WHEN "NOW KNOWN OR LATER DEVELOPED" FAILS ITS PURPOSE: HOW P2P LITIGATION HAS TURNED THE DISTRIBUTION RIGHT UPSIDE-DOWN

Vincent J. Galluzzo[*] [**]

I. INTRODUCTION

In 1999, a Northeastern University freshman needed only a quiet dorm room to design the catalyst that would spark the peer-to-peer (P2P)[1]

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1. Generally, P2P is a method of sharing computer files directly between two individuals over the Internet, without the use of an intermediary server. *See* BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 179–80 (1995) [hereinafter WHITE PAPER] (describing how a non-P2P file transfer using an intermediary server works). Because P2P eliminates the server "middle man," it "is among the most efficient of the efficient technologies the Internet enables." LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 17 (2004). More technically, P2P is a distributed (parallel or non-hierarchical) network that requires no central computer server to act as a broker

downloading phenomenon.[2] That freshman, the then-teenaged Shawn Fanning, spawned the now-infamous computer program Napster—a program that facilitated the free transfer of MP3[3] files between any two individuals anywhere in the world.[4] Napster was widely accessible to the public, available as a free download on the Internet, and required only a simple subscription to utilize the software.[5]

Although P2P had existed for many years,[6] Napster distinguished itself with its foresight and innovative design. It "combined the practicality of sharing personal music and finding MP3s online with the community features of Internet Relay Chat," a chat room interface popular with the computer-savvy.[7] Importantly, Napster "provide[d] media fans with a forum to communicate their interests and tastes with one another . . . ."[8]

As a free and fast way to get your favorite music, Napster quickly became popular, gaining ten million users within nine months of its July 1999 launch date.[9] Merely a year and a half after its launch, Napster garnered nearly eighty million users.[10] The record companies were not amused when after the release of Napster, CD sales fell as much as thirty

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between the transferor and transferee. *See* Niels Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1020 (2002). All individuals participating in the P2P network are equals, and each individual acts as both client and server. *Id.* at 1021. Thus, a "many-to-many" (or "peer-to-peer") relationship exists in which each individual computer is a "peer" of all other computers on the network. *Id.* P2P's basic architectural configuration eliminates the lag generated by transacting with an intermediary server, and allows for direct high-bandwidth communications between the transferor and transferee, making the transaction extremely efficient. *See id.* at 1022–23. At the heart of all P2P-providing computer programs, however, is an algorithm for connecting the individual users so that they may transfer files between each other. There are two popular ways to do this: Supernode and Decentralized Node. For a detailed description of these two architectures, see *infra* Part III.A.

2. Jefferson Graham, *Entertainment Firms Win File-Sharing Duel—Court Rules Sites Could Be Held Liable for Piracy*, USA TODAY, June 28, 2005, at 1B.

3. "MP3," also known as MPEG-1 Audio Layer 3, is a compressed digital audio storage standard created by the Moving Picture Experts Group that is popular for its small size and ability to maintain near CD-quality sound. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 154 (2001). MP3 is merely a file format for digital audio recordings, which may be used for infringing and unauthorized recordings, but also may be used for many legitimate uses. *See id.* Record companies dislike the MP3 format because MP3 is an non–secure standard that provides no copy protection, from which files could be copied *ad infinitum*. *Id.*

4. Napster allowed a user to download MP3 files directly from another user free of charge, without checking to see whether the MP3 files transferred were copyrighted material. See *infra* Part III.A for a more detailed discussion of how Napster functioned.

5. *See* LITMAN, *supra* note 3, at 158.

6. *See, e.g.*, A Brief(ish) History of P2P, http://iml.jou.ufl.edu/projects/fall02/moody/history.html (last visited Oct. 15, 2009).

7. MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION 93 (2007).

8. *Id.*

9. LESSIG, *supra* note 1, at 67.

10. LESSIG, *supra* note 1, at 67.

percent.[11] Seeing the CD sales market hastily eroded[12] by what it viewed as "rampant piracy,"[13] the recording industry sought the help of its trade group, the Recording Industry Association of America (RIAA).[14] In an effort to stop or even reverse the effects of the P2P craze, the RIAA first turned to Congress[15] and then to the courts[16] for relief. Eventually, the RIAA turned its litigious eyes toward the individual infringers, relying on the exclusive right of distribution granted to copyright holders by the Copyright Act of 1976 (Copyright Act).[17] In the process, the RIAA tested

11. Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing 'Contained'-Double-Digit Piracy Growth Hits Hollywood, Though*, USA TODAY, June 13, 2006, at 1B. However, some have questioned whether illegal downloading was actually a major cause of the drop in album sales. *See* Jane Black, *Big Music's Broken Record*, BUS. WK. ONLINE, Feb. 13, 2003, *available at* 2003 WLNR 12391939. For example, one reason sales dropped may have been due to a 20–25% decrease in new albums released between 1999 (38,900 new albums released) and 2001 (27,000–31,734 new albums released). *Id.* Another reason may be the rise in average CD price in the same period from $13.04 in 1999 to $14.19 in 2001, an increase of 7.2%. *Id.* Yet another reason could be that in 2002, "35% of U.S. homes had a DVD player, up from zero just three years" earlier. *Id.* DVD prices seemed cheap in comparison: the soundtrack to the film High Fidelity, for instance, was $18.98, but you could purchase the entire movie on DVD for $19.99. *Id.* Rapidly increasing DVD sales caused even more problems for the recording industry. *Id.*

12. Record companies built their business models entirely upon the distribution of tangible copies of music. Schaumann, *supra* note 1, at 1013. Record companies were concerned that if anyone could access a "comprehensive recorded library of music" from anywhere at any time, then nobody would need tangible copies of music. *Id.*

13. Graham, *supra* note 11, at 1B. What was most threatening to the recording industry was not that P2P facilitates copying—copying has been going on in tangible media for as long as recordable media have been around. Rather, it was P2P's distribution capability, which "directly undermine[d] content owners' control of their product." Schaumann, *supra* note 1, at 1039.

14. The RIAA is the self-proclaimed trade group that represents the major record companies in the United States. *See* RIAA, Who We Are, http://www.riaa.com/aboutus.php (last visited Oct. 10, 2009). The RIAA is also an "extraordinarily powerful" lobbying group, reportedly paying its president "more than $1 million a year." LESSIG, *supra* note 1, at 52.

15. *See, e.g.*, *Competition, Innovation, and Public Policy in the Digital Age: Is the Marketplace Working to Protect Digital Creative Works?: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (written statement of Hilary B. Rosen, President and CEO, Recording Industry Association of America), *available at* http://judiciary.senate.gov/resources/transcripts/107transcripts.cfm.

16. *See, e.g.*, A&M Records, Inc. v. Napster, Inc. (*Napster II*), 239 F.3d 1004 (9th Cir. 2001) (resolving a conflict between record companies and the P2P provider Napster). Even though copyright infringement is a criminal offense, federal prosecutors have been reluctant to go after individual infringers for lack of resources, among other reasons. Lorenza Munoz & Jon Healey, *Crackdown on Piracy Hits Barrier; Federal Prosecutors Are Reluctant to Go After Typical Downloaders of Music and Movies*, L.A. TIMES, May 9, 2005, at C.1. Thus, when the RIAA brought civil actions against infringers, it suffered the bills of litigation. *Id.*

17. Congress passed the Copyright Act of 1976 as an attempt to overhaul the United States copyright laws to adhere to the Berne Convention. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1301 (2006)). *See* 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:72 (Sept. 2008). One of the most notable changes within the Copyright Act was that a work became copyrighted upon creation and fixation, rather than registration. *See id.* § 1:82. As a structural matter, the Copyright Act granted unrestricted rights to copyright owners in

the limits of the distribution right and turned the case law interpreting that right upside-down.

Today, P2P litigation "present[s] one of the thorniest practical problems" in copyright law.[18] Not only are individuals confused and misled about which actions are illegal and which are fair use,[19] but the courts even disagree about the current state of copyright holders' rights in the aftermath of the Internet revolution.[20] In the past, Congress had simply modified existing copyright law every time there was a new technological advance that potentially threatened the rights of copyright holders.[21] Since the massive overhaul of copyright law in 1976,[22] Congress has amended the law more than fifty times.[23] However, the recent "problems posed by the Internet are themselves more numerous ~~–a~~nd reach farther into copyright law and policy ~~–t~~han those raised by earlier technology."[24] In light of current judicial struggles with Internet technology, it has become "difficult and awkward to adapt the specific statutory provisions to comport with the [copyright] law' s principles," and therefore, it is time for Congress to make a change.[25]

This Note analyzes the current legal climate of P2P litigation, specifically regarding the distribution right of 17 U.S.C. § 106(3), and argues that Congress should amend the Copyright Act once again to encompass digital transmissions and any future means of transmissions not yet thought of or invented. Part II of this Note offers a brief historical account of P2P litigation, with emphasis on the cases involving individual infringers. To assist in understanding many of the legal issues surrounding P2P and digital transmissions, Part III provides a technical overview of

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§ 106, subject only to the limitations set forth in subsequent sections of the Copyright Act. *Id.* § 8:22. One of the exclusive rights of § 106 is the right of distribution. *See* Copyright Act of 1976 § 106(3).

18. Schaumann, *supra* note 1, at 1002; *see also* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 911–12 (2005) ("[D]isputes about music copyright rank among the most pressing issues of the day in contemporary intellectual property law.").

19. For a discussion of the applicability of fair use to the distribution right, see *infra* note 110.

20. *See* Reno v. ACLU, 521 U.S. 844, 849–53 (1997) (recounting in detail the history of the Internet and its "extraordinary growth").

21. LITMAN, *supra* note 3, at 23; *see also* Schaumann, *supra* note 1, at 1005 ("Nearly every technological advance touching copyright has required revision of the copyright laws.").

22. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1301 (2006)). For further discussion of the overhaul of the Copyright Act, see *supra* note 17.

23. Between 1976 and October 2007, Congress amended the Copyright Act fifty-nine times. *See* Preface to Copyright Act, http://www.copyright.gov/title17/92preface.pdf.

24. Schaumann, *supra* note 1, at 1011; *see also* Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763, 772 (2003) ("[Copyright] law has been responding to changes in the technology of distribution since the turn of the last century. But until the Internet, the law's response to this change has been consistent and appropriately conservative.").

25. WHITE PAPER, *supra* note 1, at 211.

how P2P works and how the RIAA gathers evidence for litigation. Part IV outlines what constitutes copyright infringement and introduces copyright terms. Part V surveys legal authority and illustrates that a digital distribution, like all other distributions, requires actual dissemination of the copyrighted works. Part VI addresses the technological dissonance between current copyright law and digital distributions. Finally, Part VII argues that by amending the Copyright Act once again, Congress may finally resolve this dissonance and reinforce the Copyright Act against current and future problems associated with technology.

