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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.

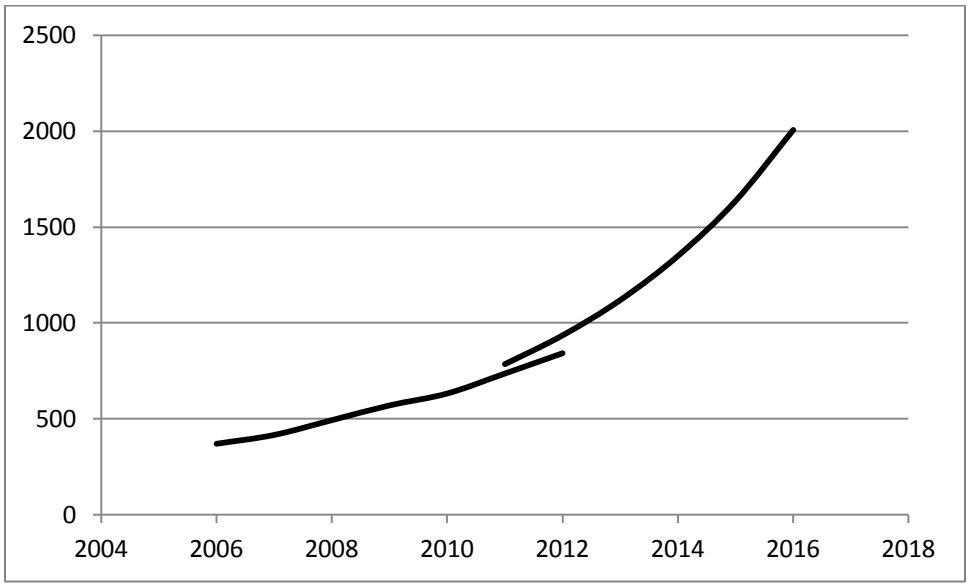
[18] U.S. CONST. ART. I, § 8, cl. 8.

[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

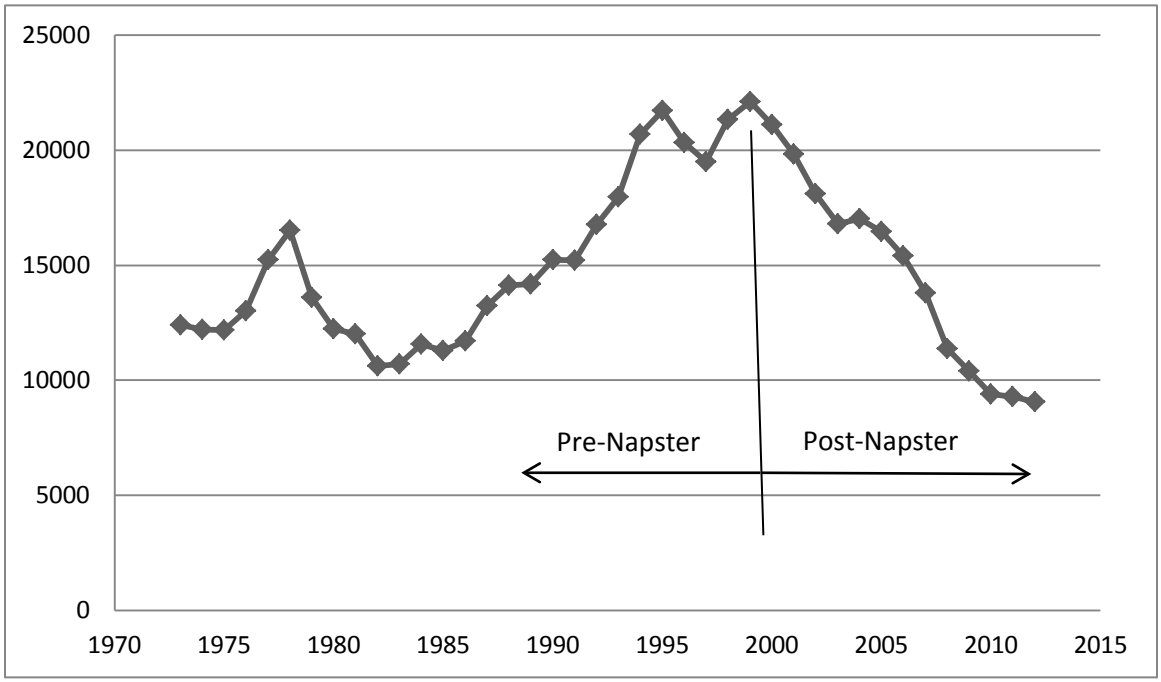
[21] CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2011-2016, at 9 (2012); CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2007-2012, at 4 (2008).

[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.

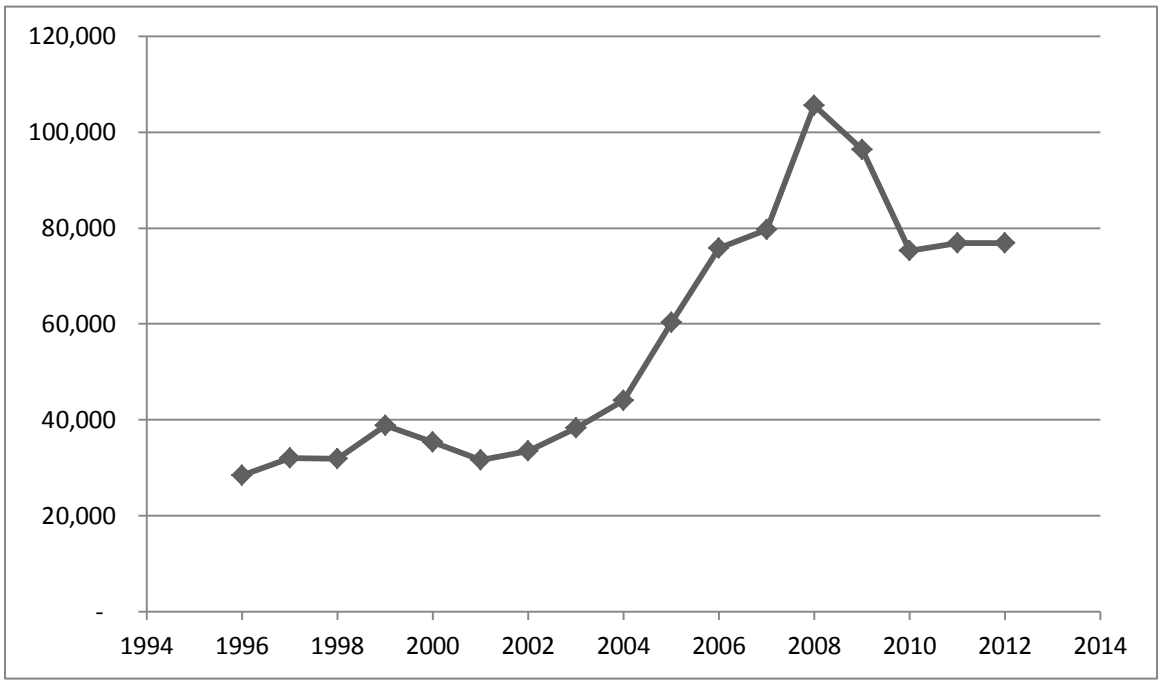
recorded music, and so may serve as a means for recapturing part of the revenue lost as a result of declining music sales.

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

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[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.