

# **In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age**

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## **ABSTRACT**

Prior to the emergence of peer-to-peer technology, the Copyright Act's distribution right was largely dormant. Most enforcement actions were premised upon violations of the reproduction right. The relatively few cases invoking the distribution right involved arcane scenarios. During the past several years, direct enforcement of the Copyright Act against file sharers has brought the scope of the distribution right to center stage. Whereas the 1909 Act expressly protected the rights to "publish" and "vend," the 1976 Act speaks of a right to "distribute." Interpreting "distribute" narrowly, some courts have held that copyright owners must prove that a sound recording placed in a peer-to-peer share folder was actually downloaded to establish violation of the distribution right. Other courts hold that merely making a sound recording available violates the distribution right. The ramifications for copyright enforcement in the Internet age are substantial. Under the narrow interpretation, the relative anonymity of peer-to-peer transmissions in combination with privacy concerns make enforcement costly and difficult. A broad interpretation exposes millions of peer-to-peer users to potentially crushing statutory damages.

Drawing upon the historical development of copyright law and the legislative history of the Copyright Act of 1976, this article explains why Congress selected the term "distribute" in its last omnibus revision of copyright law, shows unequivocally that Congress intended to encompass broadly the 1909 Act rights to "publish" and "vend" within the right to distribute, and rejects the position that Congress required proof of "actual distribution" to prove violation of the distribution right. This critical legislative history has been notably absent from treatise accounts and briefing on the liability standard in the file sharing cases, leaving courts without a compass to navigate this statutory terrain. This article traces the origins of the key legislative terms to elucidate the scope of the distribution right in the Internet age.

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## **In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age**

During the past decade, copyright law has gone through perhaps the most tumultuous period of its 300 year existence.<sup>1</sup> In the mid 1990s, the major content industries and emerging Internet companies set about planning a smooth transition to the digital age. The Digital Millennium Copyright Act's<sup>2</sup> grand compromise – providing Internet intermediaries limited safe harbors from liability in conjunction with an efficient notice-and-takedown procedure as well protection against circumvention of technical protection measures – was seen as the primary mechanism to expand online access to copyrighted works while curtailing unauthorized distribution.<sup>3</sup> But barely a year after the DMCA's passage, the release of Napster – the first widely distributed peer-to-peer file sharing protocol – thrust the music marketplace into turmoil. The genie of relatively anonymous, rampant, unauthorized distribution of sound recordings was out of the bottle. As society entered the Internet age, copyright law entered the digital enforcement age<sup>4</sup>: the past decade has tested the limits of copyright enforcement against online service providers, software vendors, and file sharers.

The introduction of Napster's peer-to-peer system barely eight months after passage of the DMCA immediately overtook Congress's efforts to update copyright for the "digital millennium." By mid 2000, less than a year after Napster's release, its user base had likely distributed more music than the entire record industry from its inception a century earlier.<sup>5</sup>

Although some saw file sharing as a way of increasing opportunities for musicians,<sup>6</sup> the effects on revenue proved devastating.<sup>7</sup> While the record industry eventually succeeded in shutting

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<sup>1</sup> The year 2010 marked the 300<sup>th</sup> anniversary of the Statute of Anne, the British precursor of the U.S. copyright law. See 8 Anne c. 19, 1710.

<sup>2</sup> See Pub. L. No. 105-304, § 404, 112 Stat. 2860 (1998) (hereinafter cited as ("DMCA")).

<sup>3</sup> See Robert P. Merges, Peter S. Menell, and Mark A. Lemley, *Intellectual Property in the New Technological Age* 672-81 (5<sup>th</sup> ed. 2010) (summarizing the DMCA's principal provisions).

<sup>4</sup> Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63, 63, 103-99 (2003).

<sup>5</sup> See Joseph Menn, *All the Rave* 161 (2003) (quoting a venture capitalist's back-of-the-envelope calculation: "You've distributed more music than the whole record industry since it came into existence").

<sup>6</sup> See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263 (2002) (suggesting that "[c]opyright is no longer needed to encourage distribution because consumers themselves build and fund the distribution channels for digital content").

<sup>7</sup> See Stan J. Liebowitz, *Filing Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & Econ. 1 (2006); Rafael Rob & Joel Waldfoegel, *Piracy on the High C's: Music*

down Napster's central server-based peer-to-peer network,<sup>8</sup> new decentralized peer-to-peer platforms quickly sprouted in its place.<sup>9</sup> The RIAA set its sites on this generation of peer-to-peer technologies in the *Grokster* litigation.<sup>10</sup> After Judge Stephen Wilson in the Central District of California ruled on summary judgment that Grokster could not be held liable for indirect infringement because its software was "capable of substantial non-infringing use,"<sup>11</sup> the RIAA decided that it had no choice but to pursue directly those using peer-to-peer software illegally for the first time.<sup>12</sup> In an effort to deter unauthorized distribution of its product, the record industry filed thousands of actions across the country beginning in 2003.<sup>13</sup> It was committed to seeing if a direct enforcement campaign could staunch the rampant unauthorized distribution of sound recordings through peer-to-peer channels. The campaign would eventually target more than 35,000 alleged file

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Downloading, Sales Displacement, and Social Welfare in a Sample of College Students, 49 J.L. & Econ. 29 (2006); International Federation of the Phonographic Industry, IFPI Digital Music Report 2010 7, 18-22 <<http://www.ifpi.org/content/library/DMR2010.pdf>> (reporting a 30% decline in total music sales from 2004-09; quoting Teemu-Brunila, former lead singer for The Crash: "One year the band played Valmiera, the biggest music festival in Latvia. We drove from the airport and heard our songs on the radio. We headlined the festival and the 10,000-strong crowd roared out our songs. When we came off stage I asked our label representative how many records we sold in Latvia. The answer was a slap in the face. 200."); Bono, Ten for the Next Ten, N.Y. Times Jan. 2, 2010 (observing that "[a] decade's worth of music file-sharing and swiping makes clear that the people it hurts are the creators").

<sup>8</sup> See John Borland and Cecily Barnes, Judge Issues Injunction Against Napster, CNet News (Jul. 26, 2000) <<http://news.cnet.com/2100-1023-243698.html>>

<sup>9</sup> See Menell, *supra* n. \_\_\_ at 150.

<sup>10</sup> See John Borland, File Swapping in the Legal Crosshairs, CNet News (Dec. 2, 2002) <[http://news.cnet.com/File-swapping-in-the-legal-crosshairs/2100-1027\\_3-975618.html](http://news.cnet.com/File-swapping-in-the-legal-crosshairs/2100-1027_3-975618.html)>

<sup>11</sup> See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029 (C.D.Cal. 2003).

<sup>12</sup> Although the Supreme Court would later reverse Judge Wilson's decision on the alternative ground that Grokster could be liable for inducing unauthorized reproduction of copyright works, See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), and Judge Wilson eventually found Grokster liable, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F.Supp.2d 966 (C.D.Cal. 2006), leading to its shutdown, by that point, other peer-to-peer file sharing operations were established, the prospects of proving inducement against these actors were less clear, and thousands of direct infringement actions were underway.

<sup>13</sup> See Amy Harmon, The Price of Music: The Overview: 261 Lawsuits Filed on Music Sharing, N.Y. Times, September 9, 2003, at A1.

sharers as defendants.<sup>14</sup> And although the record industry eventually reversed course and halted new direct enforcement actions,<sup>15</sup> it continued to prosecute those cases already in the pipeline. Furthermore, other copyright owners continue to pursue direct enforcement against file sharers.<sup>16</sup>

The overwhelming majority of the suits settled, with payments of \$3000 to \$5000,<sup>17</sup> but several defendants sought to defeat these lawsuits by arguing that it is not enough for the copyright owners to prove that a forensic investigator hired by the copyright owner had located one of its sound recordings in the defendant's share folder and downloaded the file. Rather, they maintained that the Copyright Act's distribution right cannot be established without proof that a third party – i.e., someone other than authorized forensic investigator – had actually downloaded the file from that defendant's share folder. Given the architecture of the Internet and privacy concerns, such proof would substantially raise the cost of pursuing such enforcement actions.

As Part I of this article explains, judicial construction of the distribution right is all over the map. The first district courts to address this issue, in the context of motions to dismiss, took a broad view of the distribution right, holding in essence that merely making a copyrighted work available without authorization violates the Copyright Act.<sup>18</sup> Later courts, faced with the prospect of jury trials in which individuals could be held liable for statutory damages of up to \$150,000 per work, took a more narrow view, instructing the jury that the copyright owner must prove actual distribution of the copyrighted works.<sup>19</sup> As Part II explores, legal scholarship has done little to resolve this controversy. Like the courts, commentators are scattered across the interpretive landscape.

Neither the courts nor commentators provide an adequate account of the origins and legislative rationale for choosing the term “distribute” in the 1976 Act. Parsing the voluminous

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<sup>14</sup> See Copy-wrong! Unpacking the \$1.92M Downloading Verdict WSJ Blog (Jun. 27 2009) (hereinafter cited as “Copy-wrong!”) <<http://blogs.wsj.com/law/2009/06/27/copy-wrong-unpacking-the-192m-downloading-verdict/>>

<sup>15</sup> See Sarah McBride and Ethan Smith, Music Industry to Abandon Mass Suits, Wall St. J. (Dec. 19, 2008) <<http://online.wsj.com/article/SB122966038836021137.html>>

<sup>16</sup> See Eriq Gardner, New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders (Mar. 30, 2010) <<http://thesq.hollywoodreporter.com/2010/03/new-litigation-campaign-targets-tens-of-thousands-of-bittorrent-users.html>>

<sup>17</sup> See Copy-wrong!, *supra* n. \_\_\_\_.

<sup>18</sup> See, e.g., Motown Record Co., LP v. DePietro, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); Warner Bros. Records, Inc. v. Payne, No. W-06-CA-051, 2006 WL 2844415, at \*4 (W.D. Tex. July 17, 2006); Universal City Studios Prods. LLP v. Bigwood, No. W-06-CA-051, 2006 WL 2844415 (W.D. Tex. July 17, 2006).

<sup>19</sup> See Capitol Records, Inc. v. Thomas, 579 F.Supp.2d 1210 (D.Minn. 2008); London-Sire Records, Inc. v. Doe 1, 542 F.Supp.2d 153 (D.Mass. 2008).

legislative history – spanning 21 years – that produced the Copyright Act of 1976, Part III reconstructs the foundation on which Congress built the distribution right. Drawing upon these materials, Part IV systematically interprets the distribution right using the tools of modern statutory interpretation. In so doing, it exposes the critical errors in the treatises, prior scholarship, briefing of the file sharing cases, and decisions of the courts that have considered this issue.

## I. The Distribution Right in the Courts

Prior to the emergence of peer-to-peer technology, the Copyright Act’s distribution right was largely dormant. Most enforcement actions were premised on violations of the reproduction right. The relatively few cases invoking the distribution right involved arcane scenarios. During the past several years, direct enforcement of the Copyright Act against file sharers has brought the scope of the distribution right to center stage. District courts throughout the United States have been called upon to determine whether placing a copyrighted work into a share folder accessible to a peer-to-peer network without authorization violates Section 106(3) of the Copyright Act: the copyright owner has “the exclusive right[] to do and to authorize \* \* \* the following: (3) to distribute copies or phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>20</sup>

The consequences of the interpretation of this right are substantial. Record companies brought thousands of copyright infringement suits against individuals – many in their formative years – alleging willful infringement of dozens of copyright works and requesting statutory damages. Based upon the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999,<sup>21</sup> the range of potentially recoverable statutory damages for each infringed work may extend up to \$150,000.<sup>22</sup> Thus, in a case alleging infringement of 30 works, the defendant could face potential exposure of \$4.5 million. Based upon the Supreme Court’s 1998 *Feltner* decision,<sup>23</sup> the judge could not rein in the award to a reasonable magnitude, as the amount of statutory damages is to be determined by a jury. This “perfect storm” has every prospect of discomfiting jurists hearing peer-to-peer cases.<sup>24</sup>

Perhaps not surprisingly, the courts have struggled mightily with the scope of the distribution right. As background for understanding this controversy, this Part begins by surveying the relatively few pre-file sharing distribution right cases. After scoping that terrain, it then turns to the file sharing cases, which roughly fall into two temporal and procedural categories. The early cases which arose in the context of default judgments and motions to dismiss; the more recent cases,

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<sup>20</sup> 17 U.S.C. § 106.

<sup>21</sup> Pub. L. No. 106-160, 113 Stat. 1774.

<sup>22</sup> 17 U.S.C. § 504(c)(2).

<sup>23</sup> See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

<sup>24</sup> See Peter S. Menell, *Confronting the Elephant in the Room: Interpreting and Reforming Statutory Damages in the Internet Age* (in process) (hereinafter cited as “Elephant in the Room”).

which have involved more vigorous defense and amicus advocacy and have confronted the issue on the eve of, or following, a trial.

### **A. Early (Pre-Digital) Distribution Right Cases**

During the first two decades following the enactment of the Copyright Act of 1976, few plaintiffs alleged violation of the distribution right apart from violation of the reproduction right. The reason is that the two rights tended to go hand-in-hand in the analog age. For example, if a rogue publisher were to print and offer to sell unauthorized copies of a popular novel, the copyright owner would adequately establish a copyright violation based on the making of copies. Hence, few cases delineated what constitutes a violation of the distribution right, absent antecedent violation of the reproduction right. If the rogue publisher had merely prepared the unauthorized copies, would that violate the right to distribute if no copies were actually sold? There would be little reason to address this issue once the reproduction right violation has been established. As a result, the case law surrounding the distribution right is notably inchoate.

The two early distribution right precedents that have attracted the most attention in the file sharing era are *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*<sup>25</sup> and *Hotaling v. Church of Latter-Day Saints*.<sup>26</sup> Both cases arise in arcane circumstances far removed from the file sharing context and neither case considered the legislative history surrounding the distribution right nor referenced sources providing a rigorous foundation for interpreting the Copyright Act.

In *National Car*, the Eighth Circuit discussed the scope of the distribution right in the context of determining whether the Copyright Act preempts a state law breach of contract claim. Computer Associates (“CA”) had licensed an enterprise computer software system to National Car Rental Systems subject to a limitation that the software be used “only for the internal operations of Licensee and for the processing of its own data.” CA subsequently determined that National had been using the programs to process the data of third parties. After CA threatened to sue, National brought a declaratory judgment action in which it admitted having “the Licensed Software in its business activities . . . including the activities relating to Tilden and Trucks [Lend Lease],” but requested a declaration that its use of the programs neither breached the license agreement nor infringed CA’s copyright. CA asserted two counterclaims – first, that National’s use of the programs for the benefit of Tilden and Lend Lease breached the license agreement and second, that National infringed its copyright by making an unauthorized copy of the software. National moved for judgment on the pleading by asserting that CA’s first counterclaim was preempted under Section 301(a) of the Copyright Act. The district court agreed, holding that the breach of contract cause of action was “equivalent” to the exclusive copyright right of distribution of copies of the work.<sup>27</sup>

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<sup>25</sup> 991 F.2d 426, 434 (8th Cir.), *cert. denied*, 510 U.S. 861 (1993).

<sup>26</sup> 118 F.3d 199 (4th Cir. 1997).

<sup>27</sup> See *National Car Rental System, Inc. v. Computer Associates Intern., Inc.*, 22 U.S.P.Q.2d 1375 (D.Minn. 1992)

On appeal, the Eighth Circuit reversed, offering the following cursory analysis of the right to distribute:

Given our standard of review, we do not believe that CA's complaint may be read to allege that National actually distributed the program. The copyright holder's distribution right is the right to distribute copies. See 17 U.S.C. § 106(3). Section 106(3) grants the copyright owner the "exclusive right publicly to sell, give away, rent or lend any *material embodiment* of his work." 2 Nimmer on Copyright § 8.11[A], at 8-123 (emphasis added). An examination of CA's pleadings demonstrates that they cannot reasonably be read to complain about wrongful distribution. First, the contract provisions CA alleges are at issue place limits upon the way those in rightful possession of a copy of the program can use that copy. The provisions do not prohibit National or EDS from giving a copy of the program to anyone else. Second, CA does not specifically allege that National gave a copy of the program to Lend Lease or Tilden. CA alleges that "National has used and permitted the use of the Licensed Programs for the processing of data for the benefit of third parties." CA did not allege use by Lend Lease and Tilden, but instead alleged use for their benefit.<sup>28</sup>

Thus, the court focuses entirely on an excerpt from the *Nimmer on Copyright* summarizing the distribution right by reference to the definition of "copies."<sup>29</sup> The court goes on to note that the "only potential allegation of unauthorized distribution comes in CA's contention that National 'permitted the use' of the programs."<sup>30</sup>

National pressed the distribution violation further, contending that use of a program for another "is in fact an allegation that it distributed the 'functionality' of the program."<sup>31</sup> In dismissing this contention – which makes little sense on its face – the Eighth Circuit states that "the distribution right is only the right to distribute *copies* of the work. As Professor Nimmer has stated, '[i]nfringement of [the distribution right] requires an actual dissemination of either copies or

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<sup>28</sup> See *National Car*, 991 F.2d at 430 (footnote omitted).

<sup>29</sup> Section 106(3) speaks of the exclusive right to "distribute copies" of the copyrighted work. Section 101 defines "copies" as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . ." 17 U.S.C. § 101. It is well-established that fixation of a copyrighted work on a computer medium – such as a hard drive or even random access memory (for more than transitory duration) – constitutes a "copy." See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-519 (9th Cir. 1993).

<sup>30</sup> See *id.*

<sup>31</sup> See *National Car*, 991 F.2d at 434.

phonorecords.’ 2 Nimmer on Copyright § 8.11[A], at 8-124.1.’<sup>32</sup>

Neither the Eighth Circuit nor the *Nimmer* treatise provide analysis of the statutory text or legislative history of the pertinent provisions. Yet, this offhand statement – that “infringement of the distribution right requires an actual dissemination of either copies or phonorecords” – becomes the central pillar for many decisions to come.<sup>33</sup> It gets picked up by treatises,<sup>34</sup> which reinforce its impact.

The principal authority to the contrary – that the distribution right can be violated merely by making a copyrighted work available – arose in another unusual circumstance where the court offers only superficial analysis. In *Hotaling v. Church of Latter-Day Saints*,<sup>35</sup> plaintiffs compiled genealogical research materials, of which the Mormon Church made a number of unauthorized microfiche copies. In response to plaintiffs’ protest, the defendant destroyed those infringing reproductions – except for the one that plaintiffs discovered in the Church’s main library after the statute of limitations had already expired for the reproduction violations. Hence, the copyright owner alleged violation of the distribution right. As to whether that remaining copy constituted an independent violation of the distribution right, the majority of a Fourth Circuit panel reasoned that:

[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public. At that point, members of the public can visit the library and use the work. Were this not to be considered distribution within the meaning of § 106(3) [and were further evidence required that a patron actually checked out the subject work], a copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.<sup>36</sup>

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<sup>32</sup> See *National Car*, 991 F.2d at 434 (emphasis in original).

<sup>33</sup> The full paragraph from which the Eighth Circuit quoted that sentence is set forth below. See Part II(A)(1), *infra*. As explicated there, that paragraph simply states that there is no violation of the distribution right when the substance of the copyrighted work has been *intangibly* dispersed, via performance; to violate the distribution right, instead, *tangible* copies must be at issue.

<sup>34</sup> See Part II(C), *infra*.

<sup>35</sup> 118 F.3d 199 (4th Cir. 1997).

<sup>36</sup> See *id.* at 203. The dissent subscribed to the policy determination that “on-premises public use of an unauthorized copy should probably infringe a copyright.” *Id.* at 205 (Hall, J., dissenting).



The court offered no examination of the text or legislative history of the Copyright Act.<sup>37</sup>

## **B. The Early Digital Distribution Cases**

The distribution right issue first surfaced in the Internet context in several cases brought by adult magazines against Internet newsgroups hosting and selling copyrighted adult images.<sup>38</sup> The courts in these cases did not address whether actual distribution of the works in question had to be proved. Furthermore, the treatment of the distribution right was dicta in that the courts found violation of the reproduction right. Moreover, after these cases were handed down, Congress enacted the DMCA's safe harbor provisions – which shifted the liability landscape for online service providers.<sup>39</sup> As a consequence, these cases retain little, if any, precedential value.<sup>40</sup>

Construction of the distribution right arose to the fore in the first wave of file sharing cases – those focused on indirect liability. In affirming the district court's finding that copyright owners established prima facie evidence of direct copyright infringement in the *Napster* case, the Ninth Circuit blithely held that “Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights.”<sup>41</sup>

In later proceedings in the *Napster* matter, the district court examined the issue more closely.<sup>42</sup> After noting the Eighth Circuit's *National Car* precedent and distinguishing the Fourth Circuit's decision in *Hotaling* on the grounds that Napster merely hosted an index of copyrighted works and not the works themselves, Judge Marilyn Hall Patel looked to the Supreme Court's

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<sup>37</sup> The court hedges its analysis by noting that “[i]f, as the [defendant] Church says, actual use by the public must be shown to establish distribution, no one can expect a copyright holder to prove particular instances of use by the public when the proof is impossible to produce because the infringing library has not kept records of public use.” *Hotaling*, 118 F.3d at 204.

<sup>38</sup> *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F.Supp. 543, 551 (N.D.Tex. 1997) (concluding that defendant “distributed” copyrighted works by allowing its users to download and print copies of electronic image files); *Playboy Enters., Inc. v. Frena*, 839 F.Supp. 1552 (M.D.Fla.1993) (finding that copyrighted photographs posted on internet website implicated Playboy's exclusive right of distribution).

<sup>39</sup> See 17 U.S.C. § 512.

<sup>40</sup> See *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004); *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 622 (4th Cir. 2001); cf. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361, 1368-73 (N.D.Cal. 1995) (anticipating DMCA § 512 in holding that an Internet provider which serves, without human intervention, as a passive conduit for copyrighted material, is not liable as a direct infringer).

<sup>41</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9<sup>th</sup> Cir. 2001).

<sup>42</sup> *In re Napster, Inc. Copyright Litigation*, 377 F.Supp.2d 796, 802-05 (N.D.Cal. 2005).

decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*:<sup>43</sup> “While conceding that the statute lacks any express definition of ‘distribution,’ the Court observed that the legislative history of the 1976 Act equates the term with the right of ‘publication,’ which it defines as a copyright owner’s ‘right to control the first public distribution of an authorized copy of his work.’”<sup>44</sup> From this clue, Judge Patel turned to the Copyright Act’s definition of “publication,” which requires either “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,” or alternatively, “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.”<sup>45</sup> She noted that the first clause plainly requires actual distribution, whereas the second clause contemplates an offer of distribution for “further distribution.”<sup>46</sup> Based on these sources, Judge Patel concluded that a “copyright owner seeking to establish that his or her copyrighted work was distributed in violation of section 106(3) must prove that the accused infringer either (1) actually disseminated one or more copies of the work to members of the public or (2) offered to distribute copies of that work for purposes of further distribution, public performance, or public display.”<sup>47</sup>

The scope of the distribution right arose again in *Perfect 10, Inc. v. Amazon.com, Inc.* Relying exclusively on Judge Patel’s analysis in *In re Napster*,<sup>48</sup> the district court had held that Copyright Act’s “distribution” right required an “actual distribution” of a copy.<sup>49</sup> On appeal, the Ninth Circuit noted that the district court’s “conclusion on this point is consistent with the language of the Copyright Act.”<sup>50</sup> But the court goes on, confusingly, to state that:

Perfect 10 incorrectly relies on *Hotaling v. Church of Jesus Christ of Latter-Day Saints* and *Napster* for the proposition that merely making images “available” violates the copyright owner’s distribution right. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir.1997); *Napster*, 239 F.3d 1004. *Hotaling* held that the owner of a collection of works who makes them

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<sup>43</sup> 471 U.S. 539 (1985).

<sup>44</sup> *Id.* at 552 (quoting H.R.Rep. No. 94-1476, at 62) (original alteration omitted); see also *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 299 (3d Cir.) (noting that “[p]ublication’ and the exclusive right protected by section 106(3) . . . are for all practical purposes [ ] synonymous”), *cert. denied*, 502 U.S. 939 (1991).

<sup>45</sup> 17 U.S.C. § 101.

<sup>46</sup> *In re Napster, Inc. Copyright Litigation*, 377 F.Supp.2d 796, 803-04 (N.D.Cal. 2005).

<sup>47</sup> See *id.* at 805.

<sup>48</sup> See *In re Napster, Inc. Copyright Litigation*, 377 F.Supp.2d 796, 802-05 (N.D.Cal. 2005).

<sup>49</sup> See *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 844-45 (C.D.Cal. 2006).

<sup>50</sup> See *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007).

available to the public may be deemed to have distributed copies of the works. *Hotaling*, 118 F.3d at 203. Similarly, the distribution rights of the plaintiff copyright owners were infringed by Napster users (private individuals with collections of music files stored on their home computers) when they used the Napster software to make their collections available to all other Napster users. *Napster*, 239 F.3d at 1011-14.

This “deemed distribution” rule does not apply to Google. Unlike the participants in the Napster system or the library in *Hotaling*, Google does not own a collection of Perfect 10's full-size images and does not communicate these images to the computers of people using Google's search engine. Though Google indexes these images, it does not have a collection of stored full-size images it makes available to the public. Google therefore cannot be deemed to distribute copies of these images under the reasoning of *Napster* or *Hotaling*. Accordingly, the district court correctly concluded that Perfect 10 does not have a likelihood of success in proving that Google violates Perfect 10's distribution rights with respect to full-size images.<sup>51</sup>

The Ninth Circuit's opinion does not shed any light on the origins or legislative history of the distribution right.

### **C. The End User File Sharing Cases**

The distribution right would move to center stage as enforcement litigation shifted in 2003 to end users of peer-to-peer technologies. The catalyst for this shift was the district court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>52</sup> A little background is necessary to set the stage.

Napster's technology stored the addresses of indexed files on a central server.<sup>53</sup> After the district court ruled that Napster was required to take down any links to files identified by copyright owners as infringing, the resulting raft of take-down requests ultimately led to Napster's demise.<sup>54</sup> As this litigation unfolded, decentralized peer-to-peer technologies – including KaZaA, Morpheus, and Grokster – emerged in the marketplace. Since these systems stored only the addresses of client computers and utilized links among nodes within the peer-to-peer network to enable searches for files, file names never passed through the system servers. Hence, the operators of these networks could not be subject to the barrage of take-down notices that doomed Napster. When copyright

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<sup>51</sup> *Id.* at 1162-63.

<sup>52</sup> 259 F.Supp.2d 1029 (C.D.Cal. 2003).

<sup>53</sup> See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 *New York Law School Law Review* 63, 116 (2003).

<sup>54</sup> See Brad King, *The Day the Napster Died* (May 15, 2002), at <http://www.wired.com/news/mp3/0,1285,52540,00.html>.

owners sued Grokster, the district court held that it could not be held contributorily liable for infringing activities of its users because its technology was capable of substantial non-infringing use and hence immune under the *Sony Betamax* safe harbor for staple articles of commerce.<sup>55</sup>

Although the Supreme Court later reversed this decision in 2005<sup>56</sup> and Grokster would be held liable for inducing infringement,<sup>57</sup> the district court's 2003 decision led the recording industry to launch a widespread litigation campaign targeting end users – those who directly engage in file sharing activities.<sup>58</sup> Beginning in 2003, record companies filed lawsuits against approximately thousands of individuals whom forensic investigators determined to be active uploaders of copyrighted works.<sup>59</sup> The overwhelming majority of those cases would settle for between \$3,000 and \$5,000,<sup>60</sup> but several alleged file sharers denied liability, and these cases proceeded to active litigation.

The principal substantive defense in these cases focused on the scope of the distribution right. Although forensic investigators could readily establish that copyrighted files were available from particular Internet Protocol addresses, they could not directly show that these files were being downloaded by entities other than themselves. Because the forensic investigators had authorization from their clients to download files, defendants argued that merely placing copyrighted works in a file share folder did not constitute actionable distribution absent evidence that someone without authorization downloaded the file.

The first wave of cases to address this defense held that merely making copies of copyrighted works available without authorization violated the distribution right. Relying on *Hotaling* and the Ninth Circuit's *Napster* decision, the district court in *Universal City Studios Prods. LLP v. Bigwood*,<sup>61</sup> held that defendants violated plaintiff's exclusive right to distribute copyrighted works by "by using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet."<sup>62</sup> The district court in *Warner Bros. Records, Inc. v. Payne*<sup>63</sup> invoked the Supreme

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<sup>55</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 1043, 1046 (C.D.Cal. 2003).

<sup>56</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>57</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F.Supp.2d 966 (C.D.Cal. 2006).

<sup>58</sup> See Harmon, *supra* n. \_\_; see *Copy-wrong!*, *supra* n. \_\_.

<sup>59</sup> See *Copy-wrong!*, *supra* n. \_\_.

<sup>60</sup> See *id.*

<sup>61</sup> See *Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006)

<sup>62</sup> *Id.* at 190.

<sup>63</sup> No. W-06-CA-051, 2006 WL 2844415 (W.D. Tex. July 17, 2006); see also *Interscope Records v. Duty*, No. 05-CV-3744, 2006 WL 988086, at \*2 (D. Ariz. Apr. 14, 2006) (holding

Court's equation of "publication" with "distribution" in *Harper & Row* to find that "[l]isting unauthorized copies of sound recordings using an online file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right of distribution."<sup>64</sup> The court further observed that:

listing copyrighted works on an online file-sharing system contemplates "further distribution. . . . Making an unauthorized copy of a sound recording available to countless users of a peer-to-peer system for free certainly contemplates and encourages further distribution, both on the Internet and elsewhere. Therefore, the Court is not prepared at this stage of the proceedings to rule out the Plaintiffs' "making available" theory as a possible ground for imposing liability."<sup>65</sup>

The district court in *Motown Record Co., LP v. DePietro*<sup>66</sup> determined that "[a] plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant 'made available' the copyrighted work."<sup>67</sup> The court based its conclusion on its reading of the statute, the Ninth Circuit's decision in *Napster*, and "the opinion offered by the Register of Copyrights, Marybeth Peters, in a letter related to Congressional hearings on piracy of intellectual property on peer-to-peer networks, Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Rep. from the 28th Dist. of Cal. (Sept. 25, 2002) ("[M]aking [a work] available for other users of [a] peer to peer network to download ... constitutes an infringement of the exclusive distribution right, as well as the production right.")<sup>68</sup>

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that the "mere presence of copyrighted [works] in [defendant's] share file may constitute copyright infringement").

<sup>64</sup> *Id.* at , at \*3. See also *Arista Records LLC v. Greubel*, 453 F.Supp.2d 961, 969 (N.D.Tex. 2006) (observing that "the right of distribution also has been identified as synonymous with the publication of a copyrighted work"). The court bolstered this conclusion by reference to *Hotelling* and the Ninth Circuit 2001 *Napster* decision. It distinguished Judge Patel's 2005 *Napster* ruling on the dubious ground that the present case alleged direct infringement whereas *Napster* involved indirect infringement. But indirect liability must be premised on a finding of direct infringement, so *Napster* actually proceeded on the theory that users committed direct infringement, for which the company was indirectly liable.

<sup>65</sup> 2006 WL 2844415, at \*4 (W.D. Tex. July 17, 2006). See also *Elektra Entertainment Group, Inc. v. Barker* , 551 F.Supp.2d 234, 243 (S.D.N.Y. 2008) (concluding based on the text of the Copyright Act that Congress intended to treat "distribute" and "publication" "synonymous[ly]," rejecting plaintiff's "contourless 'make available' right," and reading distribute strictly in conformity with the Copyright Act's definition of "publication").

<sup>66</sup> No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).

<sup>67</sup> *Id.* at \*3.

<sup>68</sup> *Id.* at \*3, n.38.

In 2008, the pendulum swung in the opposite direction. *Atlantic Recording Corp. v. Brennan* cast doubt on the “making available” theory, observing that “‘without actual distribution of copies . . . there is no violation [of] the distribution right.’”<sup>69</sup> A little more than a month later, Judge Nancy Gertner in the District of Massachusetts issued a detailed analysis of the scope of the distribution right. *London-Sire Records, Inc. v. Doe I*<sup>70</sup> cast doubt on the *Hotelling* interpretation and inclined toward a requirement of actual distribution, observing that “[m]erely because the defendant has ‘completed all the steps necessary for distribution’ does not necessarily mean that a distribution has actually occurred.”<sup>71</sup> In response to the argument that Section 106(3) “distribution” right encompasses the statute’s definition of “publication,” Judge Gertner explained that although the Supreme Court in *Harper & Row* “‘recognized for the first time a distinct statutory right of first publication’ and quoted the legislative history as establishing that § 106(3) gives a copyright holder ‘the right to control the first public distribution of an authorized copy ... of his work,’ [t]hat is a far cry from squarely holding that publication and distribution are congruent.”<sup>72</sup> She then offered the textual argument that since the definition of “publication” in the statute incorporates the word “distribute” and not all publications are distributions to the public, the terms are not identical.<sup>73</sup> She concluded that

Congress’ decision to use the latter term when defining the copyright holder’s rights in 17 U.S.C. § 106(3) must be given consequence. In this context, that means that the defendants cannot be liable for violating the plaintiffs’ distribution right unless a ‘distribution’ actually occurred.<sup>74</sup>

Shortly after the *London-Sire* decision, Judge Neil Wake in the District of Arizona squarely

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<sup>69</sup> 534 F. Supp. 2d 278, 282 (D. Conn. 2008) (quoting 4 William F. Patry, Patry on Copyright § 13:9 (2007) and citing the Ninth Circuit’s decision in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir.2007)).

<sup>70</sup> 542 F.Supp.2d 153 (D.Mass. 2008).

<sup>71</sup> *Id.* at 168 (footnote omitted).

<sup>72</sup> *Id.* at 168 (quoting *Harper & Row*, 471 U.S. at 552(omitting internal quotation and H.R. Rep. 94-1476 at 62 (reprinted in 1976 U.S.C.C.A.N. at 5675) (alteration in *Harper & Row*)).

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* Judge Gertner also rejected the proposition that use of the phrase “to authorize” in the opening clause of Section 106 extends liability to circumstances in which a defendant authorizes infringement, even if no infringement occurs. *Id.* at 166 (citing *Venegas-Hernandez v. Ass’n De Compositores & Editores de Música Latinoamericana*, 424 F.3d 50, 57-58 (1st Cir.2005) and H.R. Rep. 94-1476, the House Report accompanying the 1976 Act (noting that Congress’ intent in adding “authorize” to the statute was to “avoid any questions as to the liability of contributory infringers”)).

rejected the “making available” theory in *Atlantic Recording Corp. v. Howell*.<sup>75</sup> He began his analysis by noting that the leading copyright treatises<sup>76</sup> state that infringement of the distribution right requires actual dissemination of copies or phonorecords.<sup>77</sup> He then noted that the *Hotaling* case lacked clear support in the Copyright Act and that the “great weight of authority” requires proof of actual distribution.<sup>78</sup> Following Judge Gertner’s reasoning in *London-Sire Records*, Judge Wake rejected the argument that “distribution” encompasses “publication.”<sup>79</sup> Judge Wake concluded emphatically that “[i]t is untenable that the definition of a different word in a different section of the statute was meant to expand the meaning of ‘distribution’ and liability under § 106(3) to include offers to distribute.”<sup>80</sup>

What Judge Wake denied the record companies through a narrow interpretation of the distribution right, he gave back through a dubious interpretation of unauthorized:

The recording companies’ investigator, MediaSentry, did download 12 of the copyrighted sound recordings from Howell’s computer. The recording companies assert that they have proven actual distribution for at least those 12 recordings. Amicus curiae, Electronic Frontier Foundation (“EFF”), responds that a copyright owner cannot infringe its own copyright, so its agent also cannot infringe the copyright owner’s rights when acting on the owner’s behalf. But the recording companies obviously did not intend to license MediaSentry to authorize distribution or to reproduce copies of their works. Rather, ‘the investigator’s assignment was part of [the recording companies’] attempt to stop [Howell’s] infringement,’ and therefore the 12 copies obtained by MediaSentry are unauthorized.<sup>81</sup>

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<sup>75</sup> 554 F. Supp.2d 976 (D. Ariz. 2008).

<sup>76</sup> As in *National Car*, there was no acknowledgment of the larger context in the which the phrase quoted from *Nimmer on Copyright* actually appeared. See n. \_\_\_ *supra*.

<sup>77</sup> See *id.* at 981 (citing 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.”); 4 William F. Patry, *Patry on Copyright* § 13:9, at 13-13 (2007) (“Without actual distribution of copies of the [work], there is no violation of the distribution right.”); 2 Paul Goldstein, *Goldstein on Copyright* § 7.5.1, at 7:125 to 7:126 (3d ed. 2005) (“[A]n actual transfer must take place; a mere offer for sale will not infringe the right.”)).

<sup>78</sup> See *id.* at 983.

<sup>79</sup> See *id.* at 984-85.

<sup>80</sup> *Id.* at 985.

<sup>81</sup> *Id.* (citing *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir.1994) (citing other instances of “investigative schemes that have been upheld in other copyright enforcement cases”) and *Interscope Records v. Leadbetter*, No. C05-1149-MJP-RSL, 2007 WL 1217705, at \*4 (W.D.Wa. Apr. 23, 2007) (accepting that distribution to a copyright holder’s investigator would be a copyright violation)).

It is hardly obvious that downloads by investigators hired by the copyright owner constituted unauthorized distributions. Such a rule is tantamount to a “making available” right since the copyright owner will typically not even know of file sharing activity without the use of investigators.<sup>82</sup>

The scope of the distribution right was propelled to major headlines as the first file sharing case against an individual made its way to trial. Capitol Records accused Jammie Thomas of sharing more than 1,000 copyrighted songs through the KaZaA file sharing network in 2005. After Ms. Thomas declined the RIAA’s settlement offer, Capitol Records filed suit on April 19, 2006 for willful violation of copyright law. The case attracted tremendous media attention – pitting the RIAA and its team of lawyers, seeking up to \$150,000 per work times for each of 24 copyrighted sound recordings, against a defiant single mother of modest means represented by pro bono counsel. The pretrial process consumed immense resources as Ms. Thomas denied liability, destroyed her computer hard drive so that it would not be available as evidence, and asserted a raft of objections and defenses. Following the close of evidence, Judge Michael Davis instructed the jury that merely “making available” the copyrighted works infringed the distribution right. On October 4, 2007, following five minutes of deliberation, the jury returned a verdict of \$9,250 per work, totaling \$222,000. But, based on Thomas’s post-trial motion, Judge Davis ordered a new trial on the ground that he misinstructed the jury as to the scope of the distribution right.<sup>83</sup> His lengthy opinion, which looks to the language of the statute as well as treatises, largely tracks Judge Wake’s reasoning in *Howell*.<sup>84</sup>

The Thomas-Rasset<sup>85</sup> retrial took place in June 2009. This time, the judge instructed the jury that, in order to find infringement, it had to find either violation of the reproduction right as a result of Ms. Thomas-Rasset’s “downloading copyrighted sound recordings on a peer-to-peer network, without license from the copyright owners” or violation of the distribution right through Ms. Rasset-Thomas “distributing copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners.” After five hours of deliberation, the jury found Ms. Thomas-Rasset liable for willful copyright infringement of all 24 sound recordings at issue and awarded the plaintiffs statutory damages of \$80,000 per song, resulting in a total award of \$1.92 million. On post-trial motions, Judge Davis determined that the damage award was “monstrous and shocking” and remitted the jury award to \$54,000 (treble the minimum willful statutory damage

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<sup>82</sup> The decision turns even more technical in holding that a peer-to-peer user who places a copyrighted work into a share folder does not distribute that work when a third party downloads it. See *id.* at 986-87. Rather, the downloader incurs liability for reproducing the work without authorization, while the uploader becomes potentially liable for indirect liability.

<sup>83</sup> See *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210 (D.Minn. 2008).

<sup>84</sup> See *id.* at 1216-25.

<sup>85</sup> Ms. Thomas was married in the interim.



level (\$750 per work) time 24 works)).<sup>86</sup> The plaintiffs offered Ms. Thomas-Rasset the opportunity to settle the matter by donating \$25,000 to a musician's charity of her choosing, which she declined.<sup>87</sup> A third trial is set for October 2010.<sup>88</sup>

The second end user file sharing trial took place in Judge Gertner's courtroom in July 2009.<sup>89</sup> Like the Thomas case, this case attracted tremendous publicity as Joel Tenenbaum, a Physics Ph.D. student at Boston University, and his appointed counsel, Harvard Law School Professor Charles Nesson, sought to turn the trial into a referendum on copyright policy. During pretrial proceedings, Mr. Tenenbaum denied any wrongdoing and even suggested that the files in question might have been shared by others, including a visitor to the family home, family friend (possibly a visitor from Burkina Faso), foster son, or burglar.<sup>90</sup> After much jockeying over the scope of the distribution right, the fair use defense, and a slough of other issues, Mr. Tenenbaum ultimately confessed to uploading and downloading copyrighted sound recordings on various peer-to-peer networks.<sup>91</sup> As a result, Judge Gertner directed a verdict on liability, leaving for the jury only the issue of statutory damages.<sup>92</sup> The jury awarded \$675,000 (based on \$22,500 per 30 works litigated). Judge Gertner later reduced the amount to \$67,500 on the grounds that the jury award violated due process.<sup>93</sup>

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<sup>86</sup> See *Capitol Records Inc. v. Thomas-Rasset*, 680 F.Supp.2d 1045, 1049 (D.Minn. 2010).

<sup>87</sup> See Greg Sandoval, *Jammie Thomas Rejects RIAA's \$25,000 Settlement Offer*, CNET (Jan. 27, 2010) <[http://news.cnet.com/8301-31001\\_3-10442482-261.html](http://news.cnet.com/8301-31001_3-10442482-261.html)>

<sup>88</sup> See Ben Sheffner, *Copyrights & Campaigns, Third Jammie Thomas-Rasset Trial Set for Oct. 4* (Mar. 1, 2010) <<http://copyrightsandcampaigns.blogspot.com/2010/03/third-jammie-thomas-rasset-trial-set.html>>

<sup>89</sup> See Greg Sanoval, *Joel Tenebaum Follows in Jammie Thomas' Footsteps*, CNet News (Jul 28, 2009) <[http://news.cnet.com/8301-1023\\_3-10298079-93.html](http://news.cnet.com/8301-1023_3-10298079-93.html)>

<sup>90</sup> See *Affidavit in Support of Motion to Dismiss and in Support of Motion for Summary Judgment at 2, Sony BMG Music Entertainment v. Tenenbaum*, Civil Action No.07-CV-11446 (D. Mass.) (filed Nov. 16, 2007) <<http://joelfightsback.com/wp-content/uploads/487.pdf>>

<sup>91</sup> See Ben Sheffner, "Tenenbaum takes the stand: I used P2P and lied about it," *ars technica* (Jul. 30, 2009) <<http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-takes-the-stand-i-used-p2p-and-lied-about-it.ars>>

<sup>92</sup> See Ben Sheffmner, *Copyrights & Campaigns, Plaintiffs Win Tenenbaum Case; Court Considers Rule 50 Ruling; Grants Directs Verdict on Copyright Liability* (Jul. 31, 2009) <<http://copyrightsandcampaigns.blogspot.com/2009/07/plaintiffs-win-tenenbaum-case-court.html>>

<sup>93</sup> See *Sony BMG Music Entertainment v. Tenenbaum*, --- F.Supp.2d ----, 2010 WL 2705499 (D. Mass 2010).

The pendulum swung back in *UMG Recordings, Inc. v. Alburger*<sup>94</sup> and *Warner Bros. Records v. Walker*.<sup>95</sup> *Alburger* followed the holding in *DePietro* that “[t]here is no requirement that plaintiffs show that the files were actually downloaded by other users from Defendant, only that the files were *available* for downloading.”<sup>96</sup> *Walker* found that downloading by the plaintiff’s authorized forensics expert established unauthorized distribution, relying on *Howell*, thereby avoiding any need for the court to even reach the issue of whether the distribution right encompasses merely making a copyrighted work available on a peer-to-peer network without authorization.<sup>97</sup>

#### **D. Statutory Interpretation Chaos**

As the foregoing demonstrates, courts are deeply divided on the scope of Copyright’s distribution right. Some courts have read the right broadly to encompass merely making copies available, congruent with the Copyright’s Act definition of “publication.” Other courts have imposed a strict requirement that the plaintiff prove not merely that the defendant has made the work available, but that the work was in fact distributed to third parties. But some of these courts have largely negated this requirement by allowing proof that the work was downloaded by the plaintiff’s forensic investigator.

There are three interrelated factors behind this chaos. First, the term “distribute” in the 1976 Copyright Act is open to a range of plausible interpretations. Second, the briefs filed in these cases provide little guidance as to why Congress chose the term “distribute.” Third, the judges were likely concerned by the enormous potential damages – up to \$150,000 per work – and the uncertainties inherent in jury damage determinations.<sup>98</sup> Both judges who have conducted file sharing trials against end users have dramatically second-guessed the juries’ judgments. In the *Thomas-Rasset* litigation, Judge Davis ordered a retrial based on a flawed instruction regarding the distribution right after the jury returned a large damage award (\$222,000).<sup>99</sup> After the second trial produced an even larger award (\$1.92 million), he remitted the award by a factor of nearly 35.<sup>100</sup> Judge Gertner reduced the jury’s award by a factor of 10.<sup>101</sup> There is good reason to believe that judges have been influenced

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<sup>94</sup> 2009 WL 3152153 (E.D. Pa. 2009).

<sup>95</sup> --- F.Supp.2d ---, 2010 WL 1333147 (W.D.Pa. 2010).

<sup>96</sup> 2009 WL 3152153 at \*3, n.41 (emphasis in original).

<sup>97</sup> 2010 WL 1333147 at \*6.

<sup>98</sup> See *Elephant in the Room*, *supra* n. \_\_\_.

<sup>99</sup> See *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210 (D.Minn. 2008).

<sup>100</sup> See *Capitol Records Inc. v. Thomas-Rasset*, 680 F.Supp.2d 1045 (D.Minn. 2010).

<sup>101</sup> See *Sony BMG Music Entertainment v. Tenenbaum*, --- F.Supp.2d ---, 2010 WL 2705499 (D. Mass 2010).

by potentially crushing liability in the hands of a jury – the proverbial “elephant in the room.”<sup>102</sup>

The scope of the distribution right has critical ramifications for copyright enforcement in the Internet age. Under the narrow interpretation, the relative anonymity of peer-to-peer transmissions in combination with privacy concerns makes enforcement costly and difficult. By contrast, a broad interpretation exposes millions of uploaders to potentially large statutory damages. The next section explores copyright treatises, academic research, and the views of Copyright Office personnel in the search for answers to the scope of the distribution right.

## II. The Scholarly Vacuum

In view of the complexity of modern copyright law, it is not surprising that jurists can divide on their interpretation of the law. The United States relies on general jurisdiction courts to adjudicate copyright disputes and few district judges get more than a handful of copyright cases over the course of their careers. Hence, courts often turn to treatise writers and legal scholars to help decipher the Copyright Act. This section explores what legal scholars and copyright specialists have had to say about the distribution right. As we will see, none of these sources have provided comprehensive, systematic analysis of the origins, rationale, and basis for copyright’s distribution right. With one exception, they have not gone back to the most pertinent sources. And, as explained in below,<sup>103</sup> that one exception overlooked key elements of the legislative history and misapprehended the basis for the distribution right. In short, the copyright scholars and specialists have tended to rehash the same superficial analyses.

### A. Copyright Treatises

In determining that violation of copyright’s distribution right requires proof of actual distribution of a copyrighted work, Judge Wake found comfort in “the great weight of authority” indicating that actual distribution must be established.<sup>104</sup> In addition to citing several cases, he includes the following string citation of the well-known treatises:

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

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<sup>102</sup> The same might said of Judge Stanton’s interpretation of the DMCA §512 safe harbor in the *Viacom v. YouTube* case. See *Viacom Intern. Inc. v. YouTube, Inc.*, --- F.Supp.2d ----, 2010 WL 2532404 (S.D.N.Y. 2010); Frank Ahrens, “Viacom Sues YouTube Over Copyright Infringement ‘Cornerstone’ of Site’s Business, Media Firm Says,” *Wash. Post* (Mar. 14, 2007) (noting that the suit requested \$1 billion in damages) <<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300595.html>>; see *Elephant in the Room*, *supra* n. \_\_\_.

<sup>103</sup> See Part III *infra* TAN \_\_\_.

<sup>104</sup> See *Atlantic Recording Corp. v. Howell*, 554 F.Supp.2d 976, 981 (D.Ariz. 2008).

either copies or phonorecords.”); 4 William F. Patry, Patry on Copyright § 13:9, at 13-13 (2007) (“Without actual distribution of copies of the [work], there is no violation of the distribution right.”); 2 Paul Goldstein, Goldstein on Copyright § 7.5.1, at 7:125 to 7:126 (3d ed. 2005) (“[A]n actual transfer must take place; a mere offer for sale will not infringe the right.”).<sup>105</sup>

Such congruity justifiably inspires confidence in the correctness of this interpretation. But, is that confidence warranted in this instance? Specifically, did they merely reinforce what some earlier courts had concluded?

### 1. Nimmer on Copyright

After quoting the pertinent language from Section 106(3), *Nimmer* emphasizes that the distribution right concerns “public” distribution.<sup>106</sup> It then observes that “[t]he term ‘distribution’ rather than ‘publication’ was used merely ‘for the sake of clarity.’”<sup>107</sup> The accompanying footnote observes:

“The language of this clause is virtually identical with that in the definition of ‘publication’ in section 101, but for the sake of clarity we have restated the concept here.” Reg. Supp. Rep., p. 19. But note that an offer to distribute copies or phonorecords to the public may in itself constitute a “publication” (see § 4.04 supra), while the right of distribution apparently is not infringed by the mere offer to distribute to members of the public. (Nonetheless, if the *offer* to distribute matures into an actual *authorization*, liability may be found. See § 12.04[A] infra.) The comparable right to vend under § 1(a) of the 1909 Act was not infringed by the act of offering for sale. *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) . The distribution right under the current Act is broader than the right to vend under the 1909 Act. See *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247 (W.D.N.Y. 1983).<sup>108</sup>

The treatise later asserts that “[i]nfringement of this right requires actual dissemination of either copies or phonorecords.”<sup>109</sup> But two aspects of that assertion bear emphasis. First, Judge Wake overread that sentence when applying it to the peer-to-peer context. The full paragraph from

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<sup>105</sup> See *id.*

<sup>106</sup> See *Nimmer on Copyright* §8.11[A].

<sup>107</sup> See *id.*

<sup>108</sup> See *id.* at n.2 (emphasis in original).

<sup>109</sup> See *id.*

*Nimmer on Copyright* in which the subject sentence appears<sup>110</sup> reads 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.<sup>111</sup>

It will be observed that that language, written before the emergence of peer-to-peer technology, did not attempt to address its implications for copyright law. It merely contrasted distribution, which requires the dissemination of a copy, with *performance*, in which no such copy need be disseminated. In context, the paragraph simply means that there is no violation of the distribution right when the substance of the copyrighted work has been *intangibly* dispersed, via performance. To violate the distribution right, instead, *tangible* copies must be at issue. In the peer-to-peer context, uploading followed by downloading results in a “copy” resident on the second peer’s computer, meaning that the tangibility requirement has been met.<sup>112</sup>

Nonetheless, before absolving *Nimmer* from all responsibility for the manner in which it was cited, the treatise’s accompanying footnote should also be quoted:

National Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc., 991 F.2d 426, 434 (8th Cir.) (Treatise quoted), cert. denied, 510 U.S. 861, 114 S. Ct. 176, 126 L. Ed. 2d 136 (1993); Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 844 (C.D. Cal. 2006) (Treatise quoted), aff’d in part, rev’d on other grounds sub nom. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).<sup>113</sup>

It is clear from this citation that *Nimmer* was merely extrapolating from prior jurisprudence, rather than examining the origins of the distribution right. To this extent, that treatise leaves the answer open as to how the original understanding of the distribution right applies to the peer-to-peer context.

## 2. Goldstein on Copyright

*Goldstein on Copyright* also begins its treatment of the distribution right also begins with the

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<sup>110</sup> The Eighth Circuit’s quotation in *National Car Rental* was equally truncated. See n. \_\_\_ *supra*.

<sup>111</sup> 2 *Nimmer on Copyright* § 8.11[A] (footnotes omitted).

<sup>112</sup> See n. 30 *supra*.

<sup>113</sup> See *id.* at n.4.7.

text of Section 106(3).<sup>114</sup> It then addresses the scope of the distribution right:

The crux of the distribution right lies in the transfer, not the receipt, of a copy or phonorecord. Consequently, someone who simply buys or otherwise acquires a copy or phonorecord does not infringe the distribution right. Further, an actual transfer must take place; a mere offer of sale will not infringe the right.<sup>FN15</sup>

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<sup>FN15</sup> See, e.g., *Obolensky v. G.P. Putnam's Cons*, 628 F. Supp. 1552, 1555 (S.D.N.Y.), *aff'd without op.*, 795 F.2d 1005 (2d Cir. 1986); *Greenbie v. Noble*, 151 F. Supp. 45, 63-64, (S.D.N.Y. 1957). *But cf.* *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4<sup>th</sup> Cir. 1997) (library publicly distributes copy “[w]hen it places an unauthorized copy of the work in its collection, includes the copy in its catalogue or index system, and makes the copy available to the public”); *Wildlife Internationale, Inc. v. Clements*, 591 F. Supp. 1542, 1546-1547 (S.D. Ohio 1984) (stating in dicta that “the distribution, through the sale or offer of sale to the public or otherwise, of copies of any of the 22 listed works of art acquired by defendant” infringed plaintiff’s copyrights in the works).<sup>115</sup>

The critical conclusions – that “actual transfer must take place” and “a mere offer of sale will not infringe the right” – rely on the *Obolensky* and *Greenbie* cases. Upon inspection, however, *Obolensky* itself relies solely upon *Greenbie*, a pre-1976 Act case. Therefore, *Obolensky* provides no more than *Greenbie*. And *Greenbie* relies solely upon *Minter v. Williams*,<sup>116</sup> an 1835 English patent case interpreting English patent law.

In *Obolensky*, the plaintiffs, holder of a copyright in a book, had negotiated with the defendant to distribute the book.<sup>117</sup> In reliance on terms set forth in an offer letter, defendant listed the book in its catalog and presented the book at a sales conference. Following the collapse of negotiations, defendant immediately notified its sales force to stop selling the book, informed its largest customers that the book had been de-listed, and cancelled all outstanding orders. Nonetheless, the book appeared in two of defendant’s catalogs following termination of negotiations. The record established that the “defendant never copied the Book, in whole or in part, never sold any copies of the Book, and never had possession, custody, or control of any copies of the Book.”<sup>118</sup> Nonetheless, the plaintiffs alleged that the mere listing of the book in the defendant’s

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<sup>114</sup> Paul Goldstein, *Goldstein on Copyright* §7.5.1 (Vol. II 3d ed. 2009) (2009 Supplement).

<sup>115</sup> See *id.* at 7:125-26 (footnote 14 and parallel citations omitted).

<sup>116</sup> 111 Eng.Rep. 781, 4 Adol. & El. 63.

<sup>117</sup> *Obolensky v. G.P. Putnam's Sons*, 628 F.Supp. 1552 (S.D.N.Y. 1986).

<sup>118</sup> See *Id.* at 1555.

catalog constituted a violation of the distribution right. Relying solely on *Greenbie v. Noble*,<sup>119</sup> a pre-1976 Act case, *Obolensky* ruled that a sale must be completed to violate the “vend” right, from which the court inferred that an actual sale must occur to violate the distribution right under these circumstances.<sup>120</sup> Of course, the case can also be understood to mean that one cannot violate the distribution right without “possession, custody, or control” of the work in question.

*Goldstein*’s basis for interpreting “distribute” to require actual distribution becomes all the more tenuous upon reviewing the *Greenbie* case. The case’s entire analysis comes in one sentence: “Although the word ‘vend’ may include the act of offering or sale, a mere offer without more does not constitute vending. See *Minter v. Williams*, 111 Eng.Rep. 781, 4 Adol. & El. 63.”<sup>121</sup> Thus, the case answers the critical question of whether the distribution right under the 1976 Copyright Act requires actual distribution by advertng to *Minter v. Williams* – an 1835 *English patent* case!<sup>122</sup> Furthermore, *Greenbie* indicates that this narrow interpretation of “vend” is not essential to the court’s conclusion.<sup>123</sup> Thus, *Goldstein*’s jurisprudential basis for concluding that “distribution” requires actual distribution boils down to dicta based on a 175 year old English patent case interpreting English patent law. Furthermore, the treatise acknowledges that the *Hotaling* and *Wildlife Internationale* cases point to the opposite conclusion.<sup>124</sup>

*Goldstein* then notes that “[c]ourts have historically read section 106(3) to require that, for the public distribution right to be infringed, copies or phonorecords must actually be distributed.”<sup>125</sup> The accompanying footnote refers to the Ninth Circuit’s *Perfect 10* case, the 8<sup>th</sup> Circuit’s *National*

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<sup>119</sup> 151 F.Supp. 45 (S.D.N.Y. 1957).

<sup>120</sup> *Obolensky v. G.P. Putnam's Sons*, 628 F.Supp. 1552, 1555 (S.D.N.Y. 1986).

<sup>121</sup> 151 F.Supp. at 63-64.

<sup>122</sup> *Minter v. Williams* can be found in William Carpmael, Esq., *Law Reports of Patent Cases*, Vol. I 647-50 (1843).

<[http://books.google.com/books?id=LFkDAAAAQAAJ&pg=PA647&lpg=PA647&dq=%22Minter+v.+Williams%22&source=bl&ots=0zCMinSvHm&sig=7ykHPW1t41M-XkHfzGd-AqrOJhs&hl=en&ei=f093TP\\_fCsKXnAeavfCWCw&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CBIQ6AEwAA#v=onepage&q=%22Minter%20v.%20Williams%22&f=false](http://books.google.com/books?id=LFkDAAAAQAAJ&pg=PA647&lpg=PA647&dq=%22Minter+v.+Williams%22&source=bl&ots=0zCMinSvHm&sig=7ykHPW1t41M-XkHfzGd-AqrOJhs&hl=en&ei=f093TP_fCsKXnAeavfCWCw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBIQ6AEwAA#v=onepage&q=%22Minter%20v.%20Williams%22&f=false)>

<sup>123</sup> See 151 F.Supp. at 64 (noting that “[i]n any event, the offer of sale emanated from Illinois and the sales were consummated in Illinois when Sears mailed the books to its members. Consequently, Sears’ alleged violation of plaintiff’s rights to publish and vend her book gave rise to a cause of action in Illinois and is controlled by the Illinois statute of limitations . . .” (citations omitted)).

<sup>124</sup> The *Goldstein* treatise notes that *Hotaling* can be read narrowly based on the failure of the defendant to maintain records of public use of the works at issue. See *Goldstein on Copyright* §7.5.1 at 7:127 (citing 118 F.3d at 204).

<sup>125</sup> See *Goldstein on Copyright* §7.5.1 at 7:127.

*Car* decision, and the 2005 *Napster* decision. As noted earlier, none of these decisions fully analyze the development of the distribution right. On this basis, *Goldstein* endorses Judge Gertner’s “meticulous” analysis leading to her rejection of a “making available” right in *London-Sire Records*.<sup>126</sup>

In sum, *Goldstein* is no more indicative than *Nimmer* on this issue. Neither treatise traces the origins of the distribution right to its roots. Both leave the crucial question unanswered of how to interpret the distribution right in the peer-to-peer context.

### 3. Patry on Copyright

*Patry on Copyright* provides the following explanation for the “distribution right”:

During the process of drafting the 1976 Act, the Copyright Office regarded the enumeration of rights in section 1(a) of the 1909 Act (“printing, reprinting, publishing, copying, and vending”) as redundant and reducible to one right: the right to reproduce the work in copies.<sup>FN1</sup> Accordingly, the Register’s 1961 report recommended that a separate distribution right not be included in the new statute. For unexplained reasons,<sup>FN2</sup> two years later the Copyright Office changed its position, and in its 1963 preliminary draft bill, the following separate distribution right was proposed:

Section 5 EXCLUSIVE RIGHTS COMPRISED IN COPYRIGHT.  
Subject to the provisions of sections 6 through 12, copyright under this title shall consist cumulatively of the following exclusive rights:  
...

(b) The right to distribute copies and sound recordings. Copyright shall include the exclusive right to sell or otherwise transfer ownership of, rent, lease, or lend one or more copies or sound recordings of the work.<sup>FN3</sup>

In 1964, in the first legislative bills, copyright owners were granted the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.”<sup>FN4</sup> No changes in this formulation were made in the intervening 12 years before enactment in 1976.<sup>127</sup>

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<sup>FN1</sup> Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 21 (House Comm. Print 1961).

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<sup>126</sup> See *Goldstein on Copyright* §7.5.1 at 7:129-30.

<sup>127</sup> See *Patry on Copyright* §13.8.



<sup>FN2</sup> In discussions on this section, the Copyright Office merely noted that the proposed new right “would cover everything that’s covered in section 1(a) of the present law by reference to the terms ‘publish’ and ‘vend’ – broadened ... to 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. ... [T]he draft covers virtually all forms of distribution.” Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 110 (Sept. 1964) (remarks of Copyright Office General Counsel Abe Goldman).

<sup>FN3</sup> Copyright Law Revision Part 3 at 4 (§ 5(b)).

<sup>FN4</sup> S. 3008 § 5(a) (3), 88th Cong., 2d Sess. (July 20, 1964). The current numbering of the exclusive rights as § 106 occurred in 1965. See H.R. 4347 S. 1006 § 106, 89th Cong., 1st Sess. (1965).

*Patry* further notes that although the statute does not separately define “distribution,” the Register of Copyrights’ 1965 Supplementary Report made reference to the definition of “publication” in a discussion of the distribution right:<sup>128</sup>

The language of [section 106(3)] is virtually identical with that in the definition of “publication” in section 101, but for the sake of clarity, we have restated the concept here. And, lest there be any possible misunderstanding because of the language of the preceding clauses, the right of public distribution would apply to all types of copyrighted works, including derivative works.<sup>129</sup>

It concludes, however, that “[t]he Register’s remarks should not be interpreted as stating that distribution is synonymous with publication” on the grounds that “the definition of ‘publication’ was included in the 1976 Act to assist in determining when a copyright notice had to be affixed.”<sup>130</sup> *Patry* reaches this conclusion by reference to the text of Section 106(3) (“distribute copies or phonorecords”) and the *National Car*, *Howell*, *London-Sire*, and *Obolensky* decisions. Yet, as we will see below,<sup>131</sup> *Patry* overlooks substantial legislative history showing that the Register fully intended to encompass the 1909 Act’s publish and vend rights within the 1976 Act’s distribute right. Moreover, the crafting of the definition of publication – in both 1965 and 1971 – illuminates interpretation of “distribute.” Furthermore, *National Car*, *Howell*, *London-Sire*, and *Obolensky* pay no heed to the legislative history or contextual meaning of “distribute.”

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<sup>128</sup> See *Patry on Copyright* §13.9.

<sup>129</sup> Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. 19 (House Comm. Print 1965).

<sup>130</sup> See *Patry on Copyright* §13.9.

<sup>131</sup> See Part III, *infra*.

As noted earlier, the distribution right attracted little attention prior to the emergence of end user file sharing cases less than a decade ago. For that reason, the requirements for proving violation of the distribution right received little attention. None of the treatises provide a clear basis for interpreting the Copyright Act's distribution right. Nor do they explain why Congress shifted from the 1909 Act's right to publish to the 1976 Act's right to distribute.

## **B. Law Review Commentary and Policy Papers**

Prior to the deluge of file sharing cases, the scope of the distribution right did not attract any significant attention in law review articles.<sup>132</sup> But as the file sharing cases moved through the litigation pipeline, the tide of student notes and commentary rose to flood levels. Several dozen law review articles and students notes evaluate the file sharing cases. Most conclude that the scope of the distribution right is ambiguous and unsettled,<sup>133</sup> with some opposing a "making available" right<sup>134</sup> and others supporting liability even without proof of actual distribution.<sup>135</sup> For the most part, these articles merely "remix" the same authorities explored by the courts without adding any new ingredients or examining the scope of the distribution right on the basis of independent review of the underlying history by which the language was formulated or via first principles of statutory construction.

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<sup>132</sup> See David O. Carson, Making the Making Available Right Available, 33 Colum. J.L. & Arts 135, 135 (2010) (observation by the General Counsel of the Copyright Office that "very little had been written" about the distribution right as of the fall of 2008).

<sup>133</sup> See, e.g., Joe Weissman, Distribution, I Presume: A Role for Presumptions in Establishing the "Making Available" Right, 27 Cardozo Arts & Ent. L.J. 737, 739 (2010) ("While the success of the RIAA's litigation strategy in stemming the tide of illegally downloaded music is questionable, it has at least demonstrated that the existence of a 'making available' right in U.S. copyright law is an uncertain proposition." (footnote omitted)); Vincent J. Galluzzo, When 'Now Known or Later Developed' Fails its Purpose: How P2P Litigation Has Turned the Distribution Right Upside-Down, 61 Fla. L. Rev. 1165 (2009); Ken Nicholds, The Free Jammie Movement: Is Making a File Available to Other Users over a Peer-to-peer Computer Network Sufficient to Infringe the Copyright Owner's 17 U.S.C. § 106(3) Distribution Right? 78 Fordham L. Rev. 983, 1001- (2009) (observing that courts and commentators are in conflict); William Henslee, Money for Nothing and Music for Free? Why the RIAA Should Continue to Sue Illegal File-sharers, 9 J. Marshall Rev. Intell. Prop. L. 1 (2009).

<sup>134</sup> See, e.g., Galuzzo, *supra* n. \_\_; Shana Dines, Actual Interpretation Yields 'Actual Dissemination': An Analysis of the 'Make Available' Theory Argued in Peer-to-Peer File Sharing Lawsuits, and Why Courts Ought To Reject It, 32 Hastings Comm. & Ent. L.J. 157 (2009).

<sup>135</sup> See, e.g., Nicolds, *supra* n. \_\_ (arguing that there is no "making available" right, but that "making available" may be considered as circumstantial evidence of distribution); Henslee, *supra* n. \_\_.

The scope of the distribution right also attracted attention from digital advocacy and policy groups. Through a series of amicus briefs and position papers, the Electronic Frontier Foundation (“EFF”), a digital rights organization, advocated a narrow conception of the distribution right based on a strict textualist reading of the statute: “The distribution right encompasses only the distribution of certain things (‘copies or phonorecords’), to certain people (‘the public’), in certain ways (‘by sale or other transfer of ownership, or by rental, lease, or lending’).”<sup>136</sup> Thus, in EFF’s view, the copyright owners must prove actual distribution to third parties.

On the opposite side, the Progress and Freedom Foundation (“PFF”), a “market-oriented,” “classically conservative” think tank,<sup>137</sup> argued for judicial recognition of a “making available” right. In a series of press releases, papers, and amicus briefs, Thomas Sydnor II, Director of PFF’s Center for the Study of Digital Property, placed primary emphasis on deference to eleven international agreements that require the United States to provide a making available right.<sup>138</sup> Sydnor also called attention to various aspects of the legislative history of the Copyright Act as well as doctrines of statutory construction. He provides the most thorough exploration of the legislative history, but his analysis comes across as strident and unbalanced.<sup>139</sup>

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<sup>136</sup> See Brief Amici Curiae of Electronic Frontier Foundation, Public Knowledge, United States Internet Industry Association, and Computer & Communications Industry Association in Support of Defendant Jammie Thomas, Thomas, 579 F. Supp. 2d 1210 (No. 06-1497) at 6; <Howell brief>.

<sup>137</sup> See The Progress & Freedom Foundation, Our Mission <<http://www.pff.org/about/>>

<sup>138</sup> See Thomas D. Sydnor III, *The Making-Available Right under U.S. Law*, Vol. 16, Issue 7, *Progress on Point* (The Progress & Freedom Foundation March 2009) (calling attention to *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804) (requiring courts to defer to reasonable interpretations of U.S. statutes that implement U.S. international obligations); see also *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (utilizing the “long heeded-admonition of Mr. Chief Justice Marshall” in *Charming Betsy* to interpret a statute); Restatement (third) of Foreign Relations Law of the U.S. § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States.”).

<sup>139</sup> For example, Sydnor points to the scope of the term “distribute” in child pornography cases, see Sydnor, *supra* n. \_\_\_, at 43-44, as a guide for interpreting copyright’s distribution right. Yet those cases operate under a specific definition of “distribution” set forth in the Federal Sentencing Guidelines. See 18 U.S.C. § 2G2.2, Application Note 1 (““Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.”); *U.S. v. Clawson*, 408 F.3d 556, 558 (8<sup>th</sup> Cir. 2005). Sydnor’s article does not provide the full context for this analogy. More generally, Sydnor fails to fully expose counter-arguments to his position.

### C. Copyright Office and Copyright Office Personnel Views

Given the importance of the distribution right to copyright enforcement in the Internet age, it is not surprising that the Copyright Office and its key staff would be asked to weigh in on the scope of the distribution right. Over the years, the Copyright Office has been involved in the debate over the scope of the distribution right on several levels, reflecting its multiple roles: administering the Copyright Act, advising Congress on legislation, and working with the Administration on treaty matters. Like courts and other commentators, the Copyright Office and its key policy personnel have struggled to provide a definitive foundation for construing the distribution right.

Marybeth Peters, Register of Copyrights since 1994, first addressed the “making available” in 1995, before the diplomatic conference leading to the WIPO Internet treaties. At that time, she testified to Congress that “the Copyright Act in its present form can and should be read to encompass within the author’s exclusive rights the right to transmit the work electronically to individual members of the public.”<sup>140</sup> At the time, the only issue before Congress was whether electronic transmission could constitute a distribution. Register Peters also observed that the definition of “publication” was written to parallel the language of the distribution right and should be read to be “coextensive.”<sup>141</sup>

In 1997, as Congress was considering the Digital Millennium Copyright Act, the Register spoke directly to whether the distribution right encompasses making a work available over the Internet as Congress was considering the Digital Millennium Copyright Act. The DMCA began as an effort to implement the 1996 WIPO Internet treaties,<sup>142</sup> which provide:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(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.<sup>143</sup>

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<sup>140</sup> See National Information Infrastructure Copyright Protection Act of 1995: Hearing on H.R. 2441 and S. 1284 Before the Subcomm. On Courts and Intellectual Property of the H. Comm. on the Judiciary, 104th Cong. 44 (1995) (statement of Marybeth Peters, Register of Copyrights).

<sup>141</sup> See *id.* at 45.

<sup>142</sup> Those two treaties encompass the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. See 3 Nimmer on Copyright § 12A.02[B].

<sup>143</sup> See Article 8, WIPO Copyright Treaty (adopted in Geneva on Dec. 20, 1996) (emphasis added). To the same effect, with slightly different language is Article \_\_. WIPO Performance and Phonograms Treaty (adopted in Geneva on Dec. 20, 1996)

Congress asked Register Peters her views on whether U.S. Copyright Law comported with the WIPO Internet treaties. She testified that “[a]fter an extensive analysis the Copyright Office concluded that existing protections are adequate to fulfill all but two of the substantive treaty obligations,” and neither of those were related to the making-available right.<sup>144</sup> She further stated that the implementation bill “fully and adequately implements the obligations of the [new WIPO] treaties.”<sup>145</sup> She later testified that “making [a work] available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right.”<sup>146</sup>

In a 2008 article, Robert Kasunic, Principal Legal Advisor at the Copyright Office, acknowledged the confusion over the scope of the distribution right and argued that the violation of the distribution right in the file sharing cases could usefully be addressed through the standards governing circumstantial evidence.<sup>147</sup> This approach elides the interpretive question and provides an alternative mechanism for proving actual distribution – at least probabilistically. But this approach has the problem of opening the prima facie liability determination to a contested trial.

Most recently, David Carson, the Copyright Office General Counsel, spoke to the “making available” issue in the 22nd Annual Horace S. Manges Lecture.<sup>148</sup> He canvassed the international treaties, cases, and commentary – but did not delve significantly into the legislative history of the

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<sup>144</sup> See Online Copyright Liability Limitation Act Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 43-44 (1997) (statement of Marybeth Peters, Register of Copyrights).

<sup>145</sup> See *id.* at 27-28 (alteration in original) (quoting WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 43 (1997) (statement of Marybeth Peters, Register of Copyrights)).

Title I of the DMCA is called the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” and the Conference Committee Report states that Title I “implements two new intellectual property treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, signed in Geneva, Switzerland in December 1996.” [Digital Millennium Copyright Act Title I, 17 U.S.C. § 512 (1998); H.R. Rep. No. 105-796, at 63 (1998) (Conf. Rep.)]. The House Judiciary Committee’s report on the DMCA states that “[t]he treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.” H.R. Rep. No. 105-551 at 9 (1998).

<sup>146</sup> Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Subcomm. on Courts, the Internet and Intellectual Prop. 1 (Sept. 25, 2002), reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 114 (2002)).

<sup>147</sup> See Robert Kasunic, Making Circumstantial Proof of Distribution Available, 18 Fordham Intell. Prop. Media & Ent. L.J. 1145 (2008).

<sup>148</sup> See David O. Carson, Making the Making Available Right Available, 33 Colum. J.L. & Arts 135 (2010)

distribution right. He concluded that all of these sources support the existence of a “making available” right under U.S. Copyright law. His presentation closed with a policy plea:

If we agree that the purpose of copyright law is to provide an incentive for authors to create and publish their works, and if we agree that others should not be permitted to exploit those works in ways that undermine that incentive and even threaten the authors’ livelihood, then in this age of the Internet it seems pretty clear that a making available right is indispensable.

Even as authorized online music services are finally taking off, the number of authorized transactions is dwarfed in volume by the number of online infringements that take place every day. You don’t have to accept the RIAA’s figures to conclude that infringement in the online world has been a major factor in the decline of the recording industry, and that it represents a threat to the motion picture industry and other creative industries as well. And when the nature of the technology is such that the actual transmission of infringing copies is undetectable, a making available right that focuses on the act of enabling the infringing distribution of copies may well be the only effective legal remedy.<sup>149</sup>

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Thus, like the courts, the commentators are scattered across the interpretive landscape. *Nimmer* and *Goldstein* offer little analysis and no legislative background on this long dormant and now critically important issue. Legal scholarship in the area is divided and highly politicized. The most extensive treatise account is provided by *Patry*—although, as explained below, that treatment overlooks key pieces of legislative history and relies upon unpersuasive cases.<sup>150</sup> The Copyright Office personnel are inclined toward a broad interpretation of the distribution right, but fail to substantiate their view with definitive evidence from the 1976 Act’s legislative history.

### **III. Rediscovering the Lost Ark: Exploring the Legislative History of the Copyright Act of 1976**

In interpreting statutes, courts generally seek to determine and effectuate the legislature’s intent. When the plain meaning of statutory terms can be clearly determined from the text of the statute, the task is supposed to end there. But when the statutory text is amenable to a range of interpretations, courts typically look to the origins and evolution of the term in question and the larger statutory context, as well as prior judicial interpretations. When the choice of the statutory term was the result of a broad consensus, the rationale for the term was clearly explained in contemporaneous hearings and reports, and the process for its selection was transparent and documented, legislative history provides critical information for construing a facially ambiguous statutory term’s meaning. Furthermore, when a statutory term derives from more than a century of

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<sup>149</sup> See *id.* at 162-63.

<sup>150</sup> See \_\_\_, *infra*.

jurisprudence – as is true of the Copyright Act – courts must pay attention to the specialized meaning that has developed. As the Supreme Court has observed, “[i]t is a well-established rule of construction that ‘[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’ ”<sup>151</sup>

As explored in Part I, none of the courts to confront the meaning of the Copyright Act’s distribution right traced the critical term back to its origins or explored specialized or settled meaning from practice or jurisprudence. The distribution right cases pose several fundamental and critical statutory interpretation questions: (1) Why did Congress enunciate a right to “distribute” against a backdrop of prior legislation, which referred to rights to “publish” and “vend”?; (2) Did Congress intend to encompass those prior rights within the right to “distribute” or to narrow the scope of protection?; (3) Did Congress explain the contours of the right to “distribute”?; (4) Did Congress view the distribution right in a narrow, technical way (such as might support proof of “actual distribution”) or did it intend a broad and flexible provision?; and (5) If the distribution right encompasses the antecedent law’s right to publish, what was the scope of the publication right? Any judge interpreting the distribution right would presumably want to know the answers to these critical questions, if such answers in fact existed. Thus far, the judges who have confronted the scope of the distribution right have operated in a total vacuum as no brief, treatise, or scholarly article has yet discovered and explicated the critical documents.

Perhaps, as suggested by some of the scholarship reviewed in Part II, these questions are unanswerable. Or perhaps the answers have been lost, like the holy ark depicted in the first Indiana Jones blockbuster. As we will explain, the copyright ark exists and its contents directly answer the critical questions just posed. To put these materials in context, section A explains the larger legislative context, which illuminates why these documents evaded discovery. Section B traces the statutory precursors to the distribution right: the rights to “publish” and “vend” found in 1909 Act and the right to “publish” found in the 1790 Act. With this background in place, section C traces the evolutionary process that produced the distribution right in the 1976 Act.

## **A. The Making of the Copyright Act of 1976**

As this Part will demonstrate, litigants and jurists have entirely overlooked critical passages from the legislative history of the Copyright Act of 1976 explaining the meaning and scope of the distribution right. How can this occur in the information age – with easy access to vast legal

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<sup>151</sup> *Neder v. U.S.* 527 U.S. 1, 21-22 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); see also *United States v. Morrisette*, 342 U.S. 246, 250 (1952) (observing that “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”).

databases and Boolean search technology? Given the stakes involved, one would expect that the litigants would have exhaustively navigated this terrain.

One reason it might have been overlooked is it required looking back further than 1976, as the critical developments took place more than a decade earlier. This puzzle cannot be understood without explicating two complex and related areas of copyright law – the pre-1976 Act “publication” right from which the distribution right derives and the convoluted evolution of the 1976 Act. Congress set out to update the 1909 Copyright Act at various points during the first half of the twentieth century without success. These efforts were suspended during the development of the Universal Copyright Convention,<sup>152</sup> which came to fruition in 1952.<sup>153</sup> In 1955, Congress revived the reform effort, authorizing appropriations over the next three years for comprehensive research and preparation of studies by the Copyright Office as the groundwork for general revision. It was expected that this reform would be completed by the early to mid-1960s. The end of the story is well-known – the long and complex Copyright Act of 1976. What is glossed over, and is critical to understanding the distribution right (as well as termination rights<sup>154</sup> and other copyright conundrums), is what happened between 1961 and 1965 – a critical stage in the development of the modern act. Due to various logjams unrelated to the distribution right issue, the statute was constructed in phases, with the ultimate product finally emerging in 1976. Various issues, however, were fully resolved long before final passage.

Of particular importance to the present inquiry, the distribution right was hammered out between 1961 and 1965. The 1964 hearings and the detailed 1965 Supplementary Report prepared by the Register of Copyrights expressly explain why Congress replaced the 1909 Act “publish” and “vend” rights with the right to “distribute” as well as the overarching intent surrounding this right. By 1965, the specific statutory provision in question was fully developed as it would later be enacted in 1976. No further discussion of the distribution right occurs during the ensuing 11 years. Instead, the drafting process became bogged down in contentious debates about compulsory licenses for cable television and juke boxes as well as other issues. By the time that the cable television and other issues had been worked out over the ensuing decade, the reasons behind the distribution right had lost their salience and did not get repeated in the final House and Senate reports accompanying the 1976 Act.<sup>155</sup> Yet nothing in the intervening years addresses the clear explanations set forth in the contemporaneous documents. And since the legislative language survived to the passage of the

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<sup>152</sup> See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law x (July 1961).

<sup>153</sup> See Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, 216 U.N.T.S. 133.

<sup>154</sup> See Peter S. Menell and David Nimmer, Pooh-Poohing Copyright Law’s ‘Inalienable’ Termination Rights, *Journal of the Copyright Society* (forthcoming 2010).

<sup>155</sup> It should also be noted that the committee staffs had experienced substantial turnover between 1965 and 1976 and the distribution right was not salient at the time of ultimate passage. Hence, it is not surprising that the legislative history surrounding this provision is not reiterated in the 1976 House and Senate reports.



1976 Act, the 1964 hearing transcript and the 1965 Supplementary Report provide the best evidence of what the drafters of the legislation understood and intended.

Unfortunately, this wisdom has been entirely overlooked by the courts as well as most scholars in the contemporary debate over scope of the distribution right. But the judges have a good excuse. The briefs presented, as well as the scholarly treatises that explore this issue, have neglected or in some cases misrepresented the important passages of the legislative record. The reason for this oversight relates to the long gestation of the Copyright Act of 1976 and the relative inaccessibility of the critical documents. The volumes in which these reports and transcripts reside are not readily accessible in digital libraries.<sup>156</sup> Given this lacuna in the historical record, it is worth tracing the development of the distribution right provision in detail. But before we undertake this task, we need to lay some groundwork.

## **B. Precursors to the Distribution Right: The Rights to Publish and Vend**

Modern jurists are split on whether the 1976 Act’s distribution right encompasses or diverges from the prior law’s rights to publish and vend.<sup>157</sup> Their analyses only scratch the surface – pointing to textual clues and snippets from the legislative history – but failing to navigate the complex jurisprudence relating to “publication” and its connection to the 1976 Act’s distribution right. As we will see, understanding this landscape is crucial to interpreting the scope of the distribution right.

### **1. The 1790 Act: The Right to Publish and Ramifications of Publication**

Our journey begins with the first federal copyright act, the Copyright Act of 1790,<sup>158</sup> by which Congress established the foundation of copyright protection in the newly formed United States: “[A]ny person or persons who shall print or *publish* any manuscript, without the consent and approbation of the author or proprietor thereof . . . shall be liable . . .”<sup>159</sup> Thus, copyright protection featured two keystone rights: the right to print (which would evolve into the modern right to reproduce) and the right to publish. The legislative history of the 1976 Act confirms the importance

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<sup>156</sup> They are part of the two compilations of legislative history of the Copyright Act of 1976 – Alan Latman and James F. Lightstone (eds.), *Kaminstein Legislative History Project : A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* (1981) (6 volumes) and George S. Grossman, *Omnibus Copyright Revision Legislative History* (2001) (17 volumes). Both can be found in the major research libraries and Heinonline archive, [www.heinonline.org](http://www.heinonline.org), but are quite large and not easily searchable. In addition, they cannot be adequately understood through keyword searching. They require good, old-fashioned reading.

<sup>157</sup> See Part I, *supra*.

<sup>158</sup> Act of May 31, 1790, Ch. 15, 1 Stat. 124.

<sup>159</sup> *Id.* at § 6 (emphasis added). Section 1 of the 1790 Act states that authors of maps, books, or charts already printed within the United States shall have “the sole right and liberty of printing, reprinting, publishing and vending” such work for the term of protection.

of these rights, observing that the “twofold right to make and to publish copies” is the “historic basis of copyright and pertains to all categories of copyrighted works.”<sup>160</sup>

Publication played a second important role in early American copyright law: publication triggered the loss of common law protection – which was perpetual – for the statutory term of protection.<sup>161</sup> Publication would come to serve a more momentous and potentially calamitous role under the 1909 Act, wherein Congress decreed that publication without proper notice injected the work into the public domain.<sup>162</sup> The jurisprudential confusion resulting from this provision ultimately played a critical role in the choice of the word “distribute” in the 1976 Act.<sup>163</sup> But that gets ahead of our story.

Since the scope of “publish” and “publication” prove critical to understanding the scope of the modern right to distribute, it is worthwhile exploring the understanding of these terms in this formative period of history. Noah Webster’s landmark 1828 “American Dictionary of the English Language provides the following definition of “publish”:

PUB’LISH, v.t. [L.publico. See Public.]

1. To discover or make known to mankind or to people in general what before was private or unknown; to divulge, as a private transaction; to promulgate or proclaim, as a law or edict. We publish a secret, by telling it to people without reserve. Laws are published by printing or by proclamation. Christ and his apostles published the glad tidings of salvation.

Th’ unwearied sun, from day to day,  
Does his Creator’s power display;  
And publishes to every land  
The work of an Almighty hand.

2. To send a book into the world; or to sell or offer for sale a book, map or print.

3. To utter; to put off or into circulation; as, to publish a forged or counterfeit paper.

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<sup>160</sup> See 1961 Register’s Report at 22.

<sup>161</sup> See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); see generally David Rabinowitz, *Everything You Ever Wanted to Know about the Copyright Act Before 1909, But Couldn’t Be Bothered to Look Up*, 49 J. Copyright Soc’y U.S.A. 649 (2001); Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions* 100, 116-21 (1879).

<sup>162</sup> See *infra* TAN \_\_.

<sup>163</sup> See *infra* TAN \_\_\_\_.

4. To make known by posting, or by reading in a church; as, to publish banns of matrimony. We say also, the persons intending marriage are published; that is, their intention of marriage is published.<sup>164</sup>

Thus, as understood in the early 18<sup>th</sup> century, “publish” derives from the Latin root “publico” or “publicus,” connoting “of the people, public, open to all.”<sup>165</sup> Webster’s first definition of “publish” focuses on making known. It encompasses both physical printing as well as proclamation. Webster’s second definition comports most directly to the copyright context: “[t]o send a book into the world; or to sell or *offer* for sale a book, map or print.” These definitions do not require actual distribution. They plainly encompass the making available of a work to the public.

Webster’s definition of “publication” reinforces the breadth of the “making available” concept.

PUBLICA’ION, n. [L. publicatio, from publico, from publicus.]

1. The act of publishing or offering to public notice, notification to a people at large, either by words, writing or printing; proclamation; divulgation; promulgation; as the publication of the law at mount Sinai; the publication of the gospel; the publication of statutes or edicts.

2. The act of offering a book or writing to the public by sale or by gratuitous distribution. The author consented to the publication of his manuscripts.

3. A work printed and published; any pamphlet or book offered for sale or to public notice; as a new publication; a monthly publication.<sup>166</sup>

The first definition emphasizes the offering to the public. The second definition, which relates most directly to the copyright context, encompasses “[t]he act of offering a book or writing to the public by sale or by gratuitous distribution,” as in “[t]he author consented to the publication of his manuscripts.” This definition is clearly not limited to actual distribution or receipt of the work – publication occurs through the mere offering to the public.

Thus, the “right to publish” would have been understood by legislators and judges in the formative period of copyright law to encompass making a work available to the public, whether or

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<sup>164</sup> Noah Webster, *American Dictionary of the English Language* (1828) (hereinafter cited as “Webster’s 1828 Dictionary”) available at <<http://1828.mshaffer.com/>>

<sup>165</sup> University of Notre Dame, *Latin Dictionary and Grammar Aid* <http://www.archives.nd.edu/cgi-bin/lookit.pl?latin=publico>

<sup>166</sup> See “Webster’s 1828 Dictionary,” *supra* n. \_\_\_.

not copies were actually distributed.<sup>167</sup> The copyright jurisprudence on the scope the right to publish comports with this meaning. Eaton Drone, a leading authority on 19<sup>th</sup> century copyright in the United States and England, defines publication in the following terms in his 1879 treatise:

**What is a Publication.** – In one sense a work of literature or art is published when it is communicated to the public in whatever manner this may be done; whether by the circulation of copies, oral delivery, representation, or exhibition. At common law the word publication may have this comprehensive signification. But to determine its meaning under the statute, it is necessary to ascertain in what sense the legislature used the word. In the case of books, maps, charts, drawings, engravings, photographs, lithographs, and chromos, the only kind of publication recognized by the statute is the circulation of copies. Hence a literary composition is not published within the meaning of the statute, when it is orally communicated to the public; nor a pictorial production, excepting perhaps a painting, when it is publicly exhibited.<sup>168</sup>

**When a Book is Published.** – A book is published when printed copies are sold unconditionally to the public. A sale naturally imports publication. *But sale is not essential.* A work may be published by the gratuitous circulation of copies. The question of publication cannot depend on the number of copies sold because a sale of ten copies or even of one is as clearly a publication as is the sale of ten thousand. Nor can it be essential that a single copy shall be disposed of before the work can be said to be published. The requirements of the law are met when the book is *publicly offered* for sale. *Then the opportunity is given to the public to avail themselves of its advantages and if they fail to do so even to the extent of obtaining one copy it is through no fault of the author or publisher. But to constitute a publication it is essential that the work shall be exposed for sale or gratuitously offered to the general public so that the public without discrimination as to persons may have an opportunity to enjoy that for which protection is granted.*<sup>169</sup>

According to Drone, publication could occur by the mere “exposing” (or offering) for sale or “gratuitous” offering to the public.

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<sup>167</sup> Other contemporary dictionaries concur. See, e.g., 2 Thomas Sheridan, *A Complete Dictionary of the English Language* (3<sup>rd</sup> ed. 1790) (defining “to publish” as “[t]o discover to mankind, to make generally and openly known; to put forth a book into the world”). [http://books.google.com/books?id=pJoRAAAIAAJ&pg=PR935&dq=thomas+sheridan+dictionary+volume+2&hl=en&ei=fZV5TI-BCI76sAPSju3EAQ&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CCoQ6AEwAA#v=onepage&q&f=false](http://books.google.com/books?id=pJoRAAAIAAJ&pg=PR935&dq=thomas+sheridan+dictionary+volume+2&hl=en&ei=fZV5TI-BCI76sAPSju3EAQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCoQ6AEwAA#v=onepage&q&f=false)

<sup>168</sup> See Drone, *supra* n. \_\_\_, at 285 (footnotes omitted; emphasis added).

<sup>169</sup> See Drone, *supra* n. \_\_\_, at 291 (footnotes omitted; emphasis added).

Thus, New York’s highest court held in 1898 that:

It will be observed that the general rule . . . asserts, first, that to expose for sale is to constitute publication. It is not necessary that the book be actually sold; it is sufficient if it be offered to the public. The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence.<sup>170</sup>

The next year, the federal district court in Missouri stated that:

In its ordinary acceptance, the word ‘publication’ means ‘the act of publishing a thing or making it public; offering to public notice; or rendering it accessible to public scrutiny.’ In copyright law, it is ‘the act of making public a book; that is, offering or communicating it to the public by sale or distribution of copies.’<sup>171</sup>

E.J. MacGillivray’s copyright treatise summarizes the understanding of “publication” under U.S. law at the turn of 20<sup>th</sup> Century as follows:

The essence of publication consists in a disclosure of the thing itself so that the public without discrimination of persons have an opportunity of enjoying its use. The most usual method of publication of a literary or artistic work is the offering for sale selling or giving away of copies. *It is not necessary that a copy of the book be actually sold, it is sufficient if it be offered to the public. . . . Gratuitous distribution to members of the public or leaving copies in a place to which the public have access, such as an hotel, is publication. . . .*<sup>172</sup>

Thus, publication was in no manner tied to actual distribution. A mere offer to the general public sufficed.

## **2. 1909 Act: The Right to Publish and Forfeiture for Publication without Proper Notice**

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<sup>170</sup> See *Jewelers’ Mercantile Agency, Ltd., v. Jewelers’ Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872, 875 (Ct. App. 1898); see also *Ladd v. Oxnard*, 75 F. 703, 729-30 (C.C. Mass. 1896) (holding that making copies of a book available to subscribers onloan, even with the restriction that it should not be passed to others, was a general publication since there was no limit placed on the extent or number of persons to whom the book might be distributed).

<sup>171</sup> See *D’Ole v. Kansas City Star Co.*, 94 F. 840, 842 (C.C.Mo. 1899); see also *Chapman v. Ferry*, 9 Sawy. 395, 18 F. 539, 541 (C.C.Or. 1883) (indicating that offering for sale to the public would constitute publication under copyright law).

<sup>172</sup> See E.J. MacGillivray, *A Treatise Upon the Law of Copyright* 261-62 (1902) (emphasis added).

The 1909 Act and the jurisprudence that it spawned are notable for understanding the distribution right in two respects. First, Section 1(a) of the 1909 Act accorded copyright owners the exclusive rights to copy, publish, and vend, among other rights.<sup>173</sup> The legislative history notes that this section “adopts without change the phraseology of [prior law . . . which] the committee felt []was safer to retain without change [because it had] been so often construed by the courts.”<sup>174</sup> Thus, the scope of these rights remained the same and no judicial decision under the 1909 Act required a copyright owner to prove actual distribution in order to establish violation of the right to publish or vend.

Second, the 1909 Act provided that failure to provide proper notice upon publication of a work resulted in forfeiture of copyright protection.<sup>175</sup> Thus, publication that did not meet the strict notice requirements of the 1909 Act carried a double whammy – the act of publication forfeited common law copyright protection for the work and improper notice forfeited statutory protection. The net effect of publication without proper notice was to inject the work into the public domain.

Prior to the passage of the 1909 Act, courts distinguished between general publication (offers to the public) – which abrogated common law copyright protection – and limited publication (distribution within a limited group) – which did not – so as to limit forfeiture of common law copyright protection.<sup>176</sup> The 1909 Act intensified the pressure on courts to ameliorate the severe consequences upon authors and publishers of publication without proper notice. Several courts developed doctrines to avoid such harsh effects.

Judge Frank observed in *American Visuals Corp. v. Holland* that:

courts apply different tests of publication depending on whether plaintiff is claiming protection because he did not publish and hence has a common law claim of infringement- in which case the distribution must be quite large to constitute ‘publication’ – or whether he is claiming under the copyright statute – in which case the requirements for publication are quite narrow. In each case the courts appear so to treat the concept of ‘publication’ as to prevent piracy.<sup>177</sup>

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<sup>173</sup> See § 1, 1909 Act.

<sup>174</sup> See House Report 1 on the Copyright Act of 1909 at 4 (1909).

<sup>175</sup> See §§ 10, 19, 1909 Act; see also House Report 1 on the Copyright Act of 1909 at \_\_\_ (1909) (stating that the “notice now required by law [] must be very strictly followed in order to prevent forfeiture of the copyright”).

<sup>176</sup> See MacGillivray, *supra* n. \_\_\_, at 262.

<sup>177</sup> *American Visuals Corp. v. Holland*, 239 F.2d 740, 743 (2d Cir. 1956).

In a 1955 article, Professor Benjamin Kaplan lamented that the “[t]he concept of publication has been seriously distorted and now bedevils much of the law of copyright.”<sup>178</sup>

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As Congress embarked on the omnibus revision of copyright law in the mid-1950s, the right to “publish” was understood to encompass the offering of copyrighted works to the public. No court recognized a requirement to prove actual distribution of copies. Even gratuitous offers of a work to the public fell within the right to publish. There was neither disagreement with these contours nor confusion about their scope. But courts and commentators lamented strains in the interpretation of “publication” for purposes of abrogating common law copyright and triggering injection of works into the public domain as a result of defective notice. The judiciary’s efforts to avoid the harshness of forfeiture produced dubious distinctions. As we will see in the next section, these considerations – fully appreciated by the judges, scholars, and litigators of that era – would lead Congress to introduce the term “distribute” into the 1976 Act. Yet, contrary to the inferences made by some jurists in file sharing cases, the legislative history of the 1976 Act makes clear that Congress intended in the 1976 Act to encompass the broad right to publish recognized in prior law. The passage of time, fading of memories, and jettisoning of the harsh forfeiture provisions (effective in 1989<sup>179</sup>) have confused modern copyright litigators and some jurists into believing the 1976 Act narrowed the scope of protection. The lost ark – legislative reports and hearings from the period (1961 to 1965) when Section 106(3) was crafted – reveals the meaning, logic, and intent of this now critical provision of copyright law. Other clues from legislative history of the 1976 Act as well as parallel developments in the protection of sound recordings against piracy reinforce this understanding.

### **C. The Origins of and Contemporaneous Explanation of the Distribution Right**

The general revision process began with a study phase in 1955.<sup>180</sup> Congress appropriated funds for the preparation of studies, eventually numbering 34, under the auspices of the Copyright

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<sup>178</sup> Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. Pa. L. Rev. 469, 488-89 (1955); see also Melville Nimmer, *Copyright Publication*, 56 Colum. L. Rev. 185, 185 (1956) (observing that “[t]he concept of publication has acquired an importance and complexity in the American law of copyright far greater than in any foreign jurisdiction. It has, indeed, become a legal word of art, denoting a process much more esoteric than is suggestion by the lay definition of the term.”).

<sup>179</sup> See Berne Convention Implementation Act, Pub. L. No. 100-568, § 13(a), 102 Stat. 2853, 2861 (1988).

<sup>180</sup> Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill IX - XVI (House Comm. on the Judiciary Print) (May 1965) (hereinafter cited as “1965 Supplementary Report”) (summarizing the program for general revision of the Copyright Act).

Office. These studies provided the backdrop for the 1961 Report of the Register of Copyrights on the Revision of the U.S. Copyright Law setting forth the initial blueprint for copyright reform. The Register convened a series of four public meetings and received extensive comments in 1961 and 1962. On the basis of this input, the Copyright Office proposed a preliminary draft of copyright legislation in late 1962. After a second series of eight public meetings and receipt of comments in 1963 and early 1964 followed by six months of revisions, H.R. 11947 (“A Bill for the General Revision of Copyright Law”) emerged containing the precise text regarding Section 106(3) that would ultimately appear in the Copyright Act of 1976.

As background for understanding the scope of the distribution right in the Copyright Act, we retrace the historical record. In deciphering the scope of copyright’s distribution right, three statutory terms stand out: (1) “distribute”; (2) the scope of the term “authorize” in the preamble to the Section 106 rights; and (3) the definition of “publication” in Section 101. In addition, because of the delay in enacting omnibus copyright reform, Congress amended the 1909 Act in 1971 to provide federal protection for sound recordings. That legislative history sheds further light on the scope of the distribution right.

### **1. Section 106(3)’s Exclusive Right “to Distribute”**

None of the 34 preparatory studies leading up to the 1961 Register Report directly focused on the right to publish. The 1961 Register Report states that the drafting committee proposed “to retain the exclusive rights given to copyright owners under the present [1909] law – to make and *publish* copies, to make new versions, to give public performances, and to make recordings.”<sup>181</sup>

As background for the proposed bill, the 1961 Register Report characterized the rights of the present law in the following manner:

Section 1(a) of the present law provides for the exclusive right of the copyright owner to print, reprint, *publish*, copy, and *vend* the copyrighted work. These various terms are redundant. Printing and reprinting are modes of copying, and vending is a mode of publishing. As to vending, it is well settled that when publication has been authorized, the right to vend pertains only to the initial sale of a copy; the purchaser of the copy is then free to resell or otherwise dispose of it. On the other hand, when publication is not authorized, any vending of a copy is an infringement of the right to publish. In substance, as several courts have observed, the right embraced in the repetitive terms of section 1(a) is the twofold right to make and to *publish* copies. *This right is the historic basis of copyright and pertains to all categories of copyrighted works. The copying embraced in this right is a broad concept.* Copying is not confined to complete and literal reproduction. While anyone is free to use the ideas disclosed in a work, and to use the same source material in

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<sup>181</sup> See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law x (July 1961) (emphasis added) (hereinafter cited as “1961 Register Report”).



creating another work, the reproduction of the essential substance of an author's expression constitutes copying, even though his work is altered in the reproduction or is reproduced in a different medium or form.<sup>182</sup>

This passage emphasizes that the right to publish is fundamental to the copyright system. The Report goes on to recommend that “Subject to certain limitations and exceptions to be discussed below, the statute should continue to accord to copyright owners the exclusive rights to exploit their works by (1) making and *publishing* copies, (2) making new versions, (3) giving public performances, and (4) making records of the work.”<sup>183</sup> Thus, as of 1961, there is clearly expressed intent to retain a right to publish in the copyright reform act.

As previously noted, *Patry* asserted that the 1961 Report recommended *against* a separate distribution right.<sup>184</sup> That characterization misreads the passage just quoted. The comment that the terms in the 1909 Act are redundant does not indicate that they reduce to a single term. Read in its entirety, the passage suggests that they reduce to two – making and publishing. The 1961 Report specifically recommends that “the statute should continue to accord to copyright owners the exclusive rights to exploit their works by (1) making and *publishing* copies, (2) making new versions, (3) giving public performances, and (4) making records of the work.”<sup>185</sup> Thus, this language does not indicate an intention to drop the publishing right. *Patry* suggests that the Register proposed creation of a conjunctive right. The implication would be that making copies would not violate a revised law unless the copies were published and that one who came into possession of unauthorized copies would not violate copyright law by distributing them. There is nothing in the legislative history to support such a dramatic and counterintuitive departure from prior law. To the contrary, all indications point to retaining both reproduction and publication rights in the revised law, which is in fact what transpired.

In the nine months following issuance of the 1961 Register’s Report, the Copyright Office convened four meetings of interested parties and received comments.<sup>186</sup> There is no discussion of the Register’s recommendation regarding the publishing right. Following this process, the

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<sup>182</sup> See 1961 Register Report, *supra* \_\_\_, at 21-22 (emphasis added).

<sup>183</sup> See 1961 Register Report, *supra* \_\_\_, at 24 (emphasis added).

<sup>184</sup> See Part II(A)(3), *supra*.

<sup>185</sup> See 1961 Register Report, *supra* \_\_\_, at 24 (emphasis added).

<sup>186</sup> See Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (H. Comm. on the Judiciary Print) (Feb. 1963).

Copyright Office released its “Preliminary Draft for Revised U.S. Copyright Law” in late 1962.<sup>187</sup> It is in Section 5 of the Preliminary Draft that the right to “distribute” first appears:

§ 5 EXCLUSIVE RIGHTS COMPRISED IN COPYRIGHT. Subject to the provisions of sections 6 through 19, copyright under this title shall consist cumulatively of the following exclusive rights:

(a) the right to copy or record. \* \* \*

(b) *The right to distribute copies and sound records.* Copyright shall include the exclusive right to sell or otherwise transfer ownership of, rent, lease, or lend one or more copies or sound recordings of the work. \* \* \*<sup>188</sup>

This formulation – substituting “distribute” for the 1909 Act rights to “publish” and “vend” – raises the obvious question that has confused judges in the file sharing cases: Why did Congress introduce a new term, especially in view of the 1961 Register’s Report recommendation to retain the 1909 right to publish?

The answer emerges at the February 1963 hearing.<sup>189</sup> The meeting convened at the Library of Congress included 62 government copyright officials, industry representatives, and copyright scholars. The key players in the pertinent discussion were: Abraham L. Kaminstein, Register of Copyrights and Chairman of the drafting committee; Abe A. Goldman, the General Counsel of the Copyright Office and the staff person responsible for Section 5 of the Preliminary Draft; and Edward A. Sargoy, representative of the American Bar Association. Also participating was Prof. Melville B. Nimmer, who authored his copyright treatise that year.

Register Kaminstein opened the hearing by introducing Abe Goldman and asking him to explain Section 5 of the Preliminary Draft. Mr. Goldman began by stating that:

The draft purports in general to follow the broad recommendation of the [1961] Register’s Report: that the rights recognized in section 1 of the present [1909] statute be retained in substance with, as I will point out, some extensions and clarifications.

Subsection (a), “The right to copy or record,” includes, I believe, everything that is covered in the following provisions of the present statute:

– The references in section 1(a) to “print, reprint, and copy;” \* \* \*

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<sup>187</sup> See Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft (H. Comm. on the Judiciary Print) (1964) (hereinafter cited as “Preliminary Draft”).

<sup>188</sup> See Preliminary Draft, *supra* n. \_\_\_, at 4 (emphasis in original).

<sup>189</sup> See Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§5-8, contained in Preliminary Draft, *supra* n. \_\_\_, at 107-79.

*Subsection (b), I believe, would cover everything that's covered in section 1(a) of the present law by reference to the terms "publish" and "vend" – broadened, I would say, to 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. I think the draft covers virtually all forms of distribution. \* \* \*<sup>190</sup>*

Mr. Goldman unequivocally stated that the term right to “distribute” encompasses and **broadens** the 1909 Act rights to “publish” and “vend.” But he did not fully articulate why the term “publish” was omitted in favor of “distribute.” Edward Sargoy, echoing the concerns raised by Judge Frank, Professor Kaplan, and Professor Nimmer,<sup>191</sup> provides the rationale later in the discussion:

I am heartily in accord with the omission of the use of the words “published” or “publication.” I think that the use of the words “publication” or “published,” in hundreds of common law and statutory cases, dissertations, and otherwise, has made the terms archaic today in the light of our recent technological progress. Reference to such materials where the word derived its meaning from conditions existing in the 18th, 19th, and early part of the 20th century, will only lead to confusion. I think it is an excellent idea to use the word “distribute” and, just as the draft here has done, have “distribute” expressly include the right “to sell,” (which is strictly one of the rights of publication), “or otherwise transfer ownership of, rent, lease, or lend one or more copies or sound recordings of the work.”<sup>192</sup>

The distribution right takes the following form in the 1965 draft bill:

#### **§ 106. Exclusive rights in copyrighted works**

(a) General Scope of Copyright. – Subject to sections 107 through 114, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to *distribute* copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; \* \* \*<sup>193</sup>

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<sup>190</sup> See Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§5-8, contained in Preliminary Draft, *supra* n. \_\_\_, at 109-10 (emphasis added).

<sup>191</sup> See TAN, *supra* \_\_.

<sup>192</sup> See Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§5-8, contained in Preliminary Draft, *supra* n. \_\_\_, at 128.

<sup>193</sup> See 89<sup>th</sup> Cong., 1<sup>st</sup> Sess., S.1006, A Bill for the General Revision of the Copyright Law, Title 17 of the U.S. Code, and for Other Purposes, reprinted in 8 George S. Grossman, Omnibus Copyright Revision Legislative History 3, 8 (2001) (emphasis added).

In discussing the “general scope of copyright,” the 1965 Supplementary Report reiterates the recommendations regarding rights from the 1961 Register Report (including the exclusive rights to make and publish copies) and then states that “Section 106(a) of the bill follows all of these recommendations.”<sup>194</sup> As modern copyright lawyers readily recognize, this text is identical to the text that appears in the 1976 Act. Thus, the meaning of this language can best be understood, absent subsequent contrary indications, by the rationale provided in 1965. The 1965 Supplementary Report provides detailed explanation of the purposes and intent underlying these provisions.

Chapter 2 of the 1965 Supplementary Report explicates the “exclusive rights” section of the draft copyright law. It notes at the outset that “of the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by advancing technology in all fields of communications, including a number of future developments that can only be speculated about.”<sup>195</sup> It goes on to explain:

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

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<sup>194</sup> See “1965 Supplementary Report,” *supra* n. \_\_\_, at 15.

<sup>195</sup> See “1965 Supplementary Report,” *supra* n. \_\_\_, at 13.

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 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."<sup>196</sup>

This general statement of legislative purpose is remarkable in several respects. First, it shows that Congress was cognizant of the dangers posed by technological change and intended that the statute would be interpreted broadly so as protect against the "real danger" of confining the "scope of the author's rights on the basis of the present technology" in the face of "unforeseen technical advances." More significantly, Congress worried as early 1965 that "transmission of works by . . . *linked computers*, and other new media of communication" could threaten authors' ability to derive compensation, even when such modes of transmission are operated non-commercially. Almost half a century ago, Congress was already of the view that the "day is past when any particular use of works should be exempted for the sole reason that it is 'not for profit.'"

The 1965 Supplementary Report specifically discusses the scope of the public distribution right:

*e. Public Distribution*

Clause (3) of section 106(a) would give the copyright owner the exclusive right 'to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.' The language of this clause is virtually identical with that in the definition of 'publication' in section 101, but for the sake of clarity we have restated the concept here. \* \* \*

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<sup>196</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 13-14.

The 1965 text of Section 106 appears verbatim in the 1976 Act. The only pertinent change between the 1965 draft and 1976 Act relates to the definition of “publication” in Section 101, which we discuss in the following section. During the eleven year period leading to the ultimate passage of the Copyright Act, the legislative process becomes bogged down in a battle over compulsory licenses relating to cable television, among other issues.<sup>197</sup>

There is no further discussion of the distribution right in the legislative history of the 1976 Act until the final House Report, which unwittingly reinforces the view that Congress understood the Section 106(3) right to distribute to be none other than the prior right to publish.

### **General Scope of Copyright**

The five fundamental rights that the bill gives to copyright owners – the exclusive rights of reproduction, adaptation, *publication*, performance, and display – are stated generally in section 106. . . .

### **Rights of reproduction, adaptation, and *publication***

The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and *publishing*. . . .

**Public distribution.** – Clause (3) of section 106 establishes the exclusive right of *publication*: The right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”

. . .<sup>198</sup>

As the emphasized terms reveal, the drafters of the Report referred repeatedly to the “right of publication” and “publishing,” notwithstanding that the term “distribute” had been substituted in the interim into the actual statutory text. The reference in the main opening passage to the exclusive right of *publication* among the “five fundamental rights” as well as the interchangeable usage of “publish” and “distribute” (as well as “publication” and “distribution”) underscore what the prior legislative history expressed directly when explaining the substitution of “distribute” for “publish”: that Congress understood “distribute” to encompass “publish” and its long-established meaning and chose the term “distribute” so to limit any confusion that had emerged over judicial efforts to avoid the severe consequences of publication without proper notice. The unmistakable implication is that Congress intended: (1) for the right to distribute to fully encompass the right to publish; (2) for distribute to be understood by reference to established understanding of publish and publication; and (3) that jurisprudential confusion in interpreting publication as regards statutory formalities not narrow or obfuscate the understanding of the exclusive right to distribute/publish.

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<sup>197</sup> See 1976 House Report, *supra* n. \_\_\_, at 48 (recounting the long gestation of the Copyright Act of 1976).

<sup>198</sup> See H.R. Rep. No. 94-1476, at 61-62 (1976) (emphasis added).

Two other provisions of the 1965 legislation that unwittingly make their way into the 1976 Act reflect that the drafters treated “distribution” and “publication” synonymously and interchangeably. Section 203(a)(3) of the 1965 draft, addressing the termination or transfers, refers to the “right of first publication of the work” in prescribing the termination window.<sup>199</sup> The 1976 Act largely tracks this provision, referring to the “right of publication.”<sup>200</sup> Similarly, Section 406 of the 1965 draft, governing the deposit of copies with the Library of Congress, refers to the “owner of copyright or of the exclusive right of publication.”<sup>201</sup> The 1976 Act tracks this clause verbatim in the analogous (but renumbered) provision.<sup>202</sup> Inasmuch as Congress does not create a separate “right of publication” in the 1976 Act, Sections 203(a)(3) and 407 undoubtedly refer to the Section 106(3) right “to distribute.”

## 2. Section 106 Preamble – “to Authorize”

The preamble to Section 106 might provide a further clue to understanding the scope of the distribution right. Section 106(a) affords the “owner of copyright \* \* \* of the exclusive rights to do and *to authorize* any of the following: (1) to reproduce the copyrighted work in copies of phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; \* \* \*.”<sup>203</sup> Does the infinitive “to authorize” in the preamble broaden or modify the scope of the rights that follow? For example, it could be argued that one could violate copyright law merely by authorizing others to make or distribute copies.

The usage of this phrase traces back to the September 14, 1961 hearings on the 1961 Register’s Report. Edward Sargoy, the ABA representative, wondered

if some thought might not be given, in view of the great expense and difficulty in attempting to prove exhibition infringements in order to hold these bootleggers who are renting for these unauthorized exhibition purposes, whether there might not be a provision such as the Canadian and British laws, have whereby ‘to authorize’ any of the exclusive rights, is a species of infringement.<sup>204</sup>

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<sup>199</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 224.

<sup>200</sup> See 17 U.S.C. §203(a)(3).

<sup>201</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 258.

<sup>202</sup> See 17 U.S.C. §407.

<sup>203</sup> See 17 U.S.C. §106.

<sup>204</sup> See Copyright Law Revision: Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at 24 (House Comm. Print, 88<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1963).

Section 5 of the Preliminary Draft proposal, which was floated in late 1962, did not include Mr. Sargoy's recommendation. Its preamble to the exclusive rights stated simply that "copyright under this title shall consist cumulatively of the following exclusive rights: \* \* \*."<sup>205</sup> At the February 20, 1963 hearing to discuss this section, Herman Finklestein, General Counsel for the American Society of Composers, Authors and Publishers (ASCAP), raised the "authorize" issue again:

I wonder if at the beginning [of the exclusive rights section], right in the introductory sentence – this is a matter of drafting – we couldn't say ' . . . the rights granted under copyright shall include the right *to do or authorize* any of the following with respect to the copyrighted work.' The reason for suggesting 'authorize'" is this. Suppose ASCAP, or BMI, or any of the other licensing organizations authorizes its licensees to perform a certain work. I doubt whether that would be an act of contributory infringement, but I think that there should be liability there. *It would seem to me that the mere authorization to make the use of the copyrighted work, that particular work, ought to subject the person making the authorization to liability* even though he may not be a contributory infringer.<sup>206</sup>

Mr. Finklestein's proposal made its way into the 1964 bill<sup>207</sup> and ultimately into the final version of Section 106.<sup>208</sup> There can be little question that Mr. Finklestein proposed to broaden the scope of liability: "It would seem to me that the mere authorization to make the use of the copyrighted work\* \* \* ought to subject the person making the authorization to liability \* \* \*."

The next mention of this phrase arises at the August 6, 1964 meeting to discuss the revision bill. Abe Goldman, the Copyright Office General Counsel charged with managing the draft states:

In the opening clause we refer to 'the exclusive rights to do or to authorize any of the following: . . .' 'Or to authorize' is a phrase that did not appear in the preliminary draft. At our Panel meeting it was suggested that we insert that phrase, and the subcommittee of the A.B.A. committee that dealt with this matter also suggested that this phrase be inserted. We have followed those suggestions in the bill.<sup>209</sup>

The 1965 Supplementary Report explained the preamble in general terms:

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<sup>205</sup> Section 5, Preliminary Draft for Revised U.S. Copyright Law, Copyright Law Revision: Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, at 4 (1964).

<sup>206</sup> See Copyright Law Revision: Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, at 122-23 (1964) (emphasis added).

<sup>207</sup> See § 5(a), 1964 Bill, 1965 Supplementary Report, *supra* n. \_\_\_, at 187.

<sup>208</sup> See 17 U.S.C. § 106(a).

<sup>209</sup> See Copyright Law Revision Part 5, 1964 Revision Bill with Discussions and Comments (Sept. 2, 1965), House Committee Print, 89<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 57.



Under the language of section 106 a copyright owner ‘has the exclusive rights to do and to authorize’ any of the activities specified in the five numbered clauses of subsection (a). The right ‘to do’ something is probably broad enough to include the right ‘to authorize’ that the thing be done, but we have added the phrase ‘and to authorize’ in order to avoid possible questions as to the liability of contributory infringers. One example cited was of a person who legally acquires an authorized print of a copyrighted motion picture but who then engages in the business of renting it to others for purposes of unauthorized public performance. There should be no doubt that this kind of activity constitutes infringement.<sup>210</sup>

There is no further mention of the “authorize” term until the House Report accompanying the 1976 Act, which states:

The exclusive rights accorded to a copyright owner under section 106 are ‘to do and to authorize’ any of the activities specified in the five numbered clauses. Use of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.<sup>211</sup>

### **3. Section 101 Definition of “Publication”**

A related puzzle concerns whether Section 101’s definition of “publication” governs or informs the scope of the distribution right. In contrast to the right to publish, the definition of “publication” was a deeply controversial issue in the lead-up to and drafting of the revised act because of its role in determining: (1) whether common law protection for a work has been abrogated; and (2) forfeiture of statutory protection if copyright notice was defective.<sup>212</sup> Although

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<sup>210</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 16.

<sup>211</sup> See H.R. Rep. No. 94-1476, at 61.

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‘Publication,’ perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, ‘publication’ could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given ‘publication’ a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.

these ramifications of “publication” are potentially separate from the right to publish, the legislative history helps to illuminate Congress’ intent for how the definition of “publication” interacts with the scope of the right to distribute. This section traces the evolution of the “publication” concept and definition. Part IV addresses its relevance to the scope of the right to distribute.

Statutory definition of the term “publication” dates back to the 1909 Act. That law defines “date of publication” in the following manner:

In the interpretation and construction of this title, ‘the date of publication’ shall in the case of a work of which copies are reproduced for sale or distribution be held to be earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright under his authority . . .<sup>213</sup>

Although this definition focuses on publication by the copyright proprietor, it reflects how Congress understood the concept of publication. Publication occurs when works are made available to the public (“when copies of the first authorized edition were placed on sale, sold, or publicly distributed”), which comports with Webster’s 1828 dictionary definition.<sup>214</sup>

As noted previously, courts’ efforts to preserve common law rights and avoid the harsh consequences of forfeiture of statutory rights produced a complex jurisprudence.<sup>215</sup> The Copyright Office’s study on “Protection of Unpublished Works” recognized that the availability of a work to the general public served as the touchstone for publication.<sup>216</sup> The 1961 Register’s Report proposed maintaining common law protection for undissemated works.<sup>217</sup> In light of what the Register later characterized as “justifiable criticism” of this proposal,<sup>218</sup> the Register later changed his recommendation, in the 1964 draft bill, to propose bringing all works within a unified Federal system.<sup>219</sup> This alteration eliminated the role of “publication” in abrogating common law protection. But “publication” would still serve as the trigger for notice, registration, and deposit, as well as other

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Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 312 (House Comm. Print 1975).

<sup>213</sup> See 1909 Act, §26.

<sup>214</sup> See, *supra*, TAN \_\_.

<sup>215</sup> See, *supra*, TAN \_\_.

<sup>216</sup> See *id.* at 9-10 (citing *Jewelers’ Mercantile Agency, Ltd., v. Jewelers’ Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872, 875 (Ct. App. 1898) and *Ladd v. Oxnard*, 75 F. 703, 729-30 (C.C. Mass. 1896)).

<sup>217</sup> See 1961 Register Report, *supra* n.\_\_, at 40-41.

<sup>218</sup> See 1965 Supplementary Report, *supra* n.\_\_, at XI.

<sup>219</sup> See 1965 Supplementary Report, *supra* n.\_\_, at 81-85.

functions. Other proposed changes substantially ameliorated the effects of accidental or even deliberate errors or omissions.”<sup>220</sup>

The 1964 draft bill defined publication as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>221</sup> This definition left ambiguous whether merely making a work available to the public constituted publication, as was understood under prior law. But there is nothing in the accompanying reports to suggest a change in this aspect of “publication.” In 1971, Congress reintroduced the prior bill with “minor amendments,”<sup>222</sup> including the addition of the following sentence to the definition of “publication”: “The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”<sup>223</sup>

#### **4. The Sound Recording Amendments Act of 1971 and Ratification of Geneva Phonogram Convention**

As the battle over general copyright revision languished in the mid to late 1960s, growing concern about “record piracy” galvanized both the U.S. Congress and the Administration to take decisive action to protect sound recordings.<sup>224</sup> Federal action was particularly critical because of concern that recent Supreme Court decisions could be seen to preempt state and common law remedies to combat record piracy.<sup>225</sup> Although passage of the Copyright Act of 1976 would eclipse the events of 1971, they form a vital part of the history. In that year, Congress passes the Sound Recording Amendment Act of 1971 (“SRAA”)<sup>226</sup> and the United States ratified the Geneva

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<sup>220</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 99.

<sup>221</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 172.

<sup>222</sup> See H.R. Rep. No.1476 at 48.

<sup>223</sup> See S.644, 92<sup>nd</sup> Cong. (1971). Congress added the third sentence of the definition – “A public performance or display of a work does not of itself constitute publication.” – in 1974. See S. Rep. No. 93-983 at 5 (1974).

<sup>224</sup> See 1976 House Report, *supra* n. \_\_\_, at 48-49 (in recounting the long gestation of the Copyright Act of 1976, observing that “[w]hile action on the general revision bill was necessarily delayed, the unauthorized duplication of sound recordings became widespread. It was accordingly determined that the creation of a limited copyright in sound recordings should not await action on the general revision bill.”).

<sup>225</sup> See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (observing that state laws forbidding copying of unpatented or uncopyrighted works would interfere with federal policy); see also Letter of Deputy Attorney General Richard G. Kleindienst to House Judiciary Committee, contained in See H.Rep.No. 92-487, 92d Cong., 1st Sess. at 12 (Sept. 22, 1971) (hereinafter cited as “SRAA House Report”).

<sup>226</sup> Pub. L. No. 92-140, 85 Stat. 391 (1971).

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.<sup>227</sup> In particular, the text of the 1971 law and treaty, as well as the discussion surrounding these actions, shed valuable light on contemporary congressional understanding of the right to distribute.

As the House Report accompanying the SRAA noted, “the United States recently participated in an international conference of government experts at which the draft of an international treaty to combat record piracy was prepared” and “progress in domestic efforts to protect sound recordings will be helpful to the United States Delegation.”<sup>228</sup> Article 2 of the Geneva Phonogram Convention provides that:

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.<sup>229</sup>

Article 1 defines “distribution to the public” to mean “any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.”<sup>230</sup> Thus, as understood at the time and in the context of copyright protection, “distribution” broadly encompassed the offering – whether directly or indirectly – of duplicates to the public.<sup>231</sup>

Against this backdrop, Congress passed the SRAA to address “the widespread unauthorized reproduction of phonograph records and tapes.”<sup>232</sup> The House Report noted that “[t]he pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues.”<sup>233</sup> The SRAA added the following exclusive right to Section 1 of the 1909 Act: “(f) To reproduce and *distribute to the public*

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<sup>227</sup> 25 U.S.T. 309 , 888 U.N.T.S. 67 (Oct. 29, 1971) (hereinafter cited as “Geneva Phonogram Convention”).

<sup>228</sup> See SRAA House Report, *supra* n. \_\_\_, at 3.

<sup>229</sup> See Article 2, Geneva Phonogram Convention, *supra* n. \_\_\_.

<sup>230</sup> See Article 1(d), Geneva Phonogram Convention, *supra* n. \_\_\_.

<sup>231</sup> The United States ratified the Convention on November 26, 1973. The Convention entered into force on March 10, 1974, three months after deposit of the fifth instrument of ratification, acceptance or accession. See Article 11(1), Geneva Phonogram Convention, *supra* n. \_\_\_; World Intellectual Property Organization (WIPO) website <[http://www.wipo.int/treaties/en/Remarks.jsp?cnty\\_id=1218C](http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1218C)>

<sup>232</sup> See SRAA House Report, *supra* n. \_\_\_ at 2.

<sup>233</sup> See *id.*

by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording \* \* \* .<sup>234</sup>

The House Report provides several revealing clues to the meaning of the term “distribute” as it is used in the SRAA. L. Quincy Mumford, the Librarian of Congress (who oversees the Copyright Office) observed in a letter accompanying the report that

the problem of record piracy is one of immediate concern internationally, and that a draft treaty *closely corresponding to the content and purpose of S. 646*<sup>235</sup> was adopted by a Committee of Governmental Experts on March 5, 1971. This draft convention will be the subject of an International Conference of States to be convened in Geneva in October of this year. Favorable action on the domestic bill will not only help our negotiators but also encourage protection of our records against the growing menace of piracy in other countries.<sup>236</sup>

Mumford states that the language of the 1971 bill “closely correspond[s]” to the “content and purpose” of the Geneva Phonogram Convention. Thus, there is good reason to read “distribute” as used in the SRAA (and the Copyright Act of 1976) to encompass the offering – whether directly or indirectly – of copies to the public.

Along similar lines, David Abshire, Assistant Secretary for Congressional Relations at the Office of the Deputy Attorney General expressed the full support of the Department of State for the legislation:

The problem of unauthorized duplication of sound recordings is also one of immediate concern internationally. An International treaty which would include provisions that *correspond closely to the content and purpose of S. 646* is presently under consideration. This treaty would give to producers of phonograms who are nationals of contracting states protection against the making, distribution, or importation of duplicates made without their consent where such acts are for the purpose of distribution to the public. The United States has played an active role in the development of the treaty, and if current plans remain unchanged the treaty will be adopted at a diplomatic conference to be held in Geneva in the fall of this year.

United States ratification of or adherence to the proposed treaty depends, of course, upon enactment of a domestic law such as S. 646. Accordingly, passage of the proposed legislation is necessary to give the Department of State an effective

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<sup>234</sup> See 17 U.S.C. §1(f) (1909 Act) (emphasis added).

<sup>235</sup> [S.646 became the SRAA and the distribution portion was unchanged. See § 1(f) (1909 Act as amended by the Act of October 15, 1971, 85 Stat. 391.)

<sup>236</sup> See SRAA House Report, *supra* n. \_\_ at 10-11 (emphasis added).

basis for continuing its efforts to secure international protection for American sound recordings.<sup>237</sup>

This letter indicates that the SRAA was understood and intended to implement the Geneva Phonogram Convention. Obviously, that would include the broad conception of the “distribution right,” as reflected in the treaty. There is no language in the House Report to suggest any other conception of the distribution right.

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The Geneva Phonogram Convention in conjunction with the passage of the SRAA provides another valuable clue in solving the distribution right puzzle. Congress in that context augmented the definition of “publication” by adding a sentence – “The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”<sup>238</sup> Although no specific explanation accompanies that amendment, its timing shows that this sentence was added to conform to the broad conception of “distribution” reflected in the Geneva Phonogram Convention. In this manner, the definition of “publication” was understood Congress in the 1970s to play a role not just in formalities but in defining “distribute.”

#### **IV. Statutory Interpretation of the Distribution Right**

The exhaustive backdrop set forth above provides critical guidance in interpreting the contours of copyright’s distribution right. Little if any of this vital background was presented to the courts that have thus far grappled with the meaning of copyright’s distribution right. With this background in place and many of the stray pieces of the distribution puzzle fitting together, we are now prepared to interpret the scope of copyright’s distribution right.

As applied to file sharing enforcement actions, the central question is whether a copyright owner whose work is placed without authorization in share folders accessible through peer-to-peer networks must prove that the work has been actually downloaded by third parties in order to establish copyright liability. Alternatively, does merely proving that the defendant has placed the work in a publicly accessible share folder establish violation of the distribution right?

As noted in Part I, the numerous courts that have confronted this question have produced conflicting decisions. Based on review of the briefs filed in these cases and relative difficulty of tracing the legislative history, it is clear that none of the courts to date was made aware of the legislative history discussed above. Thus, this section will apply conventional tools of statutory

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<sup>237</sup> See SRAA House Report, *supra* n. \_\_\_, at 11 (emphasis added).

<sup>238</sup> See, *supra*, TAN \_\_\_.

construction to the interpretation of Section 106(3)'s distribution right in light of the legislative record.<sup>239</sup>

The goal here is to determine Congress' intent as manifest in the statute. "The starting point in statutory interpretation is 'the language [of the statute] itself.'"<sup>240</sup> If the plain meaning resolves the interpretive question, then the task is done absent exceptional circumstances.<sup>241</sup> But if the language is ambiguous and/or exceptional circumstances exist, then the analysis considers specific and general legislative history. For completeness, the analysis also examines evolutive considerations and policy considerations, although their role in statutory interpretation is much more tenuous and contested.

The key statutory provision states: "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: \* \* \* (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; \* \* \*"<sup>242</sup> The provision divides into two principal components: (1) the powers clause – "the copyright owner has the exclusive rights to do and to authorize"; and (2) the subsection (3) distribution right clause – "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, leasing, or lending."

Section A begins the analysis with the subsection (3) clause so as to better understand the nature and contours of the distribution right. It examines the statutory text and specific legislative history. Section B then analyzes the "powers" clause, working through the statutory text and specific legislative history. Section C examines the general legislative history for more general guidance on interpreting the Copyright Act of 1976. Section D evaluates whether any evolutive considerations should influence interpretation of the distribution right. Section E reviews policy considerations. Section F combines all of the elements of the interpretative analysis.

## **A. Subsection (3) - The Distribution Right Clause**

### **1. Statutory Text**

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<sup>239</sup> See generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *Stan. L. Rev.* 321 (1990) (exploring the landscape of approaches to statutory interpretation and positing a pragmatic positive framework).

<sup>240</sup> *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

<sup>241</sup> "[T]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12 (1987) and quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

<sup>242</sup> 17 U.S.C. § 106 (emphasis added).

The distribution rights clause has several elements: (1) the opening infinitive – “to distribute”; (2) the object of the infinitive – “copies or phonorecords of the copyrighted work”; (3) “to the public”; (4) the first means clause: “by sale or other transfer of ownership”; and (5) the second means clause: “by rental, leasing, or lending.”

It is appropriate to begin with the plain meaning of “distribute” in isolation and then put it into the statutory context. Webster’s Third New International Dictionary of the English Language, Unabridged, provides a range of possible meanings for “distribute”:

**1a:** to divide among several or many: deal out: apportion esp. to members of a group or over a period of time: allot **b:** DISPENSE, administer <~justice> **2a:** to spread out or scatter as to cover a surface or a space <*distributing* the seed over the lawn> <*distributing* the ink evenly over the print> <*distributing* magazines to subscribers> **b:** to place or position usu. so as to be properly apportioned over or throughout an area **c:** *logic:* to use (a term) so as to convey information about every member of the class named **3a** to divide or separate esp. into classes, orders, kinds, or species CLASSIFY, ASSORT **b** (1): to separate the units of (as typeset matter or handset matrices) and return to the proper storage places (2) *of a keyboard slugcasting machine:* to return (matrices) automatically to the proper magazine channels **4:** to market (a commodity) under a franchise in a particular area esp. at wholesale ~ vi: to make distribution: spread out<sup>243</sup>

Thus, the dictionary definition of “distribute” does not communicate a single meaning. The most relevant definitions in the context of copyright law would appear to Webster’s second and fourth entries: “to spread out or scatter” as in “distributing magazines to subscribers” and “to market (a commodity).”

Do either of these definitions resolve whether “to distribute” requires an actual receipt of the thing being distributed?<sup>244</sup> “[T]o spread out or scatter” as in “distributing magazines to subscribers”

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<sup>243</sup> See Webster’s Third New International Dictionary of the English Language, Unabridged 660 (Philip Babcock Gove, Editor in Chief) (1961 and 1993) (some examples and synonyms omitted; emphasis in original) (hereinafter cited as “Webster’s Third Dictionary”). Note that Webster’s provided the same definition in both its 1961 and 1993 editions. The 1961 edition would have been available to the drafters of the Copyright Act at the time that the word “distribute” was adopted.

<sup>244</sup> In *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1201 (D. Minn. 2008), Judge Davis provided scant textual analysis.

## 1. Statutory Language

Starting with the language in § 106(3), the Court notes that Congress explains the manners in which distribution can be effected: sale, transfer of ownership, rental, lease, or lending. The provision does not state that an offer to



is ambiguous. To spread out or scatter seems to involve some physical act by the distributor, but could plausibly be accomplished through placing a work into a file share folder that is searchable and accessible to a vast network of “subscribers.” The second definition – “to market (a commodity)” – does not involve actual distribution. The mere marketing of a commodity satisfies the definition. Thus, neither definition conclusively resolves the statutory interpretation puzzle – whether proof of violation of the right to distribute requires actual receipt.

The second clause – “copies or phonorecords of the copyrighted work” is relatively clear and does not appear to be disputed in the context of the file sharing cases. The third clause – “to the public” – is also relatively clear and not disputed with regard to the sharing of files across publicly accessible file sharing networks.

Read technically (and without regard to the “powers” clause), the “means” clauses arguably limit the distribution right to particular classes of distribution (sale, other transfer of ownership, or rental, leasing, or lending). The first “means” clause has two components: (1) “by sale”; or (2) “other transfer of ownership.” Placing a work in a file share folder would not fall within the “sale” means. Sale would appear to require a paid transaction. The “other transfer of ownership” is more difficult to parse. The concept of “transfer of ownership” is broad, but would appear to require a transferee. Thus, violation of the right to distribute occurs by sale or other transfer of ownership. The first “means” clause appears limited to either a transaction or a transfer of ownership.

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do any of these acts constitutes distribution. Nor does § 106(3) provide that making a work available for any of these activities constitutes distribution. An initial reading of the provision at issue supports Thomas’s interpretation.

## **2. Secondary Sources**

The ordinary dictionary meaning of the word “distribute” necessarily entails a transfer of ownership or possession from one person to another. See, e.g., Merriam-Webster's Collegiate Dictionary (10th ed.1999) (defining “distribute” as, among other things, “1: to divide among several or many: APPORTION ... 2 ... b: to give out or deliver esp. to members of a group”).

Additionally, the leading copyright treatises conclude that making a work available is insufficient to establish distribution. See, e.g., 2-8 Nimmer on Copyright, § 8.11[A] (2008); 4 William F. Patry, Patry on Copyright, § 13.11.50 (2008).

Id. at 1217. Judge Davis overlooks the relationship between “distribute” and the definition of “publication,” which encompasses “the offering to distribute copies or phonorecords to a group of persons for purposes of further distribution.” 17 U.S.C. §101 (definition of “publication”). He also ignores the most pertinent definitions of “distribute” and relies upon treatises, as noted above, lack substantiation for their interpretations. See Part II (A), *supra*.

The second “means” clause covers “rental, leasing, or lending.” “Rental” and “leasing” cover lending of a good in exchange for payment.<sup>245</sup> Both concepts envision return of the good to the owner. Lending has a somewhat broader range of dictionary meanings: “to give into another’s keeping for temporary use on condition that the borrower return the same or its equivalent” and “to give the assistance or support of,” as in “his teaching *lent* to Oxford thought much of its early originality and distinction.”<sup>246</sup> The former definition parallels the definitions of “rental ” and “leasing,” although without payment (but with expectation of its return). The latter definition is broader and could encompass making copyrighted works available to others – whether or not they are taken. One can “lend” support without it being actually taken. Although this latter definition of the text opens Section 106(3) up to the broader conception of the distribution right reflected in the legislative history, the more plausible meaning is that Congress sought to ensnare all activities that would interfere with the copyright owner’s ability to exploit the work making copies available to the public.

There is a danger, however, in reading a statute literally or woodenly, especially in the context of dramatic technological change.<sup>247</sup> Judge Learned Hand recognized long ago the need to understand both the words and the meaning of a statute:

There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis \* \* \*. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to define how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.<sup>248</sup>

This warning is particularly apt in interpreting the scope of a provision developed in analog age following the advent of the Internet and peer-to-peer technology. At the time that Congress drafted this provision (between 1961 and 1965) and even at the time that the bill became law (1976), there were no platforms for digital distribution of copyrighted works to the public. The more salient computer issue was the copyright treatment of computer software, which Congress delegated to a

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<sup>245</sup> See Webster’s Third Dictionary, *supra* n. \_\_\_, at 1923 and 1287.

<sup>246</sup> See Webster’s Third Dictionary, *supra* n. \_\_\_, at 1293 (emphasis in original).

<sup>247</sup> See Keith A. Christiansen, Technological Change and Statutory Interpretation, 1968 Wis. L. Rev. 556.

<sup>248</sup> *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir.1944) (concurring opinion), *aff’d sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945); see also *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (observing that “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intent of its makers”).

special commission.<sup>249</sup> Although linked computers were in existence, public digital distribution through a ubiquitous public network was beyond any policymaker’s serious consideration. Peer-to-peer technology was not even a glimmer.<sup>250</sup> Yet, the drafters of the Copyright Act of 1976 recognized that the rapid advance of technology and specifically sought to “guard against” “the real danger [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.”<sup>251</sup> Hence, it is essential, as Judge Learned Hand instructs, to “put ourselves in the place of those who uttered the words, and try to define how they would have dealt with the unforeseen situation.”<sup>252</sup>

Read holistically, the breadth of the “means” clauses most plausibly indicate that Congress intended a broad conception of the distribution right and provided a non-exhaustive list of then-known modes of distribution to communicate this intention. A more focused way of putting the question is to ask: “If Congress had been aware of other means of interfering with the core rights of an author, would it have included them or was it really just focused on actual transfer of copies?” There can be little doubt that putting sound recordings in a file share folder interferes dramatically with an author’s exclusive right to distribute a product – on par with, if not more than, sale of physical copies. Further, Congress considered offers to distribute to be within the definition of “publication”<sup>253</sup> and used the distribution right and “exclusive right of publication” interchangeably in other sections of the Copyright Act.<sup>254</sup>

Another textual reference to the distribution right also sheds light on this question. Section 602 of the Copyright Act states that importation into the United States “of copies or phonorecords

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<sup>249</sup> See Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201, 88 Stat. 1873 (establishing the National Commission on New Technological Uses of Copyrighted Works to recommend changes in copyright law with regard to computer technology).

<sup>250</sup> Peer-to-peer technology was not even anticipated at the time Congress passed the DMCA in 1998. See *Recording Industry Ass’n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003) (suggesting that peer-to-peer technology was “unforeseen” at the time Congress passed the DMCA). There is not a single mention of “peer-to-peer” technology or file sharing networks in the legislative history of the DMCA. See Conference Report, the Digital Millennium Copyright Act (105<sup>th</sup> Cong., 2d Sess., Report 105-796 (to accompany H.R. 2281) (Oct. 8, 1998); House Judiciary Committee Report, Digital Millennium Copyright Act of 1998 ((105<sup>th</sup> Cong., 2d Sess., Report 105-551, Parts 1 and 2 (to accompany H.R. 2281) (Jul 22, 1998); Senate Judiciary Committee Report, Digital Millennium Copyright Act of 1998 (S. Rep. 105-190 (May 11, 1998).

<sup>251</sup> See “1965 Supplementary Report,” *supra* n. \_\_\_, at 14.

<sup>252</sup> See, *supra*, TAN \_\_.

<sup>253</sup> See 17 U.S.C. § 101 (definition of “publication”).

<sup>254</sup> See 17 U.S.C. §§203(a)(3), 407.

of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106.”<sup>255</sup> This provision suggests that Congress did not consider actual distribution to be an element in proving violation of the right to distribute – mere importation of a copy or phonorecord of a work without authorization violates “the exclusive right to distribute copies or phonorecords under section 106” without proof of actual distribution. More generally, it indicates that Congress was interested in protecting the copyright owner’s exclusive right to distribute without concern for technical requirements. Someone who imports copies of a work violates the distribution right unless that person fits within one of the specific exceptions.<sup>256</sup>

Given the dramatic evolution of distribution technology that has occurred since 1976, there is good reason to delve into the legislative history to see if Congress provides a fuller understanding of the distribution right.

## 2. Specific Legislative History

As chronicled in Part III, the Copyright Act’s legislative history directly addresses the scope of the distribution right. Its drafters of the Copyright Act fully intended to encompass the 1909 Act rights to “publish” and “vend,” as understood in prior law, in the newly formulated distribution right.<sup>257</sup> In fact, the drafters stated that the intention was to “*broaden*” the distribution right beyond the historic rights to publish and vend “to 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. I think the draft covers virtually all forms of distribution.” Edward Sargoy provided the rationale for using a word other than “publish” – to avoid the confusion that had arisen around the jurisprudence relating to divestive and investive publication.<sup>258</sup> Since file sharing publishes works to the general public – the file sharing protocols in question are available to anyone connected to the Internet – this activity falls squarely within the general “publish” conception which Congress intended to retain in defining the distribution right.

Thus, the scope of “distribute” encompasses the prior right to “publish,” but in “broadened” form. It is a well-established rule of construction that “[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”<sup>259</sup>

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<sup>255</sup> 17 U.S.C. §602(a).

<sup>256</sup> See 17 U.S.C. §602(a)(3) (providing exceptions for (A) for government use (excluding education); (B) private use “and not for any distribution”; and (C) limited scholarly, educational, or religious purposes).

<sup>257</sup> See, *supra*, TAN \_\_.

<sup>258</sup> See, *supra*, TAN \_\_.

<sup>259</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); see *Standard Oil Co. of N.J. v.*

That brings us to the understanding of the right to “publish” as well as the definition of “publication.” As noted earlier, “publish” has long had a broad meaning as matters of dictionary meaning and copyright practice. Webster’s 1828 dictionary, which captured the scope of the terms publish and publication as of the time period in which the right to publish entered federal copyright law, refers to “mak[ing] known to mankind or to people in general,” see[ing] or offer[ing] for sale a book,” “put[ting] into circulation,” and “mak[ing] known by posting.”<sup>260</sup> The “right to publish” would have been understood by legislators and judges in the formative period of copyright law to encompass making a work available to the public, whether or not copies were actually distributed.<sup>261</sup> Drone commented that “sale is not essential” – “to constitute a publication it is essential that the work shall be exposed for sale or gratuitously offered to the general public so that the public without discrimination as to persons may have an opportunity to enjoy that for which protection is granted.”<sup>262</sup> Publication was in no manner tied to actual distribution. A mere offer to the general public sufficed.

The counter-argument would be that confusion about the scope of “publication” was a concern in the copyright reform process. But that argument overlooks the specific nature of the concern. At that time, courts had been narrowing the concept of “publication” so as to avoid loss

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United States, 221 U.S. 1, 59 (1911) (“[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense”).

<sup>260</sup> See, *supra*, TAN \_\_\_. The dictionary definition of “publish” more fully embraced the “making available to the public” meaning by 1961 and continued to the present. Webster’s Third Dictionary defines “publish” as:

**1a:** to declare publicly: make generally known: DISCLOSE, CIRCULATE \* \* \* **b:** to proclaim officially : PROMULGATE <~an edict> **c:** to make public announcement of (banns of marriage) **d:** PUBLICIZE \* \* \* **2a:** to make a public a evaluation of: CENSURE \* \* \* **3a:** to place before the public (as through a mass medium): DISSEMINATE \* \* \* **b:** to produce for publication or allow to be issued for distribution or sale \* \* \* **d:** to release (a product of creative work) for public distribution or sale \* \* \* **e:** to issue the work of (as an author) \* \* \* ~ *vi* **1:** to put out an edition or circulate it to the public \* \* \* **2a:** to have one’s work accepted for publication or allow it to be reproduced for public consumption \* \* \* **b:** to reproduce the work of an author and release it to the public \* \* \* **3:** to become manifest: give public witness

Webster’s Third Dictionary, *supra* n. \_\_\_, at 1837. Definition 1 conveys the emphasis on making available. Definition 3 comes closest to the copyright usage – emphasizing making available and releasing creative work to the public.

<sup>261</sup> See, *supra*, TAN \_\_\_.

<sup>262</sup> See, *supra*, TAN \_\_\_.

of common law protection and forfeiture of statutory rights for failure to include proper notice. The limiting doctrines – limited versus general publication and divestive versus investive publication – were orthogonal to the narrowing proposed in the present debate. None of those earlier court decisions imposed a requirement of actual distribution. Rather, they focused on the concept of general publication and making a work available to the general public. But the law was well established that publication entailed making a work available to the public, not actual receipt by members of the public.

The 1965 Supplementary Report specifically notes that the language of the Section 106(3) distribution right “is virtually identical with the definition of ‘publication’ in section 101, but for the sake of clarity we have restated the concept.”<sup>263</sup> The numerous examples both in the statute itself<sup>264</sup> and the key legislative report where the drafters of the Copyright Act interchange the word “publication” for “distribute”<sup>265</sup> reveal an understanding that the statutory definition of “publication” informs the scope of the distribution right. There is not need to quibble whether the two are co-extensive. Congress clearly thought of the two together and there is no indication that the distribution right is narrower than the definition of publication. If anything, Congress intended it to be broader.

This conclusion is reinforced, if not conclusively established, by the legislative history surrounding the protection of sound recording in the 1971 amendments to the 1909 Act. The Geneva Phonogram Convention defined “distribution to the public” to mean “any act by which duplicates of a phonogram are *offered*, directly or indirectly, to the general public or any section thereof.”<sup>266</sup> Here, we see the word “distribute” defined to encompass offer to the public. In commenting on the SRAA, the Librarian of Congress observes that the treaty “closely correspond[s] to the content and purpose” of the SRAA.<sup>267</sup> Direct evidence emerges from the passage of the SRAA that Congress understood “distribute” to encompass mere offers to the public in the specific context of sound recordings.

Furthermore, the coincidental timing of the amendment with the augmentation of the definition of “publication” in Section 101 to include “the offering to distribute copies or phonorecords” strongly indicates that Congress conceived of the distribution right to encompass offers – i.e., making works available to the public. Thus, Judges Wake’s conjecture, plausible in the abstract – that “[i]t is untenable that the definition of a different word in a different section of the statute was meant to expand the meaning of ‘distribution’ and liability under § 106(3) to include

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<sup>263</sup> See, *supra*, TAN \_\_.

<sup>264</sup> 17 U.S.C. §§ 203(a)(3), 407. See, *supra*, TAN \_\_.

<sup>265</sup> See, *supra*, TAN \_\_.

<sup>266</sup> See Article 1(d), Geneva Phonogram Convention, *supra* n. \_\_.

<sup>267</sup> See, *supra* TAN \_\_.

offers to distribute”<sup>268</sup> – does not withstand scrutiny in light of the legislative history. That history demonstrates that, far from wishing to impose extra requirements to prove violation of this right (such as proof of actual distribution), Congress understood “distribute” broadly and completed the Copyright Act fully mindful of the meaning reflected in the Geneva Phonogram Convention, which the United States actively negotiated, endorsed, and ratified during the lead-up to the 1976 Act.

## B. The Powers Clause

### 1. Statutory Text

The preamble to Section 106 states that the copyright owner has powers “to do and to authorize” the exclusive rights which follow. By implication, it indicates how the copyright can be violated – by the exercise of an exclusive right without the consent of the copyright owner or by the authorization of another to exercise an exclusive right of the copyright owner.

Even if violation of the right to distribute required proof of actual distribution, the preambulatory phrase – “to authorize” – could expand the scope of the right to antecedent acts – such as granting of permission to reproduce or distribute copyrighted works. Webster’s Third Dictionary offers the following meanings for “authorize”:

**1a:** to endorse, empower, justify or permit by or if by some recognized or proper authority (as custom, evidence, personal right, or regulating power): SANCTION <idiom *authorized* by use> <he was not *authorized* to use my name> **b** archaic: to furnish grounds for: JUSTIFY **2** *obs*<sup>269</sup>: to vouch for: confirm the truth or reality of by alleging one’s own or another’s authority **3** *obs*: to give legality or effective force to (a power, instrument, order) **4a:** to endow with authority or effective legal power, warrant, or right: appoint, empower, or warrant regularly, legally, or officially < Congress has authorized the President to suspend the operation of a Statute – O.W. Holmes †1935> **b:** to grant or allot by proper authority <a million dollars *authorized* for the new bridge><sup>270</sup>

Webster’s first definition – “to endorse, empower” – aligns most naturally with Section 106’s usage, although the fourth definition – “to endow with authority or effective legal power, warrant or right” – could also fit.

Outside of the copyright context, the Supreme Court has observed that the term “to authorize” “sometimes means simply ‘to permit,’ it ordinarily denotes affirmative enabling

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<sup>268</sup> See, *supra*, TAN \_\_.

<sup>269</sup> “obs” means “obsolete.” See Webster’s Third Dictionary, *supra* n. \_\_, at 53a.

<sup>270</sup> Webster’s Third Dictionary (some examples and synonyms omitted; emphasis in original).

action.”<sup>271</sup> In common parlance in the copyright context, the Supreme Court uses “authorize” consistent with meanings. In *New York Times Co., Inc. v. Tasini*, the Court states that “[t]he licenses *authorize* LEXIS/NEXIS to copy and sell any portion of those texts.”<sup>272</sup> In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Court states that anyone who is “*authorized* by the copyright owner to use the copyrighted work in a way specified in [17 U.S.C. § 106 et seq.] . . . is not an infringer of the copyright with respect to such use.”<sup>273</sup>

Thus, the plain meaning of “to authorize” is clear and broad. “[T]o endorse, empower” or “permit” would substantially broaden the scope of the Section 106(3) to encompass making a copyrighted work available to others. “[T]o endow with \* \* \* effective legal power, warrant, or right” would also have such reach. Hence, strict textualists would forgo further inquiry. Nonetheless, it is worthwhile examining the legislative background to see if Congress provided useful context.

## 2. Specific Legislative History

The early legislative history strongly supports the plain reading “authorize” to broaden the scope of the Section 106 exclusive rights. The ABA’s representative first recommended the use of this term specifically to address “the great expense and difficulty in attempting to prove \* \* \* unauthorized exhibition” of motion pictures. He believed that adding the phrase “to authorize,” borrowed from Canadian and British laws, would make it easier to enforce the distribution right against “bootleggers” who are renting motion pictures. ASCAP’s general counsel stated directly that “mere authorization to make the use of the copyrighted work \* \* \* ought to subject the person making the authorization to liability.” Abe Goldman confirmed that the drafters inserted the “to authorize” phrase into the 1964 bill based on these suggestions.

If that were the only legislative history, it would be quite clear that Congress intended to broaden the exclusive rights to encompass mere authorization of others to exercise the rights. Yet the 1965 Supplementary Report commented that “we have added the phrase ‘and to authorize’ in order to avoid possible questions as to the liability of contributory infringers.” The Report cites as an example “a person who legally acquires an authorized print of a copyrighted motion picture but who then engages in the business of renting it to others for purposes of unauthorized public performance. There should be no doubt that this kind of activity constitutes infringement.”<sup>274</sup> Apparently picking up on this reference, the House Report accompanying the final bill states “[u]se of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory

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<sup>271</sup> *Washington County v. Gunther*, 452 U.S. 161, 169 (1981) (quoting Black’s Law Dictionary 122 (5th ed. 1979) (defining “authorize” as “[t]o empower; to give a right or authority to act”).

<sup>272</sup> 533 U.S. 483, 489 (2001) (emphasis added).

<sup>273</sup> 464 U.S. 417, 433 (1984) (emphasis added).

<sup>274</sup> See, *supra*, TAN \_\_.



infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.”<sup>275</sup>

The question arises whether the legislative history confines the scope of the “to authorize” language to one particular purpose – “avoid[inig] any questions as to the liability of contributory infringers” – which would indicate that it does not broaden the scope of the distribution right (beyond indirect liability) – or whether it simply indicates that this is one of the purposes served by inserting the “to authorize” phrase. Read against this record, it can be argued that the reference to contributory liability is but one of the purposes of the preambulatory phrase. This references part of Mr. Finklestein’s statement (“Suppose ASCAP, or BMI, or any of the other licensing organizations authorizes its licensees to perform a certain work. I doubt whether that would be an act of contributory infringement, but I think that there should be liability there.”) But he clearly intended more (“*It would seem to me that the mere authorization to make the use of the copyrighted work \* \* \* ought to subject the person making the authorization to liability even though he may not be a contributory infringer.*”<sup>276</sup>) and the phrase “to authorize” accomplishes that broader purpose. Furthermore, Mr. Sargoy’s reference to the Canadian and British statutes suggests further context. Unfortunately, the 1965 Supplementary Report and the 1976 House Report are opaque. But neither report provides clear enough evidence to rebut the “strong presumption” that the plain language of the statute expresses congressional intent.<sup>277</sup>

### C. General Legislative History

Beyond specific legislative intent, legislative history can provide a general interpretive template for addressing ambiguity. Although the text in combination with the specific legislative history point toward a broad conception of the distribution right, the general legislative history reinforces the broad scope of the distribution right and the need to guard against its erosion through advances in technologies of dissemination.

As chronicled above,<sup>278</sup> the 1961 Register’s Report characterized the right to publish as one of the two historic foundational rights of copyright law. The 1965 Supplementary Report recognized the need to guard against “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.” The Report then cites “these reasons” for stating the exclusive rights in “broad terms.” Then, in an extraordinarily prescient statement, the drafters noted that

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<sup>275</sup> See, *supra*, TAN \_\_\_.

<sup>276</sup> See Copyright Law Revision: Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, at 122-23 (1964) (emphasis added).

<sup>277</sup> See *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12 (1987) and quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

<sup>278</sup> See Part III.C.1, *supra*.

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 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.'<sup>279</sup>

Thus, Congress conceived of the exclusive rights broadly, encouraged courts to interpret them so as to avoid their erosion as a result of unforeseen technological changes, and did not see the lack of financial motivation of those who would interfere with such rights to be a basis for narrowing the scope of the exclusive rights.

Applied to file sharing technology, these guides and warnings argue against engrafting unprecedented technical requirements – such as proof of actual distribution – upon their enforcement. Furthermore, the more general rationales for insertion of the “to authorize” phrase in the preamble to Section 106 similarly favor interpretation that would reach those who put copyrighted works into share folders without authorization. Just like the “great expense and difficulty in attempting to prove [motion picture] exhibition infringements”<sup>280</sup> in the early 1960s, imposition of a requirement the copyright owner must prove actual distribution raises the costs and difficulty of proving infringement without any good reason. To impose such a requirement directly “displace[s] the demand for the authors' works by other users from whom copyright owners derive compensation.”<sup>281</sup> Since the emergence of peer-to-peer technology a decade ago, revenues from the sale of sound recordings have fallen dramatically in the United States (and much of the world).<sup>282</sup>

#### **D. Evolutive Considerations**

The manner in which courts and agencies implement a statute can affect its interpretation over time.<sup>283</sup> Through doctrines like *stare decisis*, judicial interpretation can affect the path of a

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<sup>279</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 14.

<sup>280</sup> See Copyright Law Revision: Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at 24 (House Comm. Print, 88th Cong., 1st Sess. 1963).

<sup>281</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 14.

<sup>282</sup> See IFPI Digital Music Report 2010, *supra* n. \_\_\_, at . Although various factors have affected sound recording revenues, there is little question today that file sharing has played a substantial role. See Liebowitz, *supra* n. \_\_\_; Rob & Waldfoegel, *supra* n. \_\_\_.

<sup>283</sup> See Eskridge and Frickey, *supra* n. \_\_\_, at 358-59.

statute – what might be called “nautical drift.”<sup>284</sup> These factors typically play a much less significant effect on statutory construction than text and legislative history and usually only come into play where the text and legislative history are unavailing.

In the context of interpreting copyright’s distribution right, it is difficult to see how evolutive considerations would alter the clear understanding of legislative intent chronicled in the legislative history. As the foregoing establishes, the case law prior to the most recent wave of cases – principally *National Car* and *Hotaling* – was sparse, conflictual, and overlooked the origins and meaning of the key statutory terms. The recent deluge of district court file sharing cases only reinforces that chaos and fails to resolve the key questions on the basis of the most pertinent sources – the legislative record.

The same can be said of the judicial treatment of the “to authorize” preamble. Jurisprudence interpreting the “authorize” clause covers the gamut and no decision to date has fully retraced the legislative history.<sup>285</sup> Furthermore, copyright decisions using the general term “authorize” apply it in the broad manner suggested here.<sup>286</sup>

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<sup>284</sup> As Professor William Eskridge has observed, “[statutory i]nterpretation is not static, but dynamic. Interpretation is not an archeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances.” William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1482 (1987).

<sup>285</sup> See, e.g., *Venegas-Hernandez v. Asociacion De Compositores, Editores De Musica Latinoamericana*, 424 F.3d 50, 57-58 (1<sup>st</sup> Cir. 2005) (noting that “[l]ooking only at the statutory language, one might think that authorization alone could well be ‘infringement,’ but relying on the ‘avoid any questions about contributory infringement’ reference in the legislative history to override the plain meaning”); *Expeditors Intern. of Washington, Inc. v. Direct Line Cargo Management Services, Inc.*, 995 F.Supp. 468, 476-77 (D.N.J.1998) (interpreting the “authorize” clause in Section 106 based on its plain meaning); *Curb v. MCA Records, Inc.*, 898 F.Supp. 586, 595 (M.D.Tenn.1995) (holding, based upon the text and legislative history of the Copyright Act, that “domestic violation of the authorization right is an infringement, sanctionable under the Copyright Act, whenever the authorizee has committed an act that would violate the copyright owner’s § 106 rights”); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir.1994) (relying, in dicta, upon a narrow reading of the legislative history to override the plain meaning of “authorize”). Much of the controversy in the jurisprudence relates not to the plain meaning and legislative history surrounding the term “authorize,” but rather to the extraterritorial reach of the U.S. Copyright Act. See *Subafilms*, 24 F.3d at 1094 (reasoning that a defendant in the United States could not be liable based on its authorization of infringing acts overseas).

<sup>286</sup> See, e.g., *Jalbert v. Grautski*, 554 F.Supp.2d 57, 69-70 (D.Mass. 2008) (observing that “[b]ecause Jalbert, through his agent, *authorized* Leblanc’s possession of the print, Leblanc did not infringe his copyright” (emphasis added and citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984)).

Thus, the evolutive concerns do not exert any real force regarding the interpretation of the distribution right. In fact, the lack of attention to the legislative record is all the more reason for courts to look at the scope of the distribution right afresh and with the benefit of the historical evidence set forth above.

### **E. Policy Considerations**

Where the preceding considerations do not resolve the statutory construction question, some courts will, as a last resort, consider policy in interpreting an ambiguous statutory provision. Although interpretation of the distribution right does not appear to fall within this domain, copyright enforcement has become highly charged and perceptions of policy considerations likely play a subconscious role in the interpretive process.<sup>287</sup> Congress provided ample basis for interpreting the scope of copyright's distribution right. Nonetheless, it is worthwhile canvassing the relevant policy landscape.

Operating under the premise underlying the Copyright Act that enforcement of copyright's exclusive rights generally promotes progress in the creative arts,<sup>288</sup> there are strong reasons against requiring copyright owners to prove actual distribution to establish a violation of the distribution right.

First, when U2, the Foo Fighters, Eminem, or Lady Gaga release a new sound recording, there is no valid reason for a fan to place that work in a share folder accessible to the world at large if those artists (or their record labels) do not consent. The argument that such viral "sharing" allows "sampling" is without basis in today's Internet ecosystem. Potential fans can easily (and legally) sample such music through ad-supported videos on Vevo.com or the sample feature of iTunes or other online retailers. Furthermore, interpreting the distribution requirement so as to ensnare those who put copyrighted works into share folders without authorization in no way limits the defenses to liability. File sharers would still be entitled to raise fair use or any other defense to liability.

Second, effective deterrence of unauthorized distribution promotes progress in the creative arts (as viewed the drafters of the Copyright Act) by allowing allows creators to determine whether and how to commercialize their works. It can also provide the basis for investing in new authors and recording artists. When peer-to-peer technology emerged a decade ago, there was concern that the major record labels had not adequately rolled out digital distribution outlets. Whether or not the record labels were justified in their actions, there is little question that substantial digital catalog and digital distribution services – from untethered downloads to subscription – exist in the market today.

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<sup>287</sup> Cf. *Elephant in the Room*, supra n. \_\_\_.

<sup>288</sup> This premise has come under increasing scrutiny in recent years. See, e.g., Ku, supra n. \_\_\_; Michele Boldrin and David K. Levine, *Against Intellectual Monopoly* <<http://levine.sscnet.ucla.edu/general/intellectual/against.htm>>. It is beyond the scope of this article to take on this broader attack on the foundation of copyright protection.

These outlets, however, are hampered by having to compete with free – the massive peer-to-peer black market.

Third, discouraging infringement at the end user level reduces the pressure to enforce copyright protection at the distribution layer.<sup>289</sup> This can arguably reduce potential chilling effects on software developers.<sup>290</sup>

Fourth, imposition of an actual distribution requirement substantially raises the costs of enforcement, jeopardizes user's privacy interests, and imposes substantial burdens upon judicial administration. The difficulty of proving that a work placed in a file share folder was downloaded by a third party puts copyright owners in the uncomfortable position of seeking discovery of the contents of many computer hard drives and Internet traffic. On the judicial side of the ledger, dispensing with an actual distribution requirement would mean that most file sharing cases could be resolved on summary judgment. This would allow the courts to manage these cases relatively easily. And if the copyright owners stipulated to the minimum statutory damage award level, damages could also be resolved on summary judgment. By imposing a requirement to prove actual distribution, the courts open up a vast array of discovery complexities and triable jury issues that do little to address the core problem: the making available of copyrighted works to the public without authorization. Showing that a computer user has placed a copyrighted sound recording, motion picture, novel, or other work in a share folder that is accessible to the public without authorization should be sufficient to prove a *prima facie* violation of the distribution right.

Hence, putting aside the potential for disproportionate financial penalties – which should be addressed directly<sup>291</sup> – there is no downside to holding those who place copyrighted works in file share folders without authorization liable for copyright infringement. Such a requirement unduly raises the costs of enforcement and reduces the deterrent effects of copyright enforcement. Most importantly, discouraging file sharing of copyrighted works without authorization through more effective enforcement would channel fans of such works into the marketplace, which increases the rewards available to creators. It would also force some fans further underground, but given the rampant unauthorized distribution of copyrighted works at present, it is difficult to see how making enforcement more effective could increase the losses from unauthorized distribution.

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<sup>289</sup> See Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Without Restricting Innovation, 56 *Stan. L. Rev.* 1345 (2004).

<sup>290</sup> See Lemley and Reese, *supra* n. \_\_\_, at 1386-90. The effects of indirect copyright liability on technological innovation, however, are complex and subtle. While technological progress often furthers society's interests, it can also lead to undesired and unintended consequences. For this reason, tort law, government regulation and industry self-regulation seek to constrain and channel technological innovation in socially desirable ways. See Peter S. Menell, Indirect Copyright Liability and Technological Change, 32 *Columbia Journal of Law and the Arts* 375, 381 (2009).

<sup>291</sup> See Elephant in the Room, *supra* n. \_\_.

## Conclusions: Interpreting Copyright's Distribution Right

Legal scholarship over the past several decades has shown that judges approach statutory interpretation from varying perspectives.<sup>292</sup> Intentionalists seek to effectuate the legislature's intent and are open to looking beyond the literal text to other indications of legislative intent. Purposivists or modified intentionalists look more broadly to the intelligible purpose of the statute and seek to vindicate its goal(s) in the particular circumstances. Textualists place predominant (if not exclusive) reliance on the statutory text.

Based on the exhaustive analysis of language and history set forth above, all perspectives lead to the same interpretation of the scope of copyright's distribution right: that its violation does not require proof of actual distribution. Intentionalists – looking to the text and the legislative history to discover the legislature's intent in tracing the origins of the provision – should focus on the circumstance that Congress sought to perpetuate and broaden the 1909 Act's rights to publish and vend. The right to publish was triggered by the making a work available to the general public without regard to receipt. Furthermore, Congress viewed the distribution right and the definition of "publication" largely synonymously. Hence that definition – which includes "offering to distribute copies or phonorecords to a group of persons for purposes of further distribution" – provides guidance in interpreting the distribution right. This interpretation is fortified by the nearly contemporaneous development of the SRAA and the Geneva Phonogram Convention and their broad understanding of the distribution right. Moreover, the general legislative history of the Copyright Act reinforces the broad scope of the distribution right and the need to guard against its erosion through advances in technologies of dissemination. Applied to file sharing technology, Congress's expressed purpose cautions against interpreting the term "distribute" to require proof of actual distribution as a condition of enforcement.

Purposivists should find a clear animating principle in the legislative history – "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."<sup>293</sup> The legislative history provides further insight into the legislature's perspective on dealing with technological change:

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.

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<sup>292</sup> See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *Colum. L. Rev.* 1 (2006); John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum. L. Rev.* 70 (2006); Caleb Nelson, *What Is Textualism?*, 91 *Va. L. Rev.* 347 (2005); John F. Manning, *Textualism and Legislative Intent*, 91 *Va. L. Rev.* 419, 423-24 (2005); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 *U. Chi. L. Rev.* 149 (2001); Eskridge & Frickey, *supra* n. \_\_\_, at 324-25.

<sup>293</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 13.

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.<sup>294</sup>

Against this backdrop, purposivists should perceive file sharing as undermining the very foundation of the copyright system – the provision of exclusive rights as an encouragement of creative enterprise. The empirical evidence reinforces what common sense implies – competing with undermines markets for creative endeavor. This would lead purposivists to interpret Section 106 so as to enable effective enforcement of the copyright protections.

Textualists focus more heavily (strict textualists - exclusively) upon the plain meaning of the statutory text. They should find the core Section 106(3) right limited to the particular means of distribution enumerated – sale, other transfer of ownership, or rental, leasing, or lending – but might find ambiguity in other textual clues – such as Section 602(a)'s reference to mere importation (without actual distribution) constituting a violation of the Section 106(3) right to distribute, the Sections 203(a)(3) and 407 references to a “right of publication,” and the inclusion of offers to distribute within the meaning of Section 101's definition of “publication.” Taken together, these considerations might lead some (possibly most) textualists to examine the legislative history. Once there, the strong evidence relating to the scope of the distribution right – encompassing and broadening the historic right to publish and the development of the SRAA – leads to the same conclusion as intentionalists on the scope of subsection 106(3).

Textualists would be more likely than intentionalists to address the scope of the “authorize” clause. In fact, this could provide an alternative to exploring the legislative history of distribution right. Here, the plain meaning of the preambulatory clause would strongly support a broad scope for all of the Section 106 rights, including subsection 106(3), reaching conduct that endorses or empowers others to distribute and reproduce copyrighted works without authorization. Textualists would be disinclined to examine the legislative history of this clause given the clear plain meaning of the term.

Thus, intentionalists, purposivists, and textualists should all read Section 106 to impose liability upon those who place copyrighted works in publicly accessible file share folders without authorization. Interpreting the distribution right in this manner would greatly streamline enforcement of copyright protection on the Internet and create the conditions to channel file sharers into legitimate market alternatives. In holding that placing a copyrighted work in a share folder that is accessible to the public violates the distribution right, courts would be in a position to grant

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<sup>294</sup> See 1965 Supplementary Report, *supra* n. \_\_\_, at 13-14.

summary judgment on liability in most file sharing cases. The copyright owner would need only establish valid ownership of the copyrighted work and the availability of the work at an Internet Protocol address controlled by the defendant.

This article has discovered the proverbial lost ark holding the answers to how and why the distribution right was crafted. In so doing, it has shed light on critical questions relating to copyright enforcement in the Internet age. It has also revealed Congress's views about interpreting the Copyright Act of 1976 as new technologies for disseminating works evolve. Nonetheless, copyright policy can and should evolve as technology evolves. It was beyond the scope of this inquiry to address the larger policy question. I plan to confront those questions in further research.