



**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL 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

Facebook 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