II. HISTORICAL BACKGROUND OF P2P LITIGATION

P2P litigation was born on December 7, 1999, when the RIAA banded together a few record companies and filed suit against Napster for contributory and vicarious copyright infringement.[26] This first attempt to quell P2P piracy was a resounding victory for the RIAA and its constituents, as the District Court for the Northern District of California (*Napster I*)[27] and the Ninth Circuit Court of Appeals (*Napster II*)[28] agreed that Napster infringed the record companies' copyrights. Both courts issued a preliminary injunction with which Napster was unable to comply while continuing to operate its file-sharing network, and Napster eventually ceased operations.[29] The RIAA aimed this and many subsequent P2P lawsuits at the computer programs that facilitated individual infringement, sparing users of those programs from legal trouble.[30] The insulation of individual users from legal action, however, did not last long.

The RIAA began its "education and enforcement campaign"[31] in the summer of 2003 when it filed more than 1600 subpoenas to Internet Service Providers (ISPs)[32] across the country requesting personal

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26. Complaint for Contributory and Vicarious Copyright Infringement, Violations of California Civil Code Section 980(a)(2), and Unfair Competition at 2, A&M Records, Inc. v. Napster, Inc. (*Napster I*),114 F. Supp. 2d 896 (N.D. Cal. 2000) (No. C99-5183-MHP), http://w2.eff.org/IP/P2P/Napster/napster_complaint.
pdf. Although the plaintiffs listed in P2P litigation are individual record companies, the RIAA actually litigates these lawsuits. *See* Ray Beckerman, *Content Holders vs. the Web: 2008 US Copyright Law Victories Point to Robust Internet*, J. INTERNET L., Jan. 2009, at 16, 16 n.2. The plaintiffs listed are those that own the specific copyrights in question. *See id.* at 16 n.2.

27. A&M Records, Inc. v. Napster, Inc. (*Napster I*), 114 F. Supp. 2d 896, 896–911 (N.D. Cal. 2000).

28. *Napster II*, 239 F.3d. 1004, 1014 (9th Cir. 2001).

29. *In re* Napster, Inc. Copyright Litigation, 377 F. Supp. 2d 796, 799 (N.D. Cal. 2005). Napster officially shut down operations on July 1, 2001. *Id.*

30. The other P2P providers the RIAA has sued are Scour, Aimster, AudioGalaxy, Morpheus, Grokster, Kazaa, iMesh, and LimeWire. ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FIVE YEARS LATER 1, http://www.eff.org/files/eff-riaa-whitepaper.pdf.

31. Nick Wingfield & Nick Baker, *RIAA Targets Are Surprised by Piracy Suits*, WALL ST. J., Sept. 10, 2003, at B2.

32. An ISP is a company that provides its customers with access to the Internet. Normally a

information about some of the ISPs' subscribers.[33] Along with the subpoenas, the RIAA offered amnesty to all individuals not currently under investigation if they took certain steps to show good faith.[34] On September 8, 2003, not long after the first round of subpoenas, the RIAA departed from its historical litigation strategy and filed 261 lawsuits against individual infringers across the United States.[35] In bringing legal action against these 261 individuals, the RIAA sought to target major offenders: those sharing an average of 1000 digital songs through various P2P computer programs.[36] Caught in the RIAA's net, among others, was a twelve-year-old girl from Manhattan, a 71-year-old grandfather from Texas, and a father-and-son combo.[37] Some were not even aware they were defendants to a lawsuit until questioned by reporters.[38] Others did not even know that downloading copyrighted music online was illegal.[39] Most defendants, however, quickly settled.[40]

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division of the local cable or telephone company, an ISP similarly maintains databases of the personal information of its customers.

33. Jefferson Graham, *Music Industry Files First Wave of Lawsuits Against Swappers*, USA TODAY, Sept. 9, 2003, at 6D.

34. Nick Wingfield & Ethan Smith, *The High Cost of Sharing—Record Industry Files Suits Against 261 Music Uploaders; Move May Alienate Customers*, WALL ST. J., Sept. 9, 2003, at B1. To be free from the legal scrutiny of the RIAA, individuals could sign an affidavit promising to delete all illegal copies of songs from their computers and to refrain from illegally downloading music. *Id*. However, some criticized the amnesty program as not actually insulating the participants from legal action. *See, e.g.*, Paul Boutin, *An Offer You Can Refuse*, SLATE, Sept. 8, 2003, http://www.slate.com/id/2088066/.

35. Frank Ahrens, *Music Industry Sues Online Song Swappers; Trade Group Says First Batch of Lawsuits Targets 261 Major Offenders*, WASH. POST, Sept. 9, 2003, at A1. The list of plaintiffs for each lawsuit was different, depending upon the claimed infringed music, but at least one member of the five largest music companies (Vivendi Universal SA's Universal Music Group, Bertelsmann AG's BMG Music, AOL Time Warner Inc.'s Warner Music, EMI Group PLC, and Sony Corp.'s Sony Music Entertainment) was always a plaintiff. Wingfield & Smith, *supra* note 34, at B8.

36. Ahrens, *supra* note 35, at A5.

37. Lorena Mongelli, *Music Pirate: N.Y. Girl, 12, Sued for Web Songs Theft*, N.Y. POST, Sept. 9, 2003, at 1. The girl, Brianna LaHara, and her mother, Sylvia Torres, quickly settled with the RIAA for $2000. Frank Ahrens, *RIAA's Lawsuits Meet Surprised Targets; Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants*, WASH. POST, Sept. 10, 2003, at E3.

38. Wingfield & Baker, *supra* note 31, at B1.

39. Wingfield & Baker, *supra* note 31, at B1.

40. Eriq Gardner, *Seeking Order in the Court: Setbacks Emerge in Legal Battles Against File Sharers*, BILLBOARD, Oct. 11, 2008, at 11. Settlements with the RIAA average between $4000 and $4500. Neil Graves, *College Students Face Mu$ic Over Downloads*, N.Y. POST, Mar. 22, 2007, at 10. In view of the minimum statutory damages amount of $750 per song, and a maximum of $30,000 per song, *see* 17 U.S.C. § 504(c)(1) (2006), settlement is in the best interest of most alleged infringers, especially parents sued as a result of their children's file sharing. *See* Janelle A. Weber, Note, *Don't Drink, Don't Smoke, Don't Download: Parents' Liability for Their Children's File Sharing*, 57 FLA. L. REV. 1163, 1198 (2005) ("[A] plaintiff might be able to hold a parent liable for his child's unauthorized file sharing under the doctrine of contributory infringement.").

At first, the RIAA's tactics seemed to work, as there was a "marked decline in file-sharing in the months following the highly-publicized first rounds of RIAA lawsuits."[41] Some universities immediately instituted measures to protect themselves and their students from potential lawsuits.[42] The lawsuits even garnered some admonishment from pop-culture musical satirist Weird Al Yankovic.[43] However, merely a year after the RIAA's initial lawsuits, ensuing lawsuits were hardly newsworthy. At that time, twenty-three million people continued to engage in P2P activities, slightly more than the number of people doing so before the summer of 2003.[44] Although people were generally better educated on copyright law than before the lawsuits, many continued engaging in illegal P2P activities.[45]

In the ensuing years, album sales continued to fall[46] and P2P activity

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Defendants could easily pay settlements at a convenient website managed by the RIAA. *See* Posting of Eliot Van Buskirk to Listening Post, http://www.wired.com/listening_post/2007/02/riaa_launches_p/ (Feb. 28, 2007, 09:24 EST). An accused infringer need only supply his or her MasterCard, Visa, or Discover card and a case identification number to ensure avoidance of a lawsuit. *See* Posting of Meg Marco to The Consumerist, http://consumerist.com/consumer/riaa/riaa-bullies-college-students-with-p2plawsuitscom-240877.php (Mar. 1, 2007 17:22 EST). Unfortunately, the RIAA has since removed the website from the Internet. For a sample settlement agreement, see http://w2.eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/Form_of_Doe_Settlement_Agreement.pdf.

41. Fred von Lohmann, *Is Suing Your Customers a Good Idea?* (Sept. 29, 2004), http://www.boycott-riaa.com/article/14369.

42. *See, e.g.*, *UF Unleashes Tool Against File-Sharing*, ST. PETERSBURG TIMES, Nov. 24, 2003, at 4D.

43. Weird Al Yankovic released a song entitled "Don't Download this Song" that made a few jokes about the RIAA and their litigation practices. Wired Blogs, *Weird Al: 'Don't Download this Song'*, http://blog.wired.com/music/2006/08/weird_al_dont_d.html (Aug. 22, 2006, 18:37 EST). Ironically, the song was available for a short time as a free download at the website DontDownloadThisSong.com. *Id.* One verse of the song begins, "Oh, you don't wanna mess with the R-I-double-A; They'll sue you if you burn that CD-R; It doesn't matter if you're a grandma or a seven year old girl; They'll treat you like the evil hard-bitten criminal scum you are." WEIRD AL YANKOVIC, *Don't Download this Song*, *on* STRAIGHT OUTTA LYNWOOD (Volcano Entertainment 2006), *available at* http://www.com-www.com/weirdal/dontdownloadthissong.html (last visited Oct. 5, 2009).

44. Laura Petrecca, *The Song Remains the Same; Downloaders Ignoring RIAA's Legal Threats*, N.Y. POST, Oct. 3, 2004, at 30. Although not all P2P activities are illegal, a vast majority of P2P users engage in illegal activities. *See* MARY MADDEN & AMANDA LENHART, PEW INTERNET PROJECT DATA MEMO RE: MUSIC DOWNLOADING, FILE-SHARING AND COPYRIGHT 7–8, http://www.pewinternet.org/~/media/Files/Reports/2003/PIP_Copyright_Memo.pdf.pdf.

45. *See* von Lohmann, *supra* note 41 (referencing an April 2004 study "reveal[ing] that 88 percent of children between 8 and 18 years of age understood that P2P music-downloading is illegal" but noting that of the children surveyed, "56 percent . . . continue[d] to download music anyway").

46. Graham, *supra* note 11. There are other explanations for the decrease in album sales over the years, such as the advent of legitimate online music stores, such as Apple's iTunes. iTunes is a pay-per-song online store where users can purchase individual songs for 99 cents to $1.29 or entire albums for about $9.99. *See* Apple, iTunes, What's on iTunes?, http://www.apple.com/itunes/whatson/music.html (last visited Jan. 13, 2009). As of September 2008, iTunes had over sixty-five

continued to grow.[47] In an effort to stop the hemorrhaging of nearly $12.5 billion in lost revenue due to copyright infringement of music,[48] the RIAA began to target specific groups of individuals (such as college students)[49] and became more aggressive in its litigation strategies.[50]

Beginning in September 2003, the RIAA routinely filed several hundred lawsuits in federal courts each month.[51] By February 2006, the RIAA had sued 17,587 individuals and subsequently stopped making monthly announcements regarding the number of suits filed.[52] Although this made it impossible to know exactly how many individuals the RIAA has sued, it is estimated that the RIAA has filed, settled, or threatened legal action against more than 35,000 individuals to date.[53] Considering the RIAA' s win-loss

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million customer accounts, and was the top music distributor in any format in the United States, beating out Wal-Mart, Best Buy, and Amazon.com. Steve Jobs, Apple CEO, Special Event Keynote Speech (Sept. 2008) (recording available at http://events.apple.com.edgesuite.net/0809dt4bs89/event/index.html) (last visited Oct. 10, 2009). It should be noted that "the typical share for the major [record companies] on each 99 cent download [from iTunes] is . . . about 70 cents." JOHN LOGIE, PEERS, PIRATES, & PERSUASION 122 (2006). The record companies, however, contend that these gains in digital sales aren't enough to offset losses in physical album sales. *See U.S. Music Sales Drop 6.2% in '06*, L.A. TIMES, Apr. 18, 2007, at C2. Notwithstanding the impact iTunes and other similar stores may have had on the market, losses in album sales may be attributed to other causes. *See supra* note 11; George Ziemann, *RIAA's Statistics Don't Add Up to Piracy* (Dec. 11, 2002), http://www.azoz.com/music/features/0008.html (collecting the potential causes for the decrease in album sales).

47. BigChampagne, an online media and network measuring and monitoring service, estimated "that the amount of traffic on P2P networks doubled between September 2003 . . . and June 2005." ELECTRONIC FRONTIER FOUNDATION, *supra* note 30, at 9.

48. STEPHEN E. SIWEK, POLICY REPORT 188: THE TRUE COST OF SOUND RECORDING PIRACY TO THE U.S. ECONOMY (Aug. 2007), *available at* http://www.ipi.org (follow "Publications" hyperlink; then follow "All IPI Publications—by Date" hyperlink; then follow "2007" hyperlink; then follow "The True Cost of Sound Recording Piracy to the U.S. Economy" hyperlink; then follow "Full Text PDF" hyperlink). However, these numbers may be inaccurate, as there are some instances in which "the impact of piracy on the copyright holder's ability to appropriate the value of the work will be negligible." STAN LIEBOWITZ, RE-THINKING THE NETWORK ECONOMY 149 (2002). One instance that implicitly applies in the context of file sharing is "the case where the individual engaging in pirating would not have purchased an original even if pirating were not an option." *Id.*

49. *See, e.g.*, Graves, *supra* note 40. The RIAA started its "deterrence and education initiative" on February 28, 2007, which targeted college students across the nation. ELECTRONIC FRONTIER FOUNDATION, *supra* note 30, at 7. The RIAA specifically targeted young people because it is estimated that more than half of all college students engage in illegal P2P downloading activity, and account for nearly 1.3 billion illegal downloads annually. Thomas Kaplan, *Music Industry Zealous in Tracking Tune Thieves*, ST. PETERSBURG TIMES, July 20, 2008, at 1B.

50. Sarah McBride, *Arrest Signals Tougher Stance on Music Piracy*, WALL ST. J., Aug. 28, 2008, at B6.

51. Sarah McBride, *Corporate News: Music File-Sharing Decision to Have Broad Impact—If New Trial Is Granted, Copyright Violations May Be Harder to Prove*, WALL ST. J., Aug. 15, 2008, at B4.

52. ELECTRONIC FRONTIER FOUNDATION, *supra* note 30, at 4.

53. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

percentage based on known figures, the lawsuits seem to have been "wildly successful," as most defendants tend to settle for amounts less than the cost of defending the lawsuits.[54] Other defendants default due to lack of knowledge of the charges against them, lack of resources to defend the lawsuit[55] or lack of lawyers[56] adept at dealing with the RIAA's lawsuit process.[57] In all, only about 5% of the targeted individuals decide to fight back.[58] Of those that do, some have had success in getting the RIAA to dismiss its claims[59] and some have even been able to recoup attorney's fees.[60] However, for others, like Jammie Thomas of Duluth, Minnesota, fighting back ended in a jury award of $1.92 million in favor of the plaintiffs.[61]

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54. von Lohmann, *supra* note 41.

55. von Lohmann, *supra* note 41.

56. *See* Recording Industry vs. The People, *Directory of Lawyers Defending RIAA Lawsuits*, http://info.riaalawsuits.us/directory.htm (listing lawyers who are actively defending against the RIAA's P2P lawsuits) (last visited Oct. 10, 2009).

57. *See* Ray Beckerman, *How the RIAA Litigation Process Works*, http://info.riaalawsuits.us/howriaa_printable.htm (describing in detail how the RIAA's litigation process works) (last visited Oct. 10, 2009).

58. *Id.*

59. *See, e.g.*, Notice of Voluntary Dismissal at 1, Warner Bros. Records, Inc. v. Cassin, No. 06-cv-3089 (S.D.N.Y. May 27, 2008) (voluntarily dismissing claims against defendant), http://www.ilrweb.com/viewILRPDFfull.asp?filename=warner_cassin_080605NoticeOfDismissalSoOrdered.

60. *See, e.g.*, Atlantic Recording Corp. v. Andersen, No. CV 05-933 AC, 2008 WL 2536834, at *20 (D. Or. June 24, 2008) (granting attorney's fees to the defendant in the amount of $103,175); Capitol Records, Inc. v. Foster, No. 04-1569-W, slip op. at 14 (W.D. Okla. July 16, 2007), *available at* http://www.ilrweb.com/viewILRPDFfull.asp?filename=capitol_foster_070716OrderAwardAttys Fees (granting attorney's fees to the defendant in the amount of $68,685.23).

61. In the first iteration of the trial, the jury found Thomas liable for 24 counts of willful infringement to the tune of $9,250 per infringement. Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008). Subsequently, Judge Davis sua sponte ordered a new trial and vacated the judgment of $222,000. *Id.* at 1228. Prior to deliberation, Judge Davis instructed the jury with Jury Instruction No. 15, which stated, "[t]he act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown." *Id.* at 1213. After judgment, Judge Davis ordered a new trial based on Jury Instruction No. 15 being manifest error because he believed "[l]iability for violation of the exclusive distribution right . . . requires actual dissemination." *Id.* at 1226–27. Furthermore, Judge Davis noted that the

> damages awarded . . . [were] wholly disproportionate to the damages suffered by Plaintiffs. Thomas allegedly infringed on the copyrights of 24 songs—the equivalent of approximately three CDs, costing less than $54, and yet the total damages awarded [was] $222,000—more than ***five hundred*** times the cost of buying 24 separate CDs and more than ***four thousand*** times the cost of three CDs.

Id. at 1227. Upon retrial, a new jury found Thomas liable for 24 counts of willful infringement, as before. Nate Anderson, *Thomas Verdict: Willful Infringement, $1.92 Million Penalty*, Ars Technica,

Eventually, some music industry officials, tired of the incessant lawsuits, sought simpler solutions.[62] Despite this perceived calm in the storm, the RIAA continues to routinely bring lawsuits against individuals.[63] With the end of P2P litigation nowhere in sight, it is important to understand the lasting effects P2P litigation has left on the distribution right because the legal issues raised in this litigation apply to any question of digital distribution now and in the future. To understand these effects, and the issues that remain unanswered, the technological nature of P2P distribution must be addressed first.

III. THE TECHNOLOGICAL BARRIER

A. *P2P Architectures*

Prior to the September 2003 lawsuits, the RIAA exclusively targeted the computer programs (Napster, Grokster, and the like) that facilitated the P2P transfers of their subscribers. Those computer programs generally employed a centralized P2P architecture, sometimes known as Supernode. Supernode is a P2P architecture that creates a pyramidal network of computers with a central computer server (the "supernode")[64] at the top of the pyramid.[65] This supernode maintains a list of all users connected to the P2P network and the files that each user makes available to other users on the P2P network.[66] With this information, the supernode constructs a master search index of all files available on the P2P network and publishes

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June 18, 2009, *available at* http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars. This jury, however, awarded damages in the amount of $80,000 per infringement, bringing the grand total to just under $2 million. *Id.*

62. As Warner Music CEO Edgar Bronfman stated at an August 22, 2005, industry summit:

> [T]he war between the music companies and consumers has been fought. We lost. Okay? So, let's just move on. Which is to say, we've got to make our music available to people. We just need to be allowed to have a business model that allows copyright holders and owners to be compensated for their work. But our job is to get music to everyone, everywhere, as readily and as seamlessly as possible.

LOGIE, *supra* note 46, at 122.

63. *See, e.g.*, Eliot Van Buskirk, *Nothing to See Here: RIAA Lawsuits Continue*, Wired.com, May 6, 2009, *available at* http://www.wired.com/epicenter/2009/05/nothing-to-see-here-riaa-lawsuits-continue/ (last visited Oct. 5, 2009).

64. For simplicity, I will use the capitalized "Supernode" to refer to the P2P architecture and the lowercase "supernode" to refer to the central computer server within the larger "Supernode" architecture.

65. *See* Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. REV. 143, 183 (2007).

66. *See, e.g.*, Jeffrey C. J. Lee, *The Ongoing Design Duty in* Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd*—Casting the Scope of Copyright Infringement Even Wider*, 15 INT'L J.L. & INFO. TECH. 275, 276–77 (2006).

that index to each of its users.[67] The supernode does not physically maintain any computer files; however, the available files remain on a respective user's computer.[68] When one user wants to search for a particular file, that user submits a query to the supernode, which in turn searches its master search index for the requested file.[69] If the supernode finds the requested file in its master search index, the supernode sends the location of the user in possession of the requested file to the requesting user so that the two may directly connect to each other and privately transfer files.[70]

In this P2P scheme, the parent corporations of the P2P software generally control and maintain the supernode.[71] Based on this control and maintenance, the RIAA targeted the parent corporations in early P2P litigation, arguing that the corporations' publishing of available files facilitated the alleged infringement of the program's users.[72] The Supernode architecture caused liability to be directed at the parent corporation, usually a single defendant with deep pockets, and the RIAA often prevailed.[73] As the RIAA began to gain leverage over the parent corporations, however, software developers designed a new P2P architecture known as "Decentralized Node" in an attempt to avoid contributory and derivative liability.[74]

The Decentralized Node P2P architecture[75] creates a freeform

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67. *See, e.g.*, *id.*

68. *See, e.g.*, *id.*

69. *See, e.g.*, Stephen Bates, *Coming Soon to a P.C. Near You: The Past, Present, and Future of Movie Copyright Infringement on the Internet*, 5 VA. SPORTS & ENT. L.J. 97, 114 (2005).

70. *See, e.g.*, *id.*

71. MICHAEL PIATEK, TADAYOSHI KOHNO, & ARVIND KRISHNAMURTHY, UNIVERSITY OF WASHINGTON TECHNICAL REPORT: CHALLENGES AND DIRECTIONS FOR MONITORING P2P FILE SHARING NETWORKS—OR—WHY MY PRINTER RECEIVED A DMCA TAKEDOWN NOTICE 1 (2008), *available at* http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf.

72. *Id.*

73. *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (holding that the parent corporation Grokster was liable for the infringing acts of its users); *Napster II*, 239 F.3d 1004 (9th Cir. 2001) (holding that the parent corporation Napster was liable for the infringing acts of its users).

74. *See* PIATEK ET. AL., *supra* note 71, at 1. This transition from a centralized architecture to a decentralized architecture is nothing revolutionary considering the transition of P2P designs over the years. *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 159 n.4 (D. Mass. 2008) ("The history of peer-to-peer networks has been one of increasing decentralization, and thus, increasing anonymity.") (citation omitted).

75. Decentralized Node has a few versions. One version, Gnutella, is a vanilla incarnation that functions exactly as described herein. *See* Marshall Brain, How Gnutella Works, Gnutella's Architecture, http://computer.howstuffworks.com/file-sharing2.htm (last visited Oct. 10, 2009). Another version, BitTorrent, combines principles of Supernode and Decentralized Node. In particular, it utilizes centralized servers, but only to the extent that those centralized servers collect the IP addresses of all clients on the network. BitTorrent, The Basics of BitTorrent, http://www.bittorrent.com/btusers/guides/bittorrent-user-manual/chapter-02-basic-guides/basics-

relationship (as opposed to the pyramidal relationship of Supernode architecture) between individual users so that there is no centralized server and each user is an equal peer of all other users. When a user performs a search request for a particular file, the requesting user searches among all other users in a distributed fashion[76] to find that file. If the search returns a match, the requesting user directly connects to the user in possession of the requested file.[77] This architecture gives users anonymity from those not part of the file exchange because users communicate directly between each other and without any interaction with a centralized server.[78] The only practical way to observe a transfer of files is to be a party to that transfer.[79] Because in Decentralized Node the parent corporation no longer facilitates the alleged infringement, the RIAA must instead direct any legal action at P2P users individually.[80]

Enforcing copyright restrictions in Decentralized Node is extremely difficult because no information flows through an easily observable centralized server. The potentially infringing files flow directly between users, and there are too many infringers to realistically (and cost efficiently) track the transfer of information between those users. The Internet is an unfathomably large collection of networks through which information travels between two individuals via constantly changing routes.[81] It would be impossible to monitor each of these networks and wait for a potentially infringing use. The RIAA therefore changed its monitoring strategy and began directly connecting to potentially infringing users and acting as another P2P user in order to "witness" an infringing distribution.[82] The RIAA does this with the help of a company called MediaSentry.[83]

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bittorrent (last visited Oct. 10, 2009). Other than that distinction, BitTorrent functions just like the basic Decentralized Node architecture. *See id.*

76. For a simple description of how a Distributed Node architecture, Gnutella, searches its nodes, see Marshall Brain, How Gnutella Works, Gnutella Clients, http://computer.howstuff works.com/file-sharing3.htm (last visited Oct. 10, 2009).

77. *See, e.g.*, Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 516 (2003).

78. *See, e.g.*, *id.* at 517.

79. *See, e.g.*, Damien A. Riehl, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761, 1782 & n.135 (2001).

80. *See* PIATEK, ET AL., *supra* note 71, at 1.

81. For a brief description of how the Internet works, see Jeff Tyson, How Internet Infrastructure Works, http://computer.howstuffworks.com/internet-infrastructure.htm (last visited Oct. 10, 2009).

82. Catherine Rampell, *How It Does It: The RIAA Explains How It Catches Alleged Music Pirates*, CHRON. OF HIGHER EDUC., May 13, 2008, *available at* http://chronicle.com/article/How-It-Does-It-The-RIAA-Ex/786/ (last visited Oct. 10, 2009).

83. *Id.*

B. *MediaSentry*

MediaSentry runs copies of popular P2P programs as an "undercover" user and searches for copyrighted songs one at a time to see if they are available for download from other users.[84] If the search returns a result, MediaSentry connects to that user to determine the user' s IP address[85] and subsequently initiates a TCP[86] connection to "handshake" with the user to determine if the user is online and ready to share the file.[87] The TCP "handshake" never actually downloads the song but only confirms that the song is legitimate and available.[88] MediaSentry then uses free online databases to determine the ISP to which an IP address belongs.[89] Finally, MediaSentry forwards this information to the RIAA, which determines whether to sue the infringing user by way of the ISP.[90]

There are many shortfalls in using this method of investigation. For instance, the RIAA only knows when a user offers a song for other users to download and has no way of knowing when a user is actually distributing that song.[91] As will be discussed in Part V, the mere offer to distribute is not enough for copyright infringement liability–only actual distribution is

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84. *Id.*

85. An IP address is a unique "locator declaring the place of a particular piece of electronic equipment so that electronic data may be sent to it, and is usually represented as a series of four numbers between 0 and 255." London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 160 (D. Mass. 2008) (citing America Online, Inc. v. Huang, 106 F. Supp. 2d 848, 851 (E.D. Va. 2000)). An example of an IP address is 128.122.168.24. What makes identifying individual defendants more difficult is the manner in which ISPs assign IP addresses to Internet users. Very few computers have a specific, unchanging IP address (known as a "static address"). *Id.* Most computers connect directly to a network controlled by their ISP that encompasses a designated range of possible IP addresses (for example, all numbers between 168.122.1.x to 168.122.100.x). *Id.* Each time an individual connects his or her computer to the Internet, the ISP assigns an IP address to that computer for the length of its connected session. *Id.* Each time the individual connects to the Internet, the IP address assigned may be different. "This process is known as 'dynamic' addressing." *Id.* (citing H. Brian Holland, *Tempest in a Teapot or Tidal Wave? Cybersquatting Rights & Remedies Run Amok*, 10 J. TECH. L. & POL'Y 301, 305 & nn.13–18 (2005)).

86. TCP stands for Transmission Control Protocol and is a high-level host-to-host connection protocol used in computer networks such as the Internet. TRANSMISSION CONTROL PROTOCOL, DARPA INTERNET PROGRAM, PROTOCOL SPECIFICATION (RFC 793) 1 (1981), *available at* http://www.faqs.org/ftp/rfc/pdf/rfc793.txt.pdf.

87. Rampell, *supra* note 82.

88. Rampell, *supra* note 82. Thus, there is no actual distribution of the song. For a discussion on whether actual distribution is required for a cause of action under 17 U.S.C. § 106(3), *see infra* Part V. However, in some instances, MediaSentry goes as far as downloading the songs from the targeted user. *See, e.g.*, Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976, 978 (D. Ariz. 2008).

89. Rampell, *supra* note 82.

90. Rampell, *supra* note 82.

91. Rampell, *supra* note 82. Furthermore, "peer-to-peer infringers use technology specifically configured not to retain direct evidence of wrongdoing, making proof of actual dissemination difficult." Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1224 (D. Minn. 2008).

actionable. Another shortfall in using MediaSentry for investigations involves a question of legal semantics—in the cases where MediaSentry actually downloads the files from the targeted user,[92] is MediaSentry, as the authorized agent of the copyright holder, itself infringing any rights held by that copyright owner?

An established principle of copyright law is that the lawful owner of a copyright cannot infringe its own copyright.[93] Although not a lawful owner of the copyrighted songs it downloads from targeted P2P users, MediaSentry is an authorized investigator of the copyright owners; MediaSentry's "assignment [i]s part of [the copyright owner's] attempt to stop . . . infringement."[94] Such an assignment therefore "d[oes] not authorize the investigator to validate [the defendant's] unlawful conduct,"[95] and distribution to MediaSentry may be sufficient to begin an infringement action against a P2P defendant.[96] Although legal authority suggests MediaSentry's actions "can form the basis of an infringement claim," it does not follow that all defendants witnessed by MediaSentry are necessarily liable for copyright infringement.[97] Instead, the plaintiff must make an adequate showing beyond this available basis as required by case law and statute.[98]

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92. These cases are unique, however, as MediaSentry rarely completes the downloading of the copies of songs on the defendants' hard drives. *See id.* at 1215.

93. *See, e.g.*, Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir. 1994); *accord* Cortner v. Israel, 732 F.2d 267, 271 (2d Cir. 1984) ("It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him . . . .").

94. *Olan Mills*, 23 F.3d at 1348.

95. *Id.*; *see also* RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 781–82 (8th Cir. 1988) (holding defendant liable for active assistance in reproducing copyrighted works at the request of the authorized agent of the copyright holder); Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (noting that "the recording companies obviously did not intend to license MediaSentry to authorize distribution or to reproduce copies of their works" and that MediaSentry's assignment was part of an effort to stop the defendant's infringement, such that the "12 copies obtained by MediaSentry [were] unauthorized"); Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145, 1157–60 (2008) (reviewing authority stating that an investigator may violate the copyright of its principal in an effort to stop the infringement of a third party). However, in cases like *Olan Mills* and *RCA/Ariola*, it was the defendant, and not the investigator, who made the copies at the behest of the investigator. *Olan Mills*, 23 F.3d at 1347; *RCA/Ariola*, 845 F.2d at 777. In a P2P transfer, the transferee actually initiates dissemination and makes the infringing copies without substantial participation by the transferor/defendant. *See infra* note 214. Thus, *Olan Mills* and *RCA/Ariola* may be distinguishable on the facts. *But see Thomas*, 579 F. Supp. 2d at 1216 (noting that although "Thomas did not assist in the copying in the same manner as the retail defendant in *Olan Mills* . . . or as the retail defendants in *RCA/Ariola* . . . she allegedly did assist in a different, but substantial manner" by placing the copyrighted works in a folder specifically designated for dissemination to others).

96. *Thomas*, 579 F. Supp. 2d at 1216.

97. *Id.*

98. *See, e.g.*, UMG Recordings, Inc. v. Adams, 2008 WL 4516309, at *3 (S.D. Ill. Oct. 3, 2008) ("Plaintiffs must satisfy two requirements to present a prima facie case of direct [copyright]

IV. A COPYRIGHT INFRINGEMENT PRIMER

To establish a prima facie case of copyright infringement, the plaintiff must prove two elements: (1) "ownership of a valid copyright;" and (2) "copying" by the defendant.[99] In P2P litigation, the first prong is almost never at issue, as the record companies have valid and registered copyrights for the allegedly infringed songs.[100] The greater burden on the record companies lies in the second prong: proving whether the defendant "copied" the copyrighted works. This second prong, "copying," is just a shorthand way of referencing an infringement of one of the five exclusive rights granted to copyright owners in 17 U.S.C. § 106.[101] Section 106 grants to copyright holders a set of exclusive rights that encompasses reproduction of the copyrighted work,[102] creation of derivative works based upon the copyrighted work,[103] distribution of the copyrighted work,[104] and public performance[105] and display[106] of the copyrighted work. In the context of P2P litigation, however, the distribution right of § 106(3) is the central issue.

As noted previously in Part III.A, direct evidence of copyright infringement in P2P litigation is nearly impossible to obtain. Even when the RIAA employs MediaSentry to find potential infringers, rarely does the RIAA have direct evidence that the defendant actually disseminated the copyrighted material. In most cases, the RIAA' s only evidence is that the defendant made the copyrighted material available for others to download freely on a P2P network. In an effort to overcome this technological burden, the RIAA attempts to prove infringement circumstantially (and without a showing of actual distribution) by putting forth a legal argument known as "making available."

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infringement: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." (citing A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001))).

99. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

100. *See, e.g.*, *Howell*, 554 F. Supp. 2d at 981 ("The recording companies' ownership of valid copyrights to the sound recordings is not in dispute. Affidavits establish that they held valid, registered copyrights effective prior to the date on which the sound recordings were found."); Arista Records, Inc. v. MP3Board, Inc., 2002 WL 1997918, at *3 (S.D.N.Y. Aug. 29, 2002) ("The record companies' ownership of the sound recordings at issue has not been disputed.").

101. Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 291 (3d Cir. 1991) (quoting Paramount Pictures v. Video Broad. Sys., 724 F. Supp. 808, 819 (D. Kan. 1989)). *See also* 17 U.S.C. § 501(a) (2006) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by section[] 106 . . . is an infringer of the copyright . . . of the author.").

102. 17 U.S.C. § 106(1).

103. *Id.* § 106(2).

104. *Id.* § 106(3).

105. *Id.* §§ 106(4), (6).

106. *Id.* § 106(5).

V. A SIMPLE SHOWING OF ACTUAL DISTRIBUTION

A. *Making Available*

Title 17 of U.S.C. § 106(3) grants copyright holders the exclusive ability "to do and to authorize . . . [the distribution of] copies or phonorecords of the copyrighted work to the public."[107] A plain reading of the statute appears to grant two distinct rights—"doing" and "authorizing" a distribution.[108] Because it is nearly impossible for the RIAA to catch an infringer "doing" an unauthorized distribution,[109] the only actionable "authorization" of distribution may be when an individual merely makes copyrighted material available over the Internet.[110] This is what is known as the "making available" argument.[111] Generally, the "making available" argument states that when a defendant lists copyrighted works on an index, also known as a "shared folder," and that index is uploaded to a P2P file-sharing network available to other individuals, that defendant has violated the exclusive right of distribution in § 106(3) of the Copyright Act.[112] Because a plain reading of § 106 literally grants the exclusive right to "authorize," it seems to follow that an individual who, without permission

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107. *Id.* § 106(3).

108. *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 166 (D. Mass. 2008).

109. An exception may be a distribution to its agent, MediaSentry. *See supra* Part III.B. However, the legal ramifications of this kind of download are unclear. *See id.* Even without direct evidence of an unauthorized distribution, however, plaintiffs can use circumstantial evidence in an attempt to prove actual dissemination of copyrighted material. Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008).

110. Normally, liability under § 106 is conditioned upon allowance under the fair use doctrine. Fair use is governed by 17 U.S.C. § 107 and generally is an exception to the exclusive rights granted to copyright holders in §106. 4 PATRY, *supra* note 17, § 13:13 (Sept. 2008). The principle of fair use allows individuals to use copyrighted work without the copyright owner's permission "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107 (2006). Each instance of a claimed fair use must be determined on a case-by-case basis and with consideration of the four nonexclusive factors listed in § 107. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985). However, there is no case on point that determines whether fair use applies to the distribution right alone. At least one commentator believes fair use does not apply to the distribution right. *See* Schaumann, *supra* note 1, at 1038–39 (stating generally that copying is not infringement as it is protected by fair use, but distribution is infringement). Whereas a downloader makes a single copy of a copyrighted work for personal use, the distributor "opens his disk for the entire world to copy, if they wish. The former is fair use; the latter is not." *Id.* at 1039; *see also* BMG Music v. Gonzalez, 2005 WL 106592, at *1 (N.D. Ill. Jan. 7, 2005) (stating that fair use doesn't apply in the context of "sampling"). *But see* 4 PATRY, *supra* note 17, § 13:13 (recognizing that although no reported opinion has commented on the fair use defense when only the distribution right is claimed, fair use is still an exception to all of the exclusive rights granted in § 106).

111. Kristy Wiehe, *Dollars, Downloads, and Digital Distribution: Is "Making Available" a Copyrighted Work a Violation of the Author's Distribution Right?*, 15 UCLA ENT. L. REV. 117, 118 (2008).

112. *Id.*

of the copyright holder, "makes available" a copyrighted work authorizes an infringing distribution within the meaning of § 106. In 1997, the Fourth Circuit, in what would later become a surprisingly important decision, issued *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, the first case to address this issue.[113]

In *Hotaling*, the plaintiffs had compiled and copyrighted a collection of genealogical research materials.[114] Some time later, the defendant, the Church of Jesus Christ of Latter-Day Saints, acquired a legitimate copy of the materials and added it to the Church' s collection at its main library.[115] At some point, the Church made copies of the materials without the permission of the plaintiffs and sent the copies to several of its branch libraries.[116] The plaintiffs learned of these unauthorized copies and filed suit,[117] arguing that the Church had violated their distribution right under 17 U.S.C. § 106(3).[118] The Fourth Circuit noted that distributing unlawful copies of a copyrighted work to the public is an infringement.[119] Therefore, the case turned on whether the Church distributed the materials.[120] Although the Church held the unauthorized copies in a collection that was open to the public, the Church kept no records of who accessed the collection.[121] Thus, there was no evidence of specific instances when the Church loaned unauthorized copies to members of the public.[122] The Church argued that this holding in an open collection was at most an offer to distribute the work and that to establish distribution, a member of the public needs to have accepted that offer.[123] The Fourth Circuit disagreed.[124]

In a famous statement reiterated in many briefs by the RIAA and amici,[125] the court stated, "[w]hen a public library adds a work to its

113. Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997). *Hotaling* is the basis of the RIAA's "making available" argument, and is one of the strongest cases for the plaintiffs in P2P litigations today.

114. *Id.* at 201.

115. *Id.*

116. *Id.*

117. *Id.* at 202.

118. *Id.* at 203.

119. *Id. See* 17 U.S.C. § 501(a) (2006) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by section[] 106 . . . is an infringer of the copyright or right of the author, as the case may be.").

120. *Hotaling*, 118 F.3d at 203.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *E.g.*, Plaintiff's Response in Opposition to Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant John Doe's Motion to Quash Subpoena at 7, London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008) (No. 04-cv-12434-NG), http://www.ilrweb.com/viewILRPDF.asp?filename=arista_does1-21_080219RIAABriefOpposEFF; Brief of Amicus Curiae MPAA in Connection with Defendant's Motion to Dismiss the Complaint at 9, Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05CV7340),

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."[126] The court noted that if this kind of distribution were not actionable within the meaning of 17 U.S.C. § 106(3), "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."[127] The court continued, "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."[128] Equitable concerns indeed influenced the *Hotaling* court.

Four years later, in *A&M v. Napster*, the Ninth Circuit followed suit.[129] In *Napster II*, the Ninth Circuit was concerned mainly with the secondary liability of Napster for the copyright infringement of its individual users.[130] Napster did not provide any of the infringing content but rather supplied its subscribers with a directory service and facilitated connections between users who had found each other by means of that directory.[131] While considering whether or not the individual users had infringed the copyrights of the plaintiffs, however, the court stated that "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights" under 17 U.S.C. § 106(3).[132] Although the *Napster II* court never mentioned the *Hotaling* decision, the RIAA and amici contend that the court advanced a similar reasoning.[133]

The language the *Napster II* court used may only serve as dicta, however, because it adjudicates a procedurally separate issue. In *Napster II*, the defendant-appellant did not contest that its users were directly infringing the copyrights of the plaintiff-appellees and the appeal was taken on different grounds.[134] Conversely, in the vast majority of P2P cases

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http://www.ilrweb.com/viewILRPDF.asp?filename=elektra_barker_mpaabrief.

126. *Hotaling*, 118 F.3d at 203 (emphasis added).

127. *Id.*

128. *Id.* at 204. *See also* Arista Records, Inc. v. Mp3Board, Inc. 2002 WL 1997918, at * 4 (S.D.N.Y. Aug. 29, 2002) (applying this principle from *Hotaling* in the context of digital distributions of sound recordings over the Internet).

129. *Napster II*, 239 F.3d 1004 (9th Cir. 2001).

130. *Id.* at 1011.

131. *Id.*

132. *Id.* at 1014.

133. *See, e.g.*, Plaintiff's Response in Opposition to Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant John Doe's Motion to Quash Subpoena at 7-8, London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008) (No. 04-cv-12434-NG), http://www.ilrweb.com/viewILRPDF.asp?filename=arista_does1-21_080219RIAABriefOpposEFF; Brief of Amicus Curiae MPAA in Connection with Defendant's Motion to Dismiss the Complaint at 9–10, 17–18, Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05CV7340), http://www.ilrweb.com/viewILRPDF.asp?filename=elektra_barker_mpaabrief.

134. *Napster II*, 239 F.3d at 1013 ("We note that the district court's conclusion that plaintiffs

involving individual defendants, the defendants challenge the RIAA's assertion that they were directly infringing the copyrights of the plaintiffs.[135] Furthermore, in the fallout of the original *Napster II* litigation, the Northern District of California thoroughly disapproved of the "making available" argument as it pertained to the *Napster II* litigation and other similar P2P litigation.[136] That court refused to accept the "making available" argument to prove violation of the distribution right of § 106(3)[137] and required a higher burden of proof–a showing of direct infringement.[138] Other courts have similarly required plaintiffs to show actual distribution by the defendant to prove infringement.

The Ninth Circuit recently considered one such case, *Perfect 10, Inc. v. Amazon.com, Inc*.[139] In *Perfect 10*, the plaintiff argued that the defendants infringed the plaintiff's distribution right to its pornographic images by maintaining an index of smaller, lesser quality images and displaying them on public web pages.[140] Using the simple Google Image Search function, anyone could access the web pages containing "thumbnail" versions of the copyrighted pornographic images.[141] The Ninth Circuit stated that a

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have presented a prima facie case of direct infringement by Napster users is not presently appealed by Napster. We only need briefly address the threshold requirements.").

135. *See, e.g.*, Defendant David Greubel's Motion to Dismiss Plaintiff's Complaint at 8, Arista Records, LLC v. Greubel, 453 F. Supp. 2d 961 (N.D. Tex. 2006) (No. 4-05CV-531-Y), http://www.ilrweb.com/viewILRPDF.asp?filename=arista_greubel_motdismiss; Memorandum of Law of Defendant Anna Goldshteyn in Support of Her Motion to Dismiss the Complaint at 4, Maverick Recording Co. v. Goldshteyn, No. 05-CV-4523, 2006 WL 2166870 (E.D.N.Y. July 31, 2006), http://www.ilrweb.com/viewILRPDF.asp?filename=maverick_goldshteyn_memooflaw. *But see* BMG Music v. Gonzalez, No. 03-C-6276, 2005 WL 106592, at *1 (N.D. Ill. Jan. 7, 2005) (noting that the defendant admitted infringement by downloading thirty songs from the Internet, but challenged summary judgment based upon applicability of the fair use defense).

136. *See In re* Napster, Inc. Copyright Litigation, 377 F. Supp. 2d 796, 803 (N.D. Cal. 2005) ("[T]o the extent that *Hotaling* suggests that a mere offer to distribute a copyrighted work gives rise to liability under section 106(3), that view is contrary to the weight of [other] authorities.").

137. *Id.* at 802–03.

138. The court stated:

> Rather than requiring proof of the actual dissemination of a copyrighted work or an offer to distribute that work for the purpose of its further distribution or public performance, plaintiffs' theory is premised on the assumption that any offer to distribute a copyrighted work violates section 106(3). This is not sufficient to satisfy plaintiffs' burden of proving that Napster or its users directly infringed their copyrighted musical compositions and sound recordings, as they must do if they are to hold defendants secondarily liable for that infringement.

Id. at 805; s*ee also* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 430 (8th Cir. 1993) (emphasizing the requirement of actual distribution and rejecting that "an allegation that National 'permitted the use' necessarily amount[ed] to an allegation of the actual distribution of a copy").

139. 508 F.3d 1146 (9th Cir. 2007).

140. *Id.* at 1155–57.

141. *Id.* at 1157.

violation of the distribution right under the Copyright Act requires actual dissemination of the copyrighted work.[142] The court distinguished *Perfect 10* from *Hotaling* in an effort to avoid assigning liability under "making available,"[143] stating that *Hotaling* did not apply because "Google [did] not own a collection of Perfect 10' s full-size images" and did not "make [the images] available to the public."[144] The Ninth Circuit therefore rejected the "making available" argument when the alleged infringer "does not have a collection of stored full-size images it makes available to the public."[145] Unfortunately, *Perfect 10* left unclear whether an infringing distribution exists when the defendant *does* maintain full-size copies of the copyrighted work and makes those full-size copies available to the public.

On this issue, *London-Sire v. Doe 1* picks up where *Perfect 10* left off.[146] *London-Sire* was cookie-cutter P2P litigation in which the record companies consolidated four separate lawsuits into a single court proceeding.[147] In considering whether § 106(3) requires an actual dissemination, the court noted, "defendants' actions must do more than ' authorize' a distribution; they must actually ' do' it."[148] The court further stated, "[m]erely because the defendant has completed all the steps necessary for distribution does not necessarily mean that a distribution has actually occurred. It is a distribution that the statute plainly requires."[149] The *London-Sire* court thoroughly rejected the "making available" argument as it was contrary to the statutory requirements of an infringing distribution.[150] By similarly requiring actual distribution and rejecting the sufficiency of a mere "authorization," other courts have looked to the legislative history of § 106(3).

In *Venegas-Hernandez v. Asociacion De Compositores y Editores De Musica Latinoamericana*, the First Circuit considered a convoluted appeal by the surviving children of a well-known Puerto Rican composer.[151] The composer' s children contested the ownership rights of works their father had licensed during his lifetime and sued the defendants for copyright

142. *See id.* at 1162.

143. The *Perfect 10* Court referred to it as "deemed distribution." *See id.*

144. *Id.*

145. *Id.*

146. London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008).

147. *Id.* at 157. Courts often consolidate P2P lawsuits because "[t]he cases involve similar, even virtually identical, issues of law and fact: the alleged use of peer-to-peer software to share copyrighted sound recordings." *Id.* at 161.

148. *Id.* at 166. *But see* Arista Records LLC v. Greubel, 453 F. Supp. 2d 961, 969 (N.D. Tex. 2006) ("[T]he courts have recognized that making copyrighted works available to others may constitute infringement by distribution in certain circumstances.").

149. *London-Sire*, 542 F. Supp. 2d at 168 (footnotes, citations, and internal quotations omitted).

150. *Id.* at 166–68.

151. Venegas-Hernandez v. Asociacion De Compositores y Editores De Musica Latinoamericana, 424 F.3d 50, 51–53 (1st Cir. 2005).

infringement[152] Without any evidence that the songs were copied or performed under the unauthorized licenses granted by the defendants, the plaintiffs alleged violation of the distribution right solely by way of the licenses themselves.[153] In rejecting the plaintiffs' argument,[154] the court noted that the "authorize" language was added to § 106 by the Copyright Act of 1976 to "avoid any questions as to the liability of contributory infringers."[155] Following this legislative intent, the court opined that the drafters of the "authorize" language "did not intend to create an independent liability for authorizing where no [evidenced] infringing act . . . thereafter occurred."[156] Because there was "no direct proof of an infringing act" after the defendants granted the unauthorized licenses, the defendants were not liable for infringement.[157]

In light of this authority, there is no actionable offense under § 106(3) when a person does not actually consummate a distribution. The "authorize" language of the statute only guarantees liability for contributory and vicarious infringers and serves no purpose in individual infringement cases. Thus, the "making available" argument, as applied in the context of P2P litigation and digital distributions, confuses the language of § 106 and fails to serve as an appropriate basis for a cause of infringement. *Hotaling* should therefore be narrowly construed to apply only to its facts, i.e., only where such a grossly inequitable action by the defendant obfuscates any evidence of actual distribution. In most P2P cases, there exists no such inequitable conduct. Consequently, some authorities argue instead that a defendant violates the distribution right by another act not explicitly precluded in § 106(3)—publication.

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152. *Id.* The plaintiff children alleged that the defendants violated the distribution right by way of granting unauthorized licenses to the copyrighted material. *Id.* at 57.

153. *Id.* at 59 ("The [plaintiffs'] position is that the mere fact of licensing creates a presumption that the works were the subject of infringing acts . . . .").

154. "[Plaintiffs' argument] ignores the reality that licensees often seek broad licenses covering a range of works, allowing them to choose what to use. Depending upon the surrounding circumstances, an inference that a work was performed [or copied] might be stronger or weaker, but a universal presumption is not justified." *Id.*

155. *Id.* at 58 (quoting H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 61 (1976) [hereinafter HOUSE REPORT], *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674).

156. *Venegas-Hernandez*, 424 F.3d at 58; *see also* Obolensky v. G.P. Putnam's Sons, 628 F. Supp. 1552, 1555 (S.D.N.Y. 1986) ("[T]here is no violation of the right to [distribute] copyrighted works . . . where the defendant offers to sell copyrighted materials but does not consummate a sale; equally, there is no infringement of the [distribution] right where there is copying, but no sale of the material copied.") (footnotes omitted).

157. *Venegas-Hernandez*, 424 F.3d at 59; *see also* SBK Catalogue P'ship v. Orion Pictures Corp., 723 F. Supp. 1053, 1064 (D.N.J. 1989) ("[T]he mere act of 'authorizing,' without proof that the party so authorized actually distributed copies of the copyrighted work, does not constitute copyright infringement under the Act . . . .").

B. *The Relationship of Distribution and Publication*

Although § 106(3) grants to copyright holders the exclusive right of distribution, the Copyright Act fails to define a "distribution" anywhere in its text. To overcome this supposed omission, P2P plaintiffs contend that "distribution" and "publication," a more well-defined right,[158] are synonymous.[159] Similar to the "making available" argument, equating "publication" and "distribution" avoids the requirement of actual distribution because "publication" encompasses the right to "offer[] to distribute copies" of the copyrighted work.[160]

This argument is not without merit. Looking to the plain language of § 101, publication is defined as

> [T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.[161]

By this definition, "distribution" and "publication" are more than similar. In fact, the first sentence of the definition of "publication" is nearly identical to the distribution right of § 106(3).[162] Additionally, several courts[163] including the Supreme Court,[164] have supported the proposition that a distribution is synonymous with publication of a copyrighted work.

In *Arista Records LLC v. Greubel*,[165] the Northern District of Texas considered an action for copyright infringement of 1087 copyrighted computer files found on defendant Greubel' s computer that Greubel made

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158. *See* 17 U.S.C. § 101 (2006) (defining "publication").

159. *See, e.g.*, Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234, 240–41 (S.D.N.Y. 2008); Plaintiff's Response in Opposition to Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant John Doe's Motion to Quash Subpoena at 12-13, *London-Sire*, 542 F. Supp. 2d 153 (D. Mass. 2008) (No. 04-CV-12434-NG), http://www.ilrweb.com/viewILRPDF.asp?filename=arista_does1-21_080219RIAABriefOpposEFF.

160. 17 U.S.C. § 101.

161. *Id.*

162. *Compare id. with* 17 U.S.C. § 106(3) (2006).

163. *See, e.g.*, Ford Motor Co. v. Summit Motor Prod., Inc., 930 F.2d 277, 299 (3d Cir. 1991).

164. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985). *But see London-Sire Records*, 542 F. Supp. 2d at 168 (quoting *Harper & Row*, 471 U.S. at 552 (criticizing the RIAA's position that the *Harper & Row* Court held that publication and distribution were congruent, and instead stating that the *Harper & Row* Court merely stated that "§ 106(3) '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.'")).

165. 453 F. Supp. 2d. 961 (N.D. Tex. 2006).

available to the public via a P2P program.[166] In considering whether "making available" was sufficient to violate the distribution right, the court equated "distribution" with "publication" such that an offer to distribute met the requirements of § 106(3).[167] The court noted that "not just any offer will suffice"—instead, the offer must be such that "further distribution, public performance, or public display is contemplated."[168]

The Western District of Texas similarly required such an offer in *Warner Bros. Records v. Payne*[169] but applied the principle directly to P2P software.[170] The court stated, "offering to distribute a music file by listing it 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."[171]

Furthermore, the legislative history appears to support the notion that "distribution" and "publication" are synonymous. While debating the Copyright Act of 1976, the House Judiciary Committee openly described the right granted under § 106(3) as the "right of publications."[172] Throughout the discussion, the committees used the terms "publication" and "distribution" interchangeably.[173] This legislative use supports the contention that distribution is not defined in the Copyright Act because the common understanding at the time of the Act's passage was that "distribution to the public [was] . . . essentially synonymous with 'publication,' which means distribution of tangible copies."[174]

The foregoing authorities, however, make two critical errors in equating "publication" with "distribution." First, publication is quite different from distribution in that publication implicitly "cannot occur without the copyright owner's consent."[175] Thus, any unauthorized digital transmission of a work "would violate the copyright owner's § 106(3) right of distribution, but would not result in publication," due to the lack of consent.[176] Second, the authority that finds publication and distribution

166. *Id.* at 963.

167. *Id.* at 969.

168. *Id.* n.11 (citations omitted).

169. No. W-06-CA-051, 2006 WL 2844415 (W.D. Tex. 2006).

170. *Id.* at *1.

171. *Id.* at *4. *See also* Interscope Records v. Duty, 2006 WL 988086, at *2 (D. Ariz. 2006) ("[T]he mere presence of copyrighted sound recordings in Duty's share file may constitute copyright infringement.").

172. HOUSE REPORT, *supra* note 155, at 62. The committees also recited the exclusive rights granted to copyright holders as "the exclusive rights of reproduction, adaptation, *publication*, performance, and display." *Id.* at 61 (emphasis added).

173. *See id.* at 61–62.

174. Schaumann, *supra* note 1, at 1011.

175. RayMing Chang, *"Publication" Does Not Really Mean Publication: The Need to Amend the Definition of Publication in the Copyright Act*, 33 AIPLA Q.J. 225, 232 (2005).

176. *Id.*

synonymous looks only to the first sentence of the definition of "publication" and disregards the remainder.[177] The language distinguishing publication from distribution is contained in the second sentence of the definition of publication and is entirely absent from § 106(3);[178] the language addresses an "offer" to publish.[179] Publication, then, is a much broader[180] right than that of the plain language of the distribution right.[181] A publication can occur by "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending."[182] Unlike distribution, publication can also occur by "*offering* to distribute copies or phonorecords to a group of persons *for purposes of further distribution, public performance, or public display*."[183] Thus, § 101 clearly allows for infringement liability based solely upon an *offer* to publish while § 106(3) does not. Publication and distribution are related concepts but do not encompass the same activities.

Although a plain reading of the Copyright Act reveals that all distributions to the public are publications, it does not necessarily follow that all publications are distributions.[184] Equating these two concepts is a logical fallacy known as "affirming the consequent."[185] As an example, an author may sell a copy of her unpublished novel to a member of a public.[186] This action constitutes both distribution and publication.[187] However, if the author merely *offers* to sell the novel to a member of the public, without actually consummating that sale, neither a distribution nor a publication has occurred.[188] And if the author makes an offer of sale to a publishing house with the intent of future distributions but does not actually consummate that sale, a publication, and not a distribution, has occurred.[189] By this illustration, then, it is more proper to recognize that

177. *See, e.g.*, Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 299 (3d Cir. 1991) (equating "distribution" with "publication" by only looking to the first sentence of the definition of "publication").

178. *See* 17 U.S.C. §§ 101, 106(3).

179. *See id.* § 101.

180. And, at the same time, narrower because it does not require the copyright owner's consent. *See* Chang, *supra* note 175, at 232–33.

181. *Compare* 17 U.S.C. § 101, *with* 17 U.S.C. § 106(3).

182. *Id.* § 101.

183. *Id.* (emphasis added).

184. London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d. 153, 169 (D. Mass. 2008).

185. Affirming the consequent occurs by the following: If P, then Q; Q, therefore P. 4 PATRY, *supra* note 17, § 13:11.50. In the context of publications and distributions then, the fallacy occurs by the following: all distributions are publications; therefore if there is a distribution, there has also been a publication. *See id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

distributions are but a subset of publications.[190] Therefore, it is improper to allow an "offer" to distribute to satisfy the distribution right of § 106(3) because distribution and publication are not synonymous.

C. *Distinctions in Other Sections of the Act*

After discarding the "authorize" language for purposes of individual infringement and recognizing that "distribution" is a more narrow right than "publication," it is difficult to stretch the plain language of the statute to require anything but an actual infringement.[191] If Congress intended an offer to distribute to violate a copyright holder' s distribution right, it could have specified an offer to distribute in the list of prohibited actions: "sale or other transfer of ownership . . . rental, lease, [and] lending."[192] Certainly, Congress knows how to distinguish acts from offers to act because other sections of the Copyright Act make that distinction.[193] Congress has made similar distinctions in other areas of law, such as the Patent Act.[194] If Congress intended to grant copyright holders the right of an offer to distribute the copyrighted work, Congress could easily have specified such in the Copyright Act.

A survey of legal authority thus affirms that there cannot be a violation of the distribution right of § 106(3) where the alleged infringer offers to distribute the works without an actual distribution or copies the works without an actual distribution.[195] But even with this matter disposed, there remain other unanswered questions with respect to whether electronic files and digital distributions fit within the defined limits of the distribution right.

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190. *See* Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) ("It 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.").

191. *But see, e.g.*, United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007) (noting that in the context of criminal penalties for distribution of child pornography, that placing child pornography in Kazaa's shared folder and making the material freely available and downloadable for other users was sufficient for a distribution within the meaning of 18 U.S.C. § 2252A(a)(2)).

192. 17 U.S.C. § 106(3) (2006).

193. The section that discusses protections to copyrights on semiconductor chip products defines "to distribute" as: "*to sell*, lease, bail, or otherwise transfer, *or to offer to sell*, lease, bail, or otherwise transfer . . . ." *Id.* § 901(a)(4) (2006) (emphasis added); *see also id.* § 506(a)(1)(C) (holding criminally liable those who distribute "a work being prepared for commercial distribution, by *making it available* on a computer network accessible to members of the public") (emphasis added).

194. "Except as otherwise provided in this title, whoever without authority makes, uses, *offers to sell, or sells* any patented invention . . . infringes the patent." 35 U.S.C. § 271(a) (2006) (emphasis added).

195. *See* Obolensky v. G.P. Putnam's Sons, 628 F. Supp. 1552, 1555 (S.D.N.Y. 1986) (footnotes omitted).

VI. DISTRIBUTION'S BIAS TOWARD TANGIBILITY

A. *The Materiality of Electronic Files*

Looking again to the plain language of the distribution right, § 106(3) does not grant an exclusive right to distributions of all forms of a copyrighted work. Instead, it grants a more narrow right to distribute "copies or phonorecords of the copyrighted work."[196] Notwithstanding the problems discussed thus far, the uncertainty of whether an electronic file can be distributed within the meaning of § 106(3) presents quite a quandary for lawyers and judges alike. For purposes of the distribution right, does a computer file, representing a series of 1's and 0's,[197] satisfy the definition of a "copy"?[198]

The Copyright Act defines both phonorecords and 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."[199] The Copyright Act further states that a work is "fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[200] Other sources, such as the House Report addressing the Copyright Act of 1976, also emphasize the definition of a "copy" as a physical object.[201] At least

196. 17 U.S.C. § 106(3) (2006).

197. Computer files, at their lowest software abstraction, are represented by a string of binary code, which encompasses two numbers: 1 and 0. *See* Encyclopedia Britannica, http://www.britannica.com/EBchecked/topic/681536/binary-code (last visited Oct. 10, 2009).

198. As a principal of strict statutory language under the Copyright Act, material objects representing a sound recording is referred to as a "phonorecord" while a "copy" is a material object representing all other forms of copyrightable expression. *See* 17 U.S.C. § 101. For simplicity's sake, this Note uses the term "copy" to encompass both forms of reproduction.

199. *Id.*

200. *Id. But see* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 128 n.171 (exploring whether the definition of "fixed" in § 101 should also suffice as a definition of "fixed" for purposes of whether something is a copy or phonorecord).

201. *See* HOUSE REPORT, *supra* note 155, at 52–53 (discussing the requirement that work be "fixed in a 'tangible medium of expression'"). The House Report emphasizes that a copy is a physical, tangible object that acts as the medium of expression for the underlying artistic work:

> The definition of ['copies'] in section 101 . . . reflect[s] a fundamental distinction between the 'original work' which is the product of 'authorship' and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a 'book' is not a work of authorship, but is a particular kind of 'copy.' Instead, the author may write a 'literary work,' which in turn can be embodied in a wide range of 'copies' . . . including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.

one commentator agrees.[202]

Similarly, many decisions, such as that in *Agee v. Paramount Communications, Inc.*[203] have followed the plain language of the statute and legislative history in requiring transmission of a material object.[204] In *Agee*, the plaintiff owned two copyrights in sound recordings used by Paramount in its *Hard Copy* television program, aired by satellite transmission to television stations around the country.[205] The plaintiff sued Paramount for copyright infringement and the television stations for, among other things, unauthorized copying and distribution of that copy to the public.[206] In considering the violation of distribution right allegation, the court noted, "merely transmitting a sound recording to the public on the airwaves does not constitute a 'distribution.'"[207] Instead, distribution "require[s] transmission of a 'material object' in which the sound recording is fixed: a work that is of 'more than transitory duration.'"[208]

Computer files, however, are distinguishable from immaterial satellite communications. Following the plain language of the statute and the reasoning from the legislative history, commentators, and case law, a computer file is unequivocally a "material object" within the meaning of the Copyright Act.[209] The work is "fixed" in a material object (the hard drive or other memory storage device), is sufficiently permanent,[210] and may be perceived or reproduced with the aid of a computer utilizing the appropriate hardware or software.[211] It does not matter that one cannot

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Id. at 53.

202. *See* Reese, *supra* note 200, at 126 (noting that a copy is "a book, a newspaper, a magazine, a CD-ROM, a computer diskette, a set of computer punch cards" and other tangible embodiments, thus restricting the copyright owner's exclusive right to distribute such tangible embodiments).

203. 59 F.3d 317 (2d Cir. 1995).

204. *Id.* at 325–26.

205. *Id.* at 319.

206. *Id.* at 320.

207. *Id.* at 325.

208. *Id.* (citations omitted). *Agee* is still helpful case law even though satellite transmissions are distinguishable from digital transmissions. At the receiving end of a digital transmission, the transferee retains a copy of the disseminated work, whereas at the receiving end of a satellite television transmission, the transferee can only watch and listen to the program playing on his or her television, without the ability to physically possess that program.

209. However, as stated in the House Report, the requirement of "fixation" excludes "purely evanescent or transient reproductions such as those . . . captured momentarily in the 'memory' of a computer." HOUSE REPORT, *supra* note 155, at 53. For purposes of a saved file on a hard drive, however, the file is not captured "momentarily," but for a significant duration. *See infra* notes 210–211 and accompanying text.

210. Hard drives have an average life span of 3–5 years. Ultimate Hard Drives, Hard Drive Life Span, http://www.ultimate-hard-drives.com/hard-drive-life-span/ (last visited Oct. 10, 2009).

211. Case law supports the proposition that a file stored in memory on a computer is a "copy" for purposes of the Copyright Act. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007) ("A photographic image is a work that is fixed in a tangible medium of expression, for purposes of the Copyright Act, when embodied (i.e. stored) in a computer's server (or hard disk, or

physically hold a single computer file or copy it in the way one would copy a book or an audiocassette.[212] However, for an infringement of the distribution right, a computer file fitting the definition of a "material object" alone is not enough—an electronic transmission of such a file must qualify as a distribution within the meaning of § 106(3).

B. *Digital Transmission Dilemmas*

The second part of § 106(3) requires the distribution be by "sale . . . rental, lease, or lending," or involve a "transfer of ownership" or other possessory right in a material object.[213] In the context of P2P litigation, there is authority that questions whether a digital transfer,[214] by means of a computer network or the Internet, is a distribution within the meaning of § 106(3).[215] During a digital transfer, the original computer file

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other storage device). The image stored in the computer is the copy of the work for the purposes of copyright law.") (internal quotations omitted); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 517–18 (9th Cir. 1993) (holding that "loading of copyrighted software into [computer memory] creates a 'copy' of that software"); *see also* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d. 153, 171 (D. Mass. 2008) (reviewing the method by which files are transferred on a P2P network and stating that "[t]he electronic file . . . is therefore a 'phonorecord' within the meaning of the statute") (citation omitted).

212. The House Report gave a very broad allowance for what constitutes a medium of fixation:

> [I]t makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'

HOUSE REPORT, *supra* note 155, at 52.

213. 17 U.S.C. § 106(3) (2006); *see also* Reese, *supra* note 200, at 126–27.

214. To understand how files are transferred over the Internet, an illustration may be helpful. E, the transferee, wants a nondescript computer file, C_1, from the transferor, T. C_1 is stored on the hard drive or other storage device of T's computer. After a request for the file from E, and just prior to a transfer by T, T's computer reads the binary code that represents C_1 on the hard drive, and divides that information into many sequential packets of data. No single packet encompasses enough data to represent the entire C_1 file, and a computer cannot reconstruct a file from the series of packets if any single packet is missing. T's computer then sends each packet of data sequentially to E's computer, which collects the packets, arranges them into binary code, and then saves that code in its entirety to the hard drive on E's computer. E now has an entirely new and identical copy of C_1 saved on his hard drive, represented as C_2. The data packets transferred only exist during the short duration of transfer and effectively disappear after E's computer constructs the resulting file, C_2, from them.

215. *See, e.g.*, 4 PATRY, *supra* note 17, at §§ 13:11, 13:11.50 (stating that there is no distribution when the transferee "takes" a file from a transferor's hard drive, and that it is legally and technically incorrect to conclude that the transferor distributed the work); ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 81 (2003) ("It is clear . . . that under the statutory language now in effect there has been no *distribution of copies or phonorecords . . . to the public* and hence no publication when a work is disseminated electronically").

remains on the transferor' s hard drive.[216] When the transferee requests the file from the transferor' s computer and then receives that file, there is no physical transfer of ownership or possessory interest in that computer file. Only the information contained in the original file is transferred, and nothing more. Thus the argument goes, although the underlying copyrighted work is transferred by means of many bite-sized packets of information,[217] a "phonorecord" or "copy" of the copyrighted work is not. Some commentators suggest that this mere transfer of information fails to divest the transferor of his or her original copy and does not implicate any ownership rights through the transfer of that copy; therefore, a digital transfer does not fit within the boundaries of the distribution right.[218] A line of cases, however, contrarily suggests that Internet transmission does implicate the distribution right as a transfer of material objects.

The most significant case following this line of reasoning is *Playboy v. Frena*.[219] In *Frena*, the plaintiff operated a subscription computer bulletin board service (BBS).[220] Each subscriber to the BBS had the ability to upload files onto the bulletin board so that the uploaded files would be stored into memory on the BBS computer.[221] Once a subscriber uploaded files to the bulletin board, all subscribers could browse through the BBS directories to look at and download the posted files onto their home computers.[222] The BBS contained 170 images copyrighted by Playboy, and Playboy sued for infringement.[223] The court recognized that "Section 106(3) grants the copyright owner ' the exclusive right to sell, give away, rent or lend any *material embodiment* of his work.' "[224] Notwithstanding the lack of a transfer of possessory interest and the intangible nature of the

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216. *See supra* note 214.

217. *Id.*

218. WHITE PAPER, *supra* note 1, at 92, 213; Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1422 (1996) ("In the digital context . . . there is really no such thing as a distribution. Virtually all transfers of digital files result in a new copy being created, rather than the original copy being transferred."); Reese, *supra* note 200, at 127–28. Professor Reese further notes that the infringing activity does not take place during the transmission, but later, at the point in which the transferee takes the transferred information and makes a new copy of the original file. *Id.* at 129 ("This activity is basically the same as photocopying a printed volume: the user takes an existing copy of a work and mechanically fixes the work in a new material object, thus creating a new copy. This, of course, is a quintessential act of [an infringing] reproduction.").

219. Playboy Enters. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

220. *Id.* at 1554.

221. *Id.*

222. *Id.*

223. *Id.* Playboy sued Frena because, using similar reasoning to that used in *Napster II* and its progeny, Frena "supplied a product containing unauthorized copies of a copyrighted work." *Id.* at 1556. It did not matter that Frena did not make the copies himself. *Id.* (citing JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY § 6.01[3], at 6–15 (1991)).

224. *Id.* (emphasis added).

transfer, the court found that the distribution right "ha[d] been implicated by . . . Frena."[225]

Despite contrary decisions by the district courts, and even the Supreme Court,[226] others argue that Congress deliberately chose to define the distribution right such that it purposefully excludes situations such as this, when copyrighted work is transferred via a stream of digital information, and not as a "phonorecord" or "copy" of the work.[227] It follows that if Congress had intended for the distribution right to encompass the entire copyrighted work, and not just material objects embodying reproductions of the work, Congress could have specified such, as it did in other sections of the Act.[228] Furthermore, in other sections of the Copyright Act, Congress specifically limited the term "distribution" to apply only to the physical transfer of copyrighted work.[229] Normally, there is a "strong presumption that the plain language of the statute expresses congressional intent [that] is rebutted only in rare and exceptional circumstances."[230] The distribution right of §106(3), however, may qualify as a rare and exceptional circumstance.

At the drafting of the Copyright Act of 1976 and specifically the exclusive rights under § 106, it did not make sense to distribute an immaterial object or reproduction of the copyrighted work. A reproduction was a physical transfer of a manuscript, a photograph, or a cassette tape.

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225. Playboy Enters. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993). *See also* Playboy Enters. v. Webbworld, Inc., 991 F. Supp. 543, 550–53 (N.D. Tex. 1997) (expanding the rule of *Frena* and holding that transmissions over the Internet, and not just over a bulletin board system, implicate the distribution right); Playboy Enters. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 512–15 (N.D. Ohio 1997) (following the holding of *Frena*); Playboy Enters. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (following the holding of *Frena*). Professor Reese criticizes *Frena* and its progeny as misinterpreting the distribution right. Reese, *supra* note 200, at 125–36. In Professor Reese's view, "[t]he distribution right as currently framed . . . does not appear to encompass transmissions of copyrighted works over computer networks." *Id.* at 125–26. "Interpreting the distribution right to encompass computer network transmissions not only conflicts with the plain language of the right but also with its legislative history." *Id.* at 127.

226. N.Y. Times Co. v. Tasini, 533 U.S. 483, 498 (2001) (indicating that in the context of the Internet, sale and digital distribution of copyrighted works through the NEXIS database is sufficient for an action under § 106).

227. *See* Amicus Curiae Brief of EFF in Support of Defendant's Motion to Dismiss the Complaint at 4, 551 F. Supp. 2d. 234 (S.D.N.Y. 2008) (No. 05-CV-7340), http://www.ilrweb.com/viewILRPDF.asp?filename=elektra_barker_effamicusbrief.

228. *See* 17 U.S.C. § 106(1) (2006) (encompassing reproduction of "the copyrighted work"); *Id.* § 106(2) (encompassing the preparation of derivative works based on "the copyrighted work"); *Id.* §106(4) (encompassing public performance of "the copyrighted work"); *Id.* § 106(5) (encompassing public display of "the copyrighted work"); *Id.* § 106(6) (encompassing public performance of "the copyrighted work").

229. *See id.* § 115(c)(2) ("[A] phonorecord is considered 'distributed' if the person . . . has voluntarily and *permanently* parted with its possession.") (emphasis added).

230. United States v. Clintwood Elkhorn Mining Co., 128 S. Ct. 1511, 1518 (2008) (citations omitted).

Except when an infringer would photocopy a book,[231] the distributor did not retain physical possession of the infringing copy. Instead, the distributor physically transferred the infringing copy to another. The concept of digital transmission was a foreign concept to the public in 1976. It would be another twenty years before the Internet was commonplace and people began to think about transmissions of computer files over unseen networks and airwaves.[232]

Even neglecting the technological distinction, a digital distribution may still fall within the limits of § 106(3). Congress purposefully drew "a fundamental distinction between the 'original work' which is the product of 'authorship' and the multitude of material objects in which it can be embodied. In the sense of the [Copyright Act], a 'book' is not a work of authorship, but is a particular kind of 'copy.'"[233] It does not matter whether or not a transferor retains a possessory interest in such a "copy" for purposes of a distribution under § 106(3). As Judge Gertner described in *London-Sire*, "[s]ince the focus of § 106(3) is the ability of the author to control the market, it is concerned with the ability of a transferor to create ownership in someone else—not the transferor's ability simultaneously to retain his own ownership."[234] Following that, a distribution occurs whether a book physically exchanges hands or a digital copy is read at point A and duplicated by the transferee at point B.[235]

Likewise, courts and commentators should not ignore Congress's intentions by relying on an overly literal definition of "material object."[236] "Congress intended for the copyright owner to be able to control the public distribution of items that can reproduce the artist's sound recording. It makes no difference that the distribution occurs electronically, or that the items are electronic sequences of data rather than physical objects."[237] Although some commentators have had difficulty in finding a digital transmission to fit within the distribution right, "[a]ny process by which reproductions are in fact disseminated, whether by dissemination of tangible objects or by the transmission of content to a remote place where

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231. By copying the book, the infringer's actions implicate the reproduction right and not the distribution right.

232. Although other transmissions, such as those via radio and satellite, were available in some form in 1976, these earlier forms are distinguishable from digital distributions. *See supra* note 208.

233. HOUSE REPORT, *supra* note 155, at 53. By requiring a material object for a distribution, Congress further distinguished a tangible copy of a work from the performance of a work. *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d. 153, 170 n.22 (D. Mass. 2008).

234. *London-Sire*, 542 F. Supp. 2d at 174.

235. *Id.*

236. *See London-Sire*, 542 F. Supp. 2d at 170 ("The Copyright Act does not use materiality in its most obvious sense—to mean a tangible object with a certain heft, like a book or compact disc. Rather, it refers to materiality as a medium in which a copyrighted work can be 'fixed.'") (citation omitted).

237. *Id.*

it is fixed, should be regarded as 'distribution' and therefore should implicate the right of distribution under section 106(3)."[238] Nevertheless, there is no consensus that digital transmissions implicate the distribution right, and any remaining uncertainties must be remedied by an act of Congress.

VII. PROPOSED SOLUTION

The legal ambiguities discussed above are due, in part, to antiquated copyright laws that are ill fit to handle the multitude of issues that arise in today's copyright litigation. Although the Copyright Act of 1976 was intended "to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes."[239] Nevertheless, copyright law has attempted to keep up with changes in technology over the years.[240] As each technological advance moved outside the realm of current copyright protections, a debate sparked over whether that advance entitled copyright owners to an expansion of the current laws.[241] To avoid a lengthy legislative process every time technology progressed, Congress began encouraging representatives of the industries affected by the changes in technology to create their own amendments to the copyright laws and then present Congress with the text of the appropriate legislation.[242] This tradition has become such that Congress passes copyright bills only after private stakeholders agree with each other on the substantive provisions of those bills.[243] However, this practice results in an unfortunate disruption of the balance between public interest and private reward.

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238. Schaumann, *supra* note 1, at 1037; *see also London-Sire*, 542 F. Supp. 2d. at 173 ("[W]hile [§ 106(3)] requires that distribution be of 'material objects,' there is no reason to limit 'distribution' to processes in which a material object exists throughout the entire transaction—as opposed to a transaction in which a material object is created elsewhere at its finish.").

239. H.R. Rep. No. 101-735, 101st Cong., 2d Sess. 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6938.

240. *See, e.g.*, Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (dealing with anti-piracy measures for digital forms of copyrighted materials); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (creating a digital performance right); Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (implementing a copy management system for digital audio recordings); Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, 3949 (fixing problems with satellite retransmissions); Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3335, 3347 (adding design protection for semiconductor chips).

241. So far, the response from Congress has been to "recast traditional models of regulation in cyberspace with the result that [copyright] owners' rights have been unwittingly expanded." Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 109 (2001).

242. LITMAN, *supra* note 3, at 23.

243. LITMAN, *supra* note 3, at 23.

Although Congress and the Constitution[244] grant copyright owners a limited monopoly over their creative works, the primary purpose of copