee.[4] BMI's traditional role has been to license on a non-exclusive basis one of the six exclusive copyright rights identified by Congress in the U.S. Copyright Act: the right to publicly perform musical works. Public performances of musical works occur on radio, television, cable,

[2] Maria A. Pallante, *The Next Great Copyright Act*, 36 COL. J. OF LAW & ARTS 315, 324 (2013).

[3] *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the House Comm. on the Judiciary Subcomm. on Courts, Intellectual Property and the Internet*, 113th Cong., 1st Sess. (2013) (written statement for the Record of Hon. Bob Goodlatte).

[4] Significantly, the performing rights organizations enjoy statutory recognition in the Copyright Act. A "performing rights society" is defined as "an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101.

satellite and the Internet, as well as at concerts, sports venues, restaurants, hotels, retail stores and universities, to name a few of the many categories of BMI licensees. BMI licenses its music literally wherever music is performed to the public. BMI operates on a non-profit-making basis, distributing all income (less overhead and reasonable reserves) to its affiliated songwriters and publishers.

BMI is proud to represent the public performing rights of over 600,000 songwriters, composers and publishers, more than any other performing rights licensing organization. BMI's repertoire includes outstanding creators in every style and genre of music. This business model of blanket licensing has been endorsed by virtually all parties across the copyright licensing spectrum and, over the past three decades, has been adopted by Congress as a model for statutory licensing and applauded by the Registers of Copyright in several studies presented to Congress and the Committee. BMI also represents the works of thousands of foreign composers and songwriters from over 90 foreign performing rights societies when their works are publicly performed in the United States.

BMI's core competency is serving songwriters, their publishers and the businesses that use music. BMI is a trusted third party in licensing the public performing right of these musical creators to a broad range of businesses that incorporate music into their products or services. To be successful in this mission, we have developed an understanding of and appreciation for the business models and programming needs of more than 650,000 businesses across the nation that provide our creators' music to the public. This has been a win-win success story for all interested parties.

II. The Scope of Copyright – The "Communication to the Public" Right and "Making Available" Right

The right of "communication to the public" recognized in the WIPO Copyright Treaty ("WCT") is analogous to the right of public performance in the U.S. Copyright Act. The communication to the public right specifically corresponds to the second section of the Copyright Act's definition of what it means to perform or display a work "publicly" insofar as it broadly includes transmissions to the public by wire or wireless means. The "making available" right is a subset of the WCT's right of communication to the public, and includes within its scope interactive, one-to-one transmissions commonly made by Internet and mobile services. The making available right also includes the "mere offering" to transmit, without the need to demonstrate that a transmission took place.[5]

BMI believes that the current U.S. public performing right includes the full scope of wired and wireless transmissions, as well as the full scope of interactivity. In this regard, it is worth underscoring the fact that no amendments to the U.S. public performing right were deemed necessary by Congress following ratification of the WCT.

Three recent developments should compel this Committee, and Congress, to consider clarifying explicitly that the concepts embodied in the "making available" right are applicable to public performances.

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[5] The making available right inheres in both the right of distribution and the right of communication to the public. *See* WIPO Copyright Treaty, Articles 6 and 8 (1996). The text of Article 8, Right of Communication to the Public, states as follows:

> Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works 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.

WIPO Copyright Treaty, Article 8 (1996) (emphasis supplied).

First, the Department of Commerce's recent Green Paper discusses the importance of the 1996 WIPO internet treaties and their introduction at the international level of an explicit "making available" right, noting that the right raises "challenges to the meaning of the public performing right."[6] Unfortunately, the Green Paper addresses the making available right as if it were separate and apart from the public performing right.[7] The Green Paper observes that some courts have considered the mere offering of works to be related only to the publication right, which is subsumed within the U.S. distribution to the public right. A number of commentators in recent years have also claimed that the making available right inheres only in the right of distribution in the U.S. and is not part of the right of public performance.[8]

BMI disagrees with these viewpoints and has filed comments on the Green Paper to this effect. BMI believes that Congress should confirm that the making available right inheres in the public performing right, and that the mere offering of performances for transmission is covered by the public performing right. Failing to recognize this right would unduly limit the public performing right in the digital environment in a manner that violates the WCT.

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[6] *See* Green Paper at 14-15, 19-20. The Green Paper is available at http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf (last visited, Jan. 2, 2014).

[7] *Id.* at 14.

[8] As an example of this, a bill recently introduced in the U.S. House of Representatives by Representative Mel Watt (former Ranking Member of this Subcommittee) directs the Copyright Office to study separately how the "making available" right applies to the distribution right under 106(3) and how the "communication to the public" right applies to the public performing right under 106(4). See H.R. 3219, 113th Cong., 1st Sess. (2013). However, after introduction of H.R. 3219, Representative Watt wrote a letter to the Register of Copyrights asking the Copyright Office to study the current state of the law in the United States. Letter from Hon. Melvin L. Watt to Register of Copyrights Maria Pallante (Dec. 19, 2013). Representative Watt enumerated three subjects for study:

> (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; and (3) the feasibility and necessity of amending U.S. law to strengthen or clarify our law in this area.

Second, two recent Second Circuit decisions have called into question the scope of the public performing right as it applies to certain kinds of interactive streaming transmissions that unquestionably would be considered making available under the WCT: the *Cartoon Network*[9] and *Aereo*[10] decisions. These decisions have opened up a large loophole in the U.S. public performing right. Together, these decisions have curtailed the public performing right dramatically by declaring that one-to-one transmissions of a copyrighted work from purportedly "personal copies" are to be considered private transmissions that are not covered by the public performing right, if the transmissions are made by commercial services that offer "private copying" services to members of the public. The technology-based loophole is at odds with the 1976 Copyright Act's philosophy of a broad performing right covering transmissions "by any device or process." This would not be the result in Europe (as confirmed by the recent *TVCatchup* decision by the European Court of Justice),[11] and is squarely in conflict with the "making available" aspect of the "communication to the public" right in the WCT.

Prior to the *Cartoon Network* case, the right of public performance was widely recognized to apply to one-to-one "on-demand" or interactive transmissions. Section 114 of the Copyright Act expressly states that interactive transmissions are subject to the exclusive public performance right of sound recording copyright owners. Additionally, performing rights organizations have long provided blanket licenses to publicly perform musical works to both "video on demand" services and interactive Internet services. It was only recently in the *Cartoon*

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[9] *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cartoon Network*").

[10] *See WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *reh'g denied*; *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013) (collectively, "*Aereo*"). On January 10, 2014, the U.S. Supreme Court granted a petition for a writ of certiorari filed by copyright owner media companies and broadcasters.

[11] *ITV Broadcasting, Ltd. v. TVCatchup Ltd.*, Case C 607/11 at par. 40 (ECJ Mar. 7, 2013).

Network case that a loophole in the public performing right was created for certain interactive transmissions.

In *Cartoon Network*, the Second Circuit panel debated whether Cablevision's remote DVR service was more like video "on demand" or more like a set top DVR, which is similar to the VCR tape recorders considered by the U.S. Supreme Court years ago in the *Sony-Betamax* time-shifting case. Because fair use and secondary liability arguments were not presented to the court in the *Cartoon Network* case by stipulation of the parties, the court based its finding of no liability for all the acts involved in remote DVR services on a novel, unsupported concept of private transmissions made from supposedly "personal, unique copies" to members of the public. And in the more recent *Aereo* decision involving both delayed and real time retransmissions of TV broadcasts, the Second Circuit panel concluded that it was constrained to follow the precedent established in *Cartoon Network* despite even more egregious facts. By contrast, two other district court decisions have also addressed the same technology as Aereo's, and found that the service was obliged to compensate creators for the public performing right.[12]

BMI disagrees with the Second Circuit's holdings in the *Cartoon Network* and *Aereo* cases, which have the effect of eroding the public performing right and the corresponding income of content creators while undermining concurrently the robust licensing environment for digital transmissions of public performances. In testimony before this Subcommittee, the Register opined that the "courts do not have sufficient direction."[13]

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[12] *See Fox Television Stations, Inc. v. BarryDriller Content System, PLC*, 915 F. Supp.2d 1138 (C.D. Cal. 2012), *appeal docketed sub nom, Fox Television Stations, Inc. v. Aereokiller, LLC*, Nos. 13-55156, 13-55157 (9th Cir. 2013); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. CV 13-758 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-7146 (D.C. Cir. 2013).

[13] *The Register's Call for Updates to U.S. Copyright Law*, *supra* note 3. Parenthetically, Register Pallante stated in her lecture that the "courts appear to be struggling with existing statutory language," citing *Cartoon Network* as an example." Pallante, *supra* note 2, at 322.

The *Aereo* decision underscores the concern raised by many commentators after *Cartoon Network* was handed down – namely, that the *Cartoon Network* decision could be misapplied by district courts to gut the Copyright Act and, in particular, the public performance right that is so crucial to authors and copyright owners alike.[14] These decisions essentially place the application of the Copyright Act's exclusive public performing right squarely in the hands of clever software engineers to configure or not configure a performance as "public." Judge Chin agreed in his dissenting opinion in *Aereo*, describing the Aereo system of retransmission of broadcasts by thousands of tiny antennas as a "sham" with no technologically sound reason for existing besides skirting the copyright law. These decisions are especially troubling as the future of commercial music content delivery lies with highly customized and individualized content streaming offered by cloud music services.

Many of these commercial services are already claiming to make "private" performances, in reliance on *Cartoon Network*. If these court decisions remain the law of the land, or are not cured by legislation, we face the potential for a growing range of uses of copyrighted content without compensation for its creators.[15]

In summary, the holdings in *Cartoon Network* and *Aereo* conflict with the "making available" aspect of the "communication to the public" right in the WCT. That is, these decisions effectively fail to afford the U.S. public performing right the full scope of wired and wireless transmissions and interactivity, which is inconsistent with the WCT "making available" right.

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[14] *See, e.g.*, 2 GOLDSTEIN ON COPYRIGHT § 7.7.2 (3rd ed. 2012).

[15] For example the word "public" could similarly be read out of the public display right, injuring photographers and graphic artists.

Third, a development related to the public performing right in the context of the making available right involves the Second Circuit's 2010 decision to exempt downloaded transmissions from the public performing right.[16] This decision was based on an incorrect, hyper-technical reading of the transmission clause of the public performing right definition that requires a transmission to be audible in real time, and has the effect of narrowing the scope of the public performing right in a way that arguably conflicts with the WCT concept of making available musical works by all wire and wireless means. As stated above, the public performing right is applicable to all transmissions of performances of works. This includes transmissions to members of the public by any device or process, regardless of the time or place chosen by them for the transmission.

As a policy matter, one may argue that sales of music by pure downloads such as purchases of sound recordings on iTunes are economic transactions that most resemble the type of sales and transfers of ownership traditionally covered by the distribution right, and that, as such, they should be exempt from incurring fees for the public performing right. In fact, these transmissions are licenses, not sales,[17] and the industry agrees that the first sale doctrine applicable to purchases has no applicability in this area. Any evaluation of the merits of an exemption of this nature based on the economics of these transactions should be something for Congress to determine after careful consideration of all the relevant facts. It is inappropriate for the court on summary judgment with little evidence to drastically curtail the public performing right for all downloaded transmissions through a technical truncation of the definition of public

[16] *U.S. v. ASCAP*, No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010).

[17] For example, on December 31, 2013, Warner Music Group submitted a settlement to a class action lawsuit, offering to pay artists for downloads and mastertones based on license rates rather than based on royalty rates. *See In Re: Warner Music Group Corp. Digital Downloads Litig.*, No. 3:12-cv-00559-RS (N.D. Cal. filed Feb. 2, 2012).

performance. There are at least ten billion plays of conditionally downloaded music each year, likely resulting from tens of millions of conditional download transmissions, which are commonly packaged on an undifferentiated subscription basis by digital music services together with "on demand" streams. At a minimum, these must be recognized to be what they are – public performance transmissions by subscription music services that compete with all manner of other digital music delivery services.[18] A number of other types of digital transmissions of audio and television programming may involve the making of intermediate copies – making thousands of copies during transmissions is the nature of what computer networks do, after all. Any hyper-technical rule that makes the public performing right hinge on audibility during transmissions, or on whether or not a technical copying takes place before the performance of the work reaches the consumer, is nothing but an open invitation for the development of more *Aereo*-style shams.

III. Conclusion

The U.S. Constitution is rooted in a fundamental principle that authors should be incentivized to create. The Constitution authorizes Congress to enact laws to encourage the production of creative works by permitting creators to exploit exclusive rights in the marketplace. Performing rights organizations are key players, as they present, on behalf of authors, efficient marketplace licensing solutions that deliver performing rights to users and performing right royalties back to songwriters and publishers. Music always starts with a song, and without songwriters, there would be no music. The Committee should correct via legislation the misinterpretations of the public performing right in recent court decisions by clarifying that all interactive, on-demand transmissions to the public are public performances.

[18] The regulations under Section 115 of the Copyright Act refer to these as Limited Downloads. *See* 37 CFR Section 385.11 (2012).

Mr. Chairman, and Members of the Subcommittee, we commend you for your long-standing leadership on copyright issues and thank you for the opportunity to submit this statement in to the record for this important hearing on the scope of copyright.

Respectfully submitted,

BROADCAST MUSIC, INC.

Stuart Rosen
Senior Vice President & General Counsel
Joseph J. DiMona
Vice President, Legal Affairs
Broadcast Music, Inc.
7 World Trade Center
220 Greenwich Street
New York, NY 10007
212-220-3149 (Phone)
212-220-4447 (Fax)

Michael J. Remington
DRINKER BIDDLE & REATH LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005
202-842-8839 (Phone)
202-842-8465 (Fax)
michael.remington@dbr.com
Counsel for Broadcast Music, Inc.

Computer & Communications Industry Association
Tech Advocacy Since 1972

Before the

United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Regarding

"The Scope of Copyright Protection"

January 14, 2014

Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than $250 billion in annual revenues.[1]

The scope of copyright protection is an issue that regulates vast parts of the U.S. economy – industries and individuals that benefit from protection, as well as industries and individuals who depend upon copyright exceptions to engage in commerce and protected speech. The broad contours of this question are worthy of the Committee's attention. Given the narrower focus of witness testimony at this time, this statement addresses only the specific issues of a right to 'make available' and the WIPO Broadcast Treaty. CCIA requests that this statement be included in the record of this hearing.

I. The Broadcast Treaty

The proposed World Intellectual Property Organization Treaty on the Protection of Broadcasting Organizations, conventionally referred to as the "WIPO Broadcast Treaty," has been pending before the WIPO Standing Committee on Copyright and Related Rights (SCCR)

[1] A complete list of CCIA members is available at http://www.ccianet.org/members.

for roughly a decade. Although some WIPO members initially favored a broad new system of neighboring rights, WIPO has more recently agreed to a signal-based approach for the instrument, acknowledging the risk of rights gridlock or licensing complexities that could result from new rights. The move away from the proposal to create a broad, 50-year long, *sui generis* intellectual property right in signals was prudent. A "neighboring right" with a long, post-fixation term inspired considerable controversy and concern regarding overlapping entitlements and exacerbated rights gridlock. While new rights confer benefits, they also impose substantial costs, and one of the last international exercises in new rights creation — the EU Database Directive — is regarded by many as a failure. Absent empirical study the net effect of new rights is unclear at best.[2]

CCIA has long expressed the view that it is unclear whether such a treaty is necessary. Treaty proponents have yet to articulate problems that the treaty would solve which cannot be remedied with existing copyrights — with the possible exception of real-time sporting events for which no protection is available. However, even in this case, copyright claims have successfully been made with respect to replays, logos, and on-screen graphics.

Further study of new neighboring rights should analyze whether new rights would (a) inadvertently create new liabilities for innocent third parties such as Internet service providers and intermediaries, device manufacturers, and software developers, and/or (b) empower broadcasters to control and restrict the private use of signals by lawful recipients. In any event, no instrument should extend beyond the intentional misappropriation of signals, nor should it apply to post-fixation transmissions, since such transmissions would already be regulated by the existing scheme of international copyright protection. To the extent any protection is provided, that protection should be subject to mandatory limitations and exceptions which ensure that actions lawful under copyright law are not rendered unlawful by the new broadcaster protection.

CCIA will continue participating in the ongoing stakeholder dialogue on this issue in Washington and Geneva.

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[2] *See generally* Nat'l Academics of Science, *Copyright in the Digital Era: Building Evidence for Policy* (2013), at 8 ("Although copyright law's efficacy and contours are amenable to empirical inquiry, systematically collected evidence using transparent analytical methods has not often been brought to bear").

II. Making Available Right

The United States has long taken the position[3] that U.S. copyright law is in compliance with its international obligation[4] to have a "making available" right because of the combination of several of the existing 17 U.S.C. §106 rights: the reproduction right (106(1)) and the performance right (106(3)). Expanding the scope of U.S. copyright law by modifying § 106 is thus unnecessary. To the extent that a particular act ought to violate an author's exclusive rights, but involves no volitional act transgressing Section 106(1) or 106(3), courts may, in appropriate cases, penalize defendants by resorting to theories of secondary liability.

While it is commonly understood that copyright is a strict liability statute, wherein even unintentional acts can give rise to liability, a *volitional act* is nevertheless necessary. A party cannot incur direct liability in circumstances wherein it took no action. In certain specific cases, a party may be held secondarily responsible for the acts of another, however. The line dividing these two cases is drawn by the requirement of a volitional act. In the online context, a system or service provider cannot be directly liable for infringement unless the service's volitional acts caused the infringement. In cases where a service was involved, but the infringement resulted from the volitional acts of the user, the service may be liable only in cases where court-made secondary liability doctrines apply (and, under U.S. law, when the safe harbors of the Digital Millennium Copyright Act do not apply).

Accordingly, in the absence of a volitional act by the party "making available," the "making available" right should be construed as a secondary liability violation of the author's right, rather than as a direct violation of the distribution right or a new exclusive right encompassing "attempted distribution."[5] Construing the distribution right in this manner — to include not only distribution, but also "attempted distribution" — would be inconsistent with the

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[3] *See, e.g.*, U.S. submission to World Trade Organization (WTO) Trade Policy Review Body in Response to Questions from Japan regarding Copyright Issues, WT/TPR/M/88/Add.1 at 121 (Jan. 8, 2002) (stating that "making available" right is provided under existing U.S. copyright law); *accord* U.S. submission to WTO Trade Policy Review Body in Response to Questions from Chile, WT/TPR/M/126/Add.3, Chile #4 at 140 (Nov. 22, 2004).

[4] The "making available" right is derived from the WIPO Copyright Treaty, Art. 8 (1996) and the WIPO Performances and Phonograms Treaty, Art. 14 (1996). It is also found in Free Trade Agreements, such as the U.S.-Australia FTA, Art. 17.5 (2004).

[5] When Congress has previously intended *offers* to constitute direct violations of a right in the Copyright Act, it has done so explicitly. *See, e.g.*, 17 U.S.C. § 901(a)(4) (defining "distribute" to include "to sell" *and* "to offer to sell" or otherwise transfer).

statute and would impose substantial risks on online services, in a manner inconsistent with the DMCA liability limitations enacted by Congress in 1998.

Because passive "making available" does not involve a volitional act, imposing such liability would conflict with precedent on direct liability in several circuits. The volitional act requirement has been highlighted on numerous occasions, first in *Religious Tech. Center v. Netcom On-line Comm.*, 907 F. Supp. 1361 (N.D. Cal. 1995), and later adopted by in cases including *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), and *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). In *Netcom*, a case Congress explicitly endorsed when enacted the DMCA, the court explained that "[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." *Netcom* at 1370. *CoStar* endorsed this, "conclud[ing] that *Netcom* made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct — specifically, the act constituting infringement — to become a direct infringer." *CoStar* at 551. *Cablevision* similarly endorsed this requirement. "In determining who actually 'makes' a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct." *Cablevision* at 131-32. To the extent courts have held otherwise, *see, e.g., Hotaling v. Church of Latter-Day Saints*, 118 F. 3d 199 (4th Cir. 1997), those cases should be understood as limited to their facts, or overturned by subsequent holdings such as *CoStar* and *Cablevision*.

There are sound policy reasons to construe making available in a narrow manner. The potential for abusive litigation on the basis of a "making available" right is far greater than under the existing contours of Section 106. Copyright trolls already bring extortion-like suits against individuals on the basis of infringement allegations — in one case manufacturing an elaborate scheme which, in the words of one federal judge, "outmaneuvered the legal system." *Ingenuity 13 LLC v. John Doe*, Dkt. No. 12-8333, 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013). In a number of cases identified with a firm known as Prenda, several attorneys formed Ingenuity 13 and several other offshore entities, which held the copyrights to several pornographic movies and no other assets. These shell entities brought suit against individuals, threatened to make public the fact of litigation, and obtained millions in copyright infringement settlements due to the

sensitive subject matter and the availability of statutory damages, even though their claims were, in at least some cases, without merit.[6]

While incidents such as the Prenda matter demonstrate worrisome misuse of the copyright entitlement, their capacity for mischief is inherently limited by the fact that it is necessary to demonstrate, or at least allege, that some form of unauthorized access has occurred. A "making available" right would sweep away this hurdle, inviting litigation against individuals in cases where no one gained unauthorized access to a work. In fact, the potential for mischief could even extend to victims of cloud security breaches, who may unintentionally make lawfully acquired works available through no fault of their own.[7]

In sum, whatever conveniences might result from the capacity to state a claim on the mere basis of attempted distribution would be outweighed by the risk of mischief and litigation uncertainty. Because plaintiffs can adequately enforce their rights in "making available" contexts by employing existing theories of secondary liability, no reinterpretation or expansion of Section 106 is necessary.

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[6] Disciplinary proceedings resulted from various misdeeds by the principals of this scheme, including the underlying vexatious litigation, misrepresentations by counsel, failure to pay taxes on settlement income, and identity fraud related to the litigation. This trolling scheme ultimately led to multiple awards of attorneys' fees and sanctions. Joe Mullin, *Prenda hammered: Judge sends porn-trolling lawyers to criminal investigators*, ArsTechnica, May 6, 2013, *at* http://arstechnica.com/tech-policy/2013/05/prenda-hammered-judge-sends-porn-trolling-lawyers-to-criminal-investigators/; *see generally,* Ars Technica series, *Who's Behind Prenda Law?*, *available at* http://arstechnica.com/series/whos-behind-prenda-law/.

[7] *See, e.g.*, Ted Sampson, *Dropbox fiasco serves as reminder of cloud-storage insecurity*, InfoWorld, Aug. 2, 2012, *at* http://www.infoworld.com/t/cloud-security/dropbox-fiasco-serves-reminder-of-cloud-storage-insecurity-199197.

Testimony of

Future of Music Coalition

On
"The Scope of Copyright"
Hearing

House Subcommittee on the Courts, Intellectual Property and the Internet

January 14, 2014

House Subcommittee on the Courts,
Intellectual Property and the Internet
2138 Rayburn Office Building
Washington, DC 20515

September 18, 2013

Dear Chairman Goodlatte, subcommittee Chairmen Coble and Marino and members of the committee:

We are honored to submit the following testimony for the record in this hearing on the scope of copyright.

Future of Music Coalition (FMC) is 13 year-old national nonprofit education, research and advocacy organization for musicians. The bulk of our work over the years has concerned how musicians and composers reach audiences and are compensated. FMC understands that balancing access and remuneration can be a challenge—especially given the range of established and emerging stakeholders—but we are convinced that this balance is essential for musicians and other creators to flourish.

The advent of the global Internet has made striking this balance even more urgent. No longer is expression limited to the geographic region in which it was created—art and ideas can now be published across the world with the click of a mouse or a tap of a screen. Clearly, the scope of content distribution can facilitate new commercial opportunities, as well as new opportunities for freedom. But it also creates challenges. America's free market and speech traditions, often the envy of individuals abroad, are not always mirrored in the laws and norms of other nations. Therefore, we must be thoughtful when considering the scope of copyright and how our intellectual property agenda squares with our values when played out on an international stage. To demonstrate and maintain leadership in the 21st century, America must encourage respect for speech and creativity even while pursuing new avenues of enterprise. And more so, we must pay more than lip service to the needs of our own creators, by ensuring that copyright—in

both scope and application—serves the interests of those whose inspiration and creativity give it substance.

The current scope of copyright is informed by the historic development and ongoing influence of major media companies that own a tremendous number of works. These companies may perceive themselves at a disadvantage against today's successful technology concerns, but increasingly, the two sides share a common agenda: demonstrating consistent growth in a global marketplace. Monetizing content is a crucial component of this agenda. This is likely why Comcast now owns NBC/Universal, not to mention the ongoing role played by companies like Apple and Google in determining how works are accessed. Vertical integration of content, application and pipe may be a winning proposition for large corporations, but it doesn't necessarily spell success for individual creators. Congress has a responsibility to ensure that our copyright laws serve those whose expression powers the entire marketplace. To do so will require resisting the readymade narratives of a handful of corporations in order to hear and better understand the experiences of artists.

Being a music organization, FMC will keep these comments focused on those aspects we see as having a direct bearing on the musician and composer communities. Our observations around copyright and compensation are both quantitative and qualitative: FMC's ongoing research into artist revenue streams offers data-rich insights into how today's artists are earning a living;[1] our own efforts as artists, songwriters, label owners and producers—as well as the experiences of the many musicians, rightsholders and advocates with whom we work—also inform our views.

Putting Creators Front and Center

In earlier eras, bringing a work to the marketplace was a time and labor-intensive proposition that often came with considerable expense. The vast majority of creators had few, if any, opportunities to reach audiences due to these factors. Those who were lucky

[1] "Artist Revenue Streams | a Multi-method, Cross-genre Examination of How US Based Musicians and Composers Are Earning a Living." *Artist Revenue Streams*. N.p., n.d. Web. 13 Jan. 2014.

enough to attract the investment necessary to bring a work to the marketplace were typically required to enter deals with entities in a position to assist in manufacturing, distribution and promotion of a work. Such contracts were not always fair to creators; critiques of the historic inequities in the entertainment industries are comprehensive. Today's environment is less restrictive in terms of offering artists access to potential audiences, yet many of the structures that govern the marketplace—legal and otherwise—are vestiges of an earlier formula.

Given the sheer amount of entertainment options competing for our attention everyday, it would be lacking in judgment to say that creators no longer require any assistance in exploiting their work. However flawed the old system might have been, it did engender investment in the creation and dissemination of music. Investment is still important, even with lower barriers to entry and new options such as crowdfunding. With the changes to the creative landscape, Congress has even more of a duty to ensure that the Constitutional imperatives of copyright remain viable for creators and not just those who facilitate access to works or their commercial exploitation.

To be blunt, Article I, Section 8, Clause 8 of the United States Constitution[2] nowhere mentions rightsholders. It secures to *authors* (and inventors) limited-time exclusive rights. Therefore, it is well within the mandate of Congress to establish copyright laws that foremost serve authors, including musicians and composers. We understand the many complexities in doing so, and offer a few basic principles as guidance.

In 2009, FMC published its "Principles for Artist Compensation in New Business Models."[3] (We intend in the coming weeks to update this document to reflect current developments.) Our goal with the Artist Principles was to advance commonsense and implementable criteria by which a more equitable environment for musicians and composers could be established. At the time, some saw these principles as Pollyannaish,

[2] "Transcript of the Constitution of the United States - Official Text." *Transcript of the Constitution of the United States - Official Text*. N.p., n.d. Web. 12 Jan. 2014.
[3] "Future of Music Coalition." *Principles for Artist Compensation in New Business Models*. N.p., n.d. Web. 13 Jan. 2014.

but intervening years and a growing chorus of artist voices have reinforced our belief that we were on the right track. Among the principles advanced:

Equitable compensation

Musicians and composers should be guaranteed fair splits for the commercial exploitation of their work. An example of what we believe to be an artist-friendly compensation structure can in the digital public performance right for sound recordings, in which featured performers receive 45 percent of the royalty, with 50 percent going to the sound copyright owner and five percent to background musicians and singers.[4] In an environment where direct deals outside of the statutory license are increasingly common,[5] we believe that Congress has a responsibility to ensure that private marketplace deals do not disadvantage the creators of the work—in this case, performers. Such an arrangement may offend the delicate sensibilities of free market champions, but we believe that protecting the rights of creators to be compensated for the use of their work as a constitutional obligation, and one well within the authority of Congress to enforce. Congress may also consider extending this right to environments outside of a public performance context.

Transparency

Many business deals involving emerging digital business models are fundamentally lacking in transparency. This frustrates the ability of creators and artist advocates in understanding how compensation agreements are arrived at and makes it next-to-impossible to push for more equitable terms. The prevalence of non-disclosure agreements (NDAs) creates unease among stakeholders and may ultimately inhibit the growth of the legitimate digital marketplace. While non-disclosure agreements can certainly be rationalized as necessary to the interests of competing corporations, serious problems arise when creators are kept in the dark. A lack of transparency can be corrosive to trust and participation at a time when these virtues are in short supply. Going

[4] "Future of Music Coalition." *Public Performance Right for Sound Recordings*. N.p., n.d. Web. 13 Jan. 2014.
[5] Rae, Casey. "Guest Opinion: Clear Channel/Big Machine Deal Is Step In Right Direction, But Not Far Enough, by Future of Music's Casey Rae." *Billboard*. N.p., 26 July 2012. Web. 13 Jan. 2014.

further, there is a persistent problem with non-attributable income in music industry deals. From damages awarded in filesharing litigation to bundling deals and equity partnerships, there is an appalling lack of clarity regarding artists' economic benefit (or lack thereof). Royalty distribution calculations based on market share reward only the largest corporate players, while "black boxes" remain an ongoing impediment to compensation in an era where informational efficiencies should make it easier to pay and get paid. Congress should do everything in its power to encourage stakeholders to work together to make transparency a common virtue and help align incentives so that participants can recognize the benefits of accuracy and accountability.

Direct compensation

Where possible, revenue owed to artists for any use of their work on digital platforms should go directly to the artist. Without direct payment, all the revenue generated by these new models will be delivered to the labels (and/or publishers) for dissemination to the artists in the form of royalties. However, history has demonstrated that labels' accounting practices are not always to be trusted. We understand that recoupment is important to companies investing up-front capital in a work. Yet it is certainly possible to construct agreements for more limited times than the 35-year term of transfer established by Congress in the 1976 Act. Even without altering the statutory term of grant transfer (or, in the case of the major labels, even recognizing its validity), parties could enter an agreement in which revenue goes to a label for a set period of time (say, 3-5 years), after which the artists' share (let's say 50 percent) is paid directly to the artist until the time of eligibility for filing to reclaim full rights to the work.

There are other issues with a direct bearing on artists, including leverage and representation. It is entirely common for negotiations about creator compensation on emerging platforms to occur without any input from artists. In other instances, artists have proxies, such as performing rights organizations (PROs), or for superstar artists, lawyers and management. Still, huge swaths of artists and songwriters—especially those not affiliated with labels or publishers—have zero representation in these negotiations. Congress should consider these issues closely to determine how (or whether) the diverse

array of creators protected by copyright are currently being served by the companies and organizations involved in setting the terms for today's marketplace.

The Importance of Accessible Communications Networks and Cultural Infrastructure

We now turn to the concept of access and innovation as a driver of creative expression and commercial opportunity. Individual artists and large media companies alike depend on technology to bring their work to the public. For musicians and composers, this means that they needn't solely rely on outside entities to create, distribute and promote their work. Of course, the lower barriers to entry also mean more competition, and the inherently promiscuous nature of networked technologies pose challenges to the protection of rights. Still, it is clear that in 2014, the Internet—both wireline and mobile—remains the most powerful tool an artist has to reach potential audiences.

It may seem that we've solved the problem of access for creators, but this critical resource is hardly evenly distributed. At the time the National Broadband Plan was published in 2010, around 100 million Americans lacked access to broadband Internet in their homes.[6] Where broadband Internet is available, users often have only one or two choices in providers. Prices remain high for wireline Internet service, and just a few companies control the rapidly growing mobile space. An absence of competition may be a factor in escalating consumer costs as well as the lack of incentive to build out to more communities. It also may encourage telecommunications carriers to enter preferred partnerships with well-capitalized media companies who can afford to pay for premium access to subscribers. This would not only hinder innovations useful to creative entrepreneurs, but would also frustrate independent artists who increasingly depend on a level online playing field. While there are currently rules in place to prevent discrimination by wireline Internet Service Providers (ISPs), there are few protections extended to mobile.

[6] "The National Broadband Plan." - *Broadband.gov*. N.p., n.d. Web. 14 Jan. 2014.

Telecommunications companies are poised to take advantage of these loopholes. AT&T recently announced a "sponsored data" scheme in which the company would not charge its subscribers for data overages engendered through the use of the services and applications of its preferred partners.[7] While such activity may be permissible even under current rules for wireline, it illustrates how competition and clear rules of the road are necessary to creators and other innovators. If ISPs are allowed to pick winners and losers among applications and services, creators might find themselves locked into structures that don't play to their economic advantage, thereby frustrating a key incentive of our copyright regime.

At first blush, access and innovation may not seem germane to discussions about the scope of copyright, but given the interconnected nature of our communications platforms and the role they play in expression and entrepreneurship, there is every reason for Congress to consider issues of broadband competition and openness in its ongoing review. Likewise, given debates about the scope and intent of international trade agreements around intellectual property, it is crucial that the need for meaningful protections not interfere with our commitments to free speech and democratic participation.

Demonstrating Global Leadership

We recognize these discussions about the scope of copyright are taking place with an eye towards harmonizing international standards for intellectual property protections. Judging from the intensity of the public response to legislative proposals such as the Stop Online Piracy Act, passions can run hot regarding international copyright issues. We feel that it is the wrong takeaway for Congress to assume that it has no business in helping to shape American approaches to global IP enforcement. To us, the SOPA blowback is a lesson in transparency and a more inclusive process, not a condemnation of Congress' role in

[7] Weinberg, Michael. *The Daily Beast*. Newsweek/Daily Beast, n.d. Web. 14 Jan. 2014.

establishing mechanisms for protection. We feel similarly about international negotiations such as the Trans-Pacific Partnership, which has come under criticisms for a lack of transparency, among other things. As we asserted alongside other public interest groups in a 2009 letter to President Obama regarding the Anti-Counterfeiting Trade Agreement,[8] the lack of disclosure about terms under negotiation can set a troubling precedent, especially for those countries without strong democratic, speech and open marketplace traditions. Congress can and should play a role in clarifying America's intent with regard to global intellectual property standards and work to ensure that those negotiating on America's behalf understand the importance of a balanced and thoughtful copyright regime at home and abroad.

Conclusion

The scope of copyright is a topic that is too vast for any one hearing or testimony to cover. We sincerely hope that the subcommittee continues to move forward with its review while keeping track of the many varied perspectives of the stakeholders it calls forward, especially those of the creators whose expression forms the basis of our constitutional rationale for copyright. We appreciate the opportunity to submit this testimony and look forward to engaging in future discussions about these important matters.

Casey Rae
Interim Executive Director
Future of Music Coalition

[8] "Group Letter to President Obama Expressing Concern Over Lack of Transparency and Openness Surrounding Negotiations of ACTA | Public Knowledge." *Group Letter to President Obama Expressing Concern Over Lack of Transparency and Openness Surrounding Negotiations of ACTA | Public Knowledge*. N.p., n.d. Web. 13 Jan. 2014.

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COURTS, INELLECTUAL PROPERTY AND THE INTERNET

HEARING ON THE BROADCAST RIGHT, THE MAKING AVAILABLE RIGHT, AND STATE LAWS AND BUILDING CODES UNDER COPYRIGHT

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. In this statement, LCA first expresses its opposition to the adoption of a broadcast right. It then explains its concerns about the impact of the adoption of a making available right on the statute of limitations in copyright cases. Finally, LCA articulates its opposition to copyright protection for state laws and building codes. LCA requests that this statement be included in the record of this hearing.

I. A Broadcast Right

LCA has closely followed the discussion of a broadcast treaty in the World Intellectual Property Organization. Just as LCA sees no compelling public policy reason for the broadcast treaty, so too it sees no evidence of harm suffered by broadcasters sufficient to justify the establishment of a broadcast right in the United States.

A broadcast right could have an adverse impact on libraries in the United States. U.S. libraries make limited but not insignificant uses of broadcast materials, consistent with exceptions and limitations in the Copyright Act. A broadcast right could jeopardize these uses.

Libraries would be especially concerned about the impact upon:

- Classroom instruction by a non-profit educational institution, including some limited performance or display for distance education. Congress adopted the TEACH Act, 17 U.S.C. § 110(2), to allow educational institutions to take advantage of technology to teach through distance learning classes, yet the retransmission of broadcast content over the Internet even by qualified institutions for mediated instruction could be hampered by a broadcast right. For example, in a distance education health policy class, the instructor might want to transmit a short news segment concerning the Affordable Care Act.
- Educational and research uses permitted by the Copyright Act. For example, research concerning media depiction of the war in Iraq would include the study not only of news broadcasts, but also late night monologues, talk shows, and dramas that reference the war. Scholarly research on entertainment programming is an important component of research on the evolving culture and customs of our society. In addition, research integrity requires the ability to transmit content to media scholars in multiple locations for parallel and independent analysis.
- Public discourse involving news, public affairs programs, and public domain materials. The Internet allows an unprecedented level of public engagement in political and cultural discourse through blogs, social media platforms such as

Facbook and Twitter, and video-sharing sites such as YouTube. Much of this discourse involves the use of clips of broadcast material. Such uses are now permitted under the fair use doctrine. A broadcast right could interfere with these activities.

II. A Making Available Right

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

In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), and just last month in *Diversey v. Schmidly*, 2013 WL 6727517 C.A. 10 (D. N.M. Mar. 1, 2013), courts distorted the plain meaning of the distribution right for the purpose of circumventing the three year limitation period. In both cases, an unauthorized copy was made and included in a library's collection. In both cases, the complaint was filed more than three years after the making of the infringing copy. In both cases, no one ever borrowed the infringing copy. Nonetheless, in both cases the courts found that the library had infringed the distribution right within the three-year limitation period by "making 'the work available to the borrowing or browsing public.'" *Diversey*, *4, n.7, *quoting Hotaling*, 118 F.3d at 203. Because "a patron could 'visit the library and use the work,'" *Diversey*, *4, n. 7, *quoting Hotaling*, 118 F.3d at 203, the court found that the distribution right had been infringed, even though no patron had actually used the work. For these

courts, "the essence of distribution in the library lending context is the work's availability 'to the borrowing or browsing public.'" *Diversey*, *5, quoting *Hotaling*, 118 F.3d at 203.

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

This is a potential danger of a making available right. A work could be posted somewhere on the vast Web, and never be downloaded. Software employed by a rights-holder's agent could discover this obscure copy more than three years later, and at that point the person who uploaded or hosted the content could be liable for significant statutory damages for infringing the making available right. Although much of the litigation involving the concept of making available has involved the file sharing of popular music, a making available right would ensnare the wide range of works covered by copyright. The example above could involve an image included in a PowerPoint presentation that was archived on the website of a library association after the presentation was delivered. The image could be detected more than three years later by a company that crawls the web for an image-licensing firm such as Getty or Corbis. If the image had not been downloaded by anyone other than the licensing firm's agent within the previous three years, why should the copyright law allow the licensing firm to collect statutory damages simply merely because the image *could* have been downloaded? There

is no policy justification for imposing strict liability for statutory damages simply because the potential existed during the three year limitation period for a person to have viewed the image, just as there is no policy justification for a library to be liable for infringing the distribution right with respect to a copy that was never borrowed.

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

III. State Laws And Building Codes Under Copyright

The Fifth Circuit correctly found in *Veeck v. Southern Building Code Congress*, 293 F.3d 791, 796 (5th Cir. 2002), "a continuous understanding that 'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright." The fundamental policy underlying this legal conclusion is that citizens must have free access to the laws that bind them. *Id.* at 795. This fundamental policy is more compelling now than ever before. Government at all levels continually increases its regulation of the activities of citizens both at work and at home. Moreover, the Internet and other forms of technology, by integrating activities conducted at home with the outside world, are increasing the likelihood that private actions will be subject to legal rules governing the public sphere. Because their activities are more likely to be subject to regulation, citizens have a greater need to have easy access to the laws so that they can better understand their expanding legal obligations.

In the past, commercial publishers often had exclusive agreements with governments to publish judicial opinions and statutes, and the publishers initiated copyright actions against anyone who copied these materials without their authorization.

Some courts found that the publishers had valid copyrights in the page numbers of the reporters. In recent years, however, many courts and other governmental bodies have embraced the Internet and made judicial opinions, regulations, and other government information publicly available on websites. Unfortunately, many courts have not placed older opinions on their websites, although these opinions are part of the law that "bind[s] every citizen." These older opinions are available only from commercial publishers who have continued to limit public access, either by litigating aggressively against lower cost providers, or by refusing to license electronic copies to public libraries.

Moreover, commercial publishers have actively attempted to prevent government bodies from publishing legal materials and other government information on the Internet. They have lobbied both Congress and state legislatures to forbid government agencies from posting government information because the publishers believe that this posting might diminish their market. We do not know why the towns of Anna and Savoy, Texas, whose building codes were the subject of the litigation in *Veeck*, did not make their building code publicly available -- whether they did not have resources and sophistication to maintain a web-site, or whether the Southern Building Code Congress (SBCC) pressured them not to post the codes. Either way, the root of this dispute is the towns' failure to perform what we perceive as a basic government function in the twenty-first century: providing citizens with free access to the laws. Fortunately in that case, Peter Veeck stepped into the breach and published the building codes himself. In our view, Veeck performed a valuable public service.

SBCC claimed that the codes are its intellectual property. To be sure, SBCC could have demanded a license fee from Anna and Savoy when those towns adopted the SBCC

code as their building code. But SBCC did not request a license fee; to the contrary, it urged Anna and Savoy, as it has urged many other jurisdictions, to adopt the code. SBCC made a gift of the code to Anna and Savoy and, by enacting it, Anna and Savoy converted the code into the unprotectable "fact" of their law.

SBCC and its supporters argued that, if other publishers can copy their code, standards organizations will lose their incentive to develop standards and model laws. We endorse the Fifth Circuit's rebuttal to this argument. The Fifth Circuit quoted Professor Paul Goldstein's statement that:

> it is difficult to imagine an area of creative endeavor in which copyright incentive is less needed. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.

293 F.3d at 806 (*quoting* 1 Goldstein § 2.5.2, at 2:51). The private sector spends literally billions of dollars each year lobbying legislative bodies. The notion that industry groups would stop drafting model laws that benefit them if they did not receive copyright revenues is, frankly, absurd. Certain groups might have to change their business models, but at the end of the day the private sector will find a way to fund model law drafting activities because they simply are too important to the affected industries.

Moreover, the Fifth Circuit pointed out that SBCC and other organizations could continue to derive revenue by bundling the codes with value-added products, such as a commentary or lists of adopting jurisdictions. In fact, placing the building code in the public domain provides SBCC with an incentive to create such value-added products.

Finally, the Fifth Circuit drew several important distinctions that limit the impact of the decision. First, the Fifth Circuit distinguished between republication of the SBCC

model code as such and republication of the Anna and Savoy building codes. Second, the Fifth Circuit differentiated model codes from more general industry standards or fact works drafted with no intent of enactment. Third, the court distinguished between model codes adopted as laws and extrinsic standards referred to by laws. These distinctions mean that the *Veeck* decision stands only for the proposition that the reproduction of an enacted model code is not a copyright infringement so long as the reproduction purports to be of the law and not the model code.

We believe that the Fifth Circuit reached the right result in *Veeck*, and the subcommittee should not disturb it. More broadly, the subcommittee should not overturn *Veeck*'s holding that "'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright."

January 8, 2014

Testimony of
Sherwin Siy, Vice President, Legal Affairs
and
John Bergmayer, Senior Staff Attorney
Public Knowledge

Before the
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing On:
"The Scope of Copyright Protection"

Washington, DC
January 14, 2014

Testimony of
Sherwin Siy, Vice President, Legal Affairs
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Before the
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Hearing on: "The Scope of Copyright Protection"

January 14, 2014

Chairmen Coble and Goodlatte, Ranking Member Conyers, and members of the Subcommittee, thank you for the opportunity to submit this statement for the record. The contours of copyright's scope of protection must be judiciously drawn; otherwise, we risk serious curbs on freedom of speech, civic engagement, and the free flow of information. Our statement focuses on three topics: first, the consequences of a potential broadcasting right; second, the effects of a making available right; and third, whether the scope of the existing section 106 rights could be improved with a focus on their effects on the public.

1. Creating Separate Copyrights for Broadcast Signals Can Harm the Public Interest, Copyright Holders, and Conflict with Existing Law

The World Intellectual Property Organization (WIPO) has spent many years working on a proposed treaty intended to help broadcasters combat piracy of their signals. However, to date, proponents of the treaty have not shown that existing copyright law is inadequate to protect their rights. Actual signal piracy is copyright infringement, and existing legal processes should be enough to protect any legitimate interests. To the extent that they are not, this demonstrates a broader issue with the enforcement of rights, particularly in an international context.

In addition to being unnecessary, some treaty proposals have been harmful, not just to the interests of the public, but to existing rightsholders. Earlier proposals would have given broadcasters rights to the underlying programming they broadcast, merely by virtue of their having broadcast it. This family of proposals would add an additional layer of rights on top of existing copyrights, or even on public domain material, and it would add considerable uncertainty to the use of programming. For instance, even the owner of the copyright in a program might infringe a "broadcast right" if it records a telecast of its own programming and makes use of it.

Thankfully, in recent years treaty proponents have backed away from this approach and moved toward a narrower, "signal-based" approach--though some proposed language would still give broadcasters the right to control the recording and other use of programming they broadcast, and not just protection against real-time signal piracy. In light of this, it remains important for policymakers and stakeholders to be vigilant against the creation of new, quasi-copyrights that would benefit intermediaries rather than creators.

The "rights layering" problem is not the only potential problem with a broadcast treaty. A treaty could also pose problems for US policymakers and be inconsistent with US law in other areas. For example, the carriage and retransmission of broadcast signals by cable and satellite TV systems in the US is governed by statute and FCC regulation. While television broadcasters must give their consent to be carried on cable systems, Congress directs the FCC to "govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). A treaty could therefore be inconsistent with existing law. Additionally, it could prevent legal reform. Many stakeholders have argued that the current retransmission consent system should be overhauled, or even abolished. An additional international agreement could

create an obstacle to domestic telecommunications policy reforms.

The connection between the Broadcast Treaty and online antenna services like Aereo is also worthy of examination. Aereo has been found legal by a number of courts, but its case is still in active litigation. Regardless of the outcome of this legal controversy, a broadcast treaty would provide no benefit. If Aereo is ultimately held to be lawful, then any international agreement which holds otherwise would be inconsistent with US law. Attempting to implement the agreement would be highly disruptive. As a policy matter, altering existing U.S. law to outlaw Aereo and implement a treaty designed to benefit legacy over-the-air broadcasters are probably not a worthwhile expenditure of Congressional resources. Alternatively, if Aereo is ultimately held to be unlawful then there is no "problem" for the treaty to solve.

While a broadcast treaty is probably unnecessary, if the US continues to join discussions concerning one it should ensure that the treaty is limited to the real-time unlawful retransmission of broadcast signals to the public, that it does not go further than copyright law, that it is subject to all the same limitations and exceptions as copyright law (e.g., the fair use of home recording), and that it does not restrict the development of domestic telecommunications and intellectual property policies.

2. A "Making Available" Right Does Little to Curb Infringement While Creating Legal Uncertainties and Increasing Litigation Risks

Expanding the distribution right to include "making available," or, indeed, creating a new, more expansive "making available" right, would create a number of problems while offering few advantages to the current set of laws. Expanding existing rights puts a large number of innocent parties at risk for liability. This risk may come in the form of zealous rightsholders or

to copyright trolls—bad actors seeking to use frivolous litigation as a business model. Nor does the expansion offer a significantly improved tool against illegal filesharing. Illegal filesharing already requires the making of infringing reproductions, which are sufficient causes for successful suit.

Whether on a peer-to-peer filesharing service or in a more centralized online locker, infringing filesharing results in the creation of unauthorized reproductions. Infringing uploads cannot—and do not—escape liability merely for the lack of a making available right. Courts can also easily determine whether completed file transfers were likely or not, even if plaintiffs somehow neglect to collect firm evidence of a completed download. Moreover, altering the exclusive right to encompass making available would throw into question a number of areas of existing law, chilling legitimate uses and providing fodder for baseless lawsuits and litigation threats meant to induce unfair settlement agreements.

One problem with proposals to introduce a making available right is that they tend to be focused upon only one problem—peer-to-peer filesharing—and not the wider range of online uses that have emerged in the seven years or so since the p2p cases were being brought. For instance, cloud storage has become far more common over the past several years—an uncontroversial and commonly used tool that allows users to upload their files online, with varying levels of ability to make them available. Any email attachment to a webmail server thus becomes a potential distribution, even if a file is merely being sent from one of the user's accounts to another. Online document and media storage similarly involves interactions that, many years ago, were only considered in a freely-shared p2p environment. Defendants should not bear the burden of having to prove the absolute security of their Yahoo Mail, Google Drive,

or Amazon Cloud Player directories; a plaintiff should have to show that, more than simply using online services, a consumer was using them illegally.

Additionally, if distribution is made to encompass merely uploading a file, then even private lockers, accessible to no one but the owner of the original file, would create potential liability both for the consumer and the service. Currently, the delivery of a file is itself sufficient to constitute a distribution. If the act of uploading the file is also defined as an infringement, a court could easily see the uploading and downloading as constituting two separate distributions by two separate actors. Whereas before, a service provider would need to take additional culpable steps to be found secondarily liable, an expanded distribution definition could subject it to direct liability. Combined with the recent explosion in widely-used cloud storage services, an expanded right could do immense damage to this industry.

A standalone "making available" right would encompass a great deal more than merely distributing copies of copyrighted works, or even offering to distribute those copies. Read plainly, providing any sort of access to a work could be considered making it (or some sort of copy of it) "available." This expanded definition can result in legitimate, licensed services facing new liability for uncontroversial business activities. For instance, in *United States v. ASCAP*, 627 F.3d 64 (2d Cir. 2010)), rightsholders claimed that licensed online music retailers were implicating not just reproduction and distribution rights, but also public performance rights, in selling music downloads. Blurring the lines between what is currently distribution and what are currently the public performance and public display rights will likely invite new rounds of unnecessary litigation and expose good-faith actors to additional liability or licensing thickets. Furthermore, these existing public performance and public display rights can already easily be seen as forms of "making available."

Recent cases about the public performance right's scope also seem to indicate that creating a making available right will only compound legal uncertainty. Just this month, the Supreme Court agreed to address the definition of the public performance right in the Aereo case—a decision that could, by similarly redefining the scope of existing rights, significantly undermine the basis for the cloud computing industry, rendering many basic services copyright infringers.

Regardless of whether making available is proposed as a standalone right or as a broad interpretation of the distribution right, it creates new liabilities. If merely making a copy available for eventual distribution is sufficient to implicate a rightsholder's rights, then an act as simple as linking to a file can result in liability. Rather than determining whether the linker induced or contributed to an infringement, the law would then expose a whole new range of parties, including search engines, journalists, and social media users to liability for infringement even if they had the most innocent or even beneficial intentions.

The increased exposure to liability would not only cause legal uncertainty among good faith litigants; it would also invite the proliferation of copyright trolls. Like patent trolls, copyright trolls abuse the legal system by threatening large numbers of defendants with legal action based on spurious or frivolous allegations of infringement. By choosing targets who lack legal resources or sophistication, copyright trolls can profit by collecting settlement payments from victims who, regardless of their actual culpability, cannot afford the costs of litigation or even the smaller chance of a massive statutory damages award. The troll business model thrives on coupling widespread potential (or even plausible) liability with legal uncertainty. A making available right, which would both expand the scope of liability and blur its boundaries, would be a tempting addition to a troll's arsenal.

3. The Public Nature of the Section 106 Rights

A great deal of discussion around the making available right centers around the interpretation of the 1976 Act, including whether one interpretation or another fits with its intent to preserve the purpose of the rights delineated in the 1909 Act. Regardless of the particular language used in either of these, it seems necessary that the particular uses of works that the law reserves exclusively for copyright holders must be limited to those that have some market effect.

If the purpose of copyright law is to promote the creation and dissemination of new works by incentivizing authors, uses of the works that do not affect the authors' interests should not be relevant to the law. If the distribution of a work does not make it available to the public, it should not infringe an exclusive right of the copyright holder.

In fact, this principle, flowing from the basic copyright bargain, can be applied to all of the exclusive rights granted to authors by copyright. It is explicitly accounted for in the current Copyright Act's performance, display, and distribution rights—we do not consider private performances or private displays of copies of works to implicate the exclusive rights of authors; nor would a distribution that is not "to the public" be encompassed by section 106. It is only when displays, performances, and distributions reach the public that they start to interfere with the author's monopoly over those uses of the work.[1]

Applied to the other section 106 rights, a "public" precondition can actually help cleanly resolve a number of problematic fact patterns that arise under current law. Today, these fact

1 The fourth fair use factor—the effect of the use upon the potential market for the copyrighted work—is perhaps the clearest current instance of this concept in the statute. However, the fact-specific nature of fair use means that for a large number of non-public reproductions and preparations of derivative works, good faith users would not get the same benefit of the doubt that non-public performers, displayers, and distributors should.

patterns have to rely upon various exceptions and limitations in copyright law to address what should be a simple determination that addresses the needs of authors and the public.

For instance, a number of situations involve the reproduction of copyrighted works in circumstances that have no effect upon an author's economic or moral interests. An IT manager who makes hundreds of backup copies of a computer's contents should not be exposed to liability if a copyrighted work exists upon the original computer, so long as none of those copies makes its way outside of the backup system. Nor should this inquiry require a search through various patchwork limitations and exceptions (if the work is not a computer program, section 117 would not apply; if not housed within a library or archives, section 108 would not apply). Temporary reproductions of works that never pass to another person should not be prima facie infringements, especially since such reproductions are a daily, if not hourly, occurrence for any computer user.

Section 106(2)'s prohibition on the preparation of derivative works could similarly benefit from the application of a "to the public" component. Currently, the law could treat as infringements a number of legitimate uses. For instance, although publishing an annotated edition of another's work would compete with the market for the original, a reader annotating her own edition of a book should not fall under threat of liability. Similarly, without a distinction between public and personal uses, a child's art project collage faces the same sort of liability as a commercial enterprise that alters existing graphic works. Graphic designers, publishers, or sound editors can run afoul of the derivative works right even if they are merely using existing works in unfinished productions, either before clearance negotiations have been finalized, or to be replaced by another work in the only version that the public will see.

As technology makes it easier for rightsholders to learn about non-public reproductions and derivative works, chances increase that lawsuits might stifle legitimate uses in ways unanticipated when the 1976 Act was drafted. The increase in the visibility of uses makes it even more important that the law not impose liability for innocent uses, no matter how unlikely such litigation might have seemed 38 years ago.

As noted above, a number of discussions about exclusive copyright rights focus on what it means for uses of works to reach the public. Clearly that distinction matters a great deal; the current discussions on public distribution and the public performance right demonstrate that. Therefore, if the Committee is taking the step of considering the scope of the exclusive rights granted in the current Copyright Act, it should also consider applying a "to the public" limitation to the reproduction and preparation of derivative works rights as well.

Conclusion

Determining the metes and bounds of the exclusive rights granted to copyright holders is perhaps one of the most important aspects of framing a system of copyright laws. The current Act, in most cases, reaches an appropriate and time-tested balance in defining the scope of these rights, and any proposed alterations should be closely examined for unintended consequences and to ensure that they further the goal of progress in learning and innovation. Furthermore, the language used to describe these rights should, as best as possible, allow for the realities of today's uses and anticipate those of the future as well.

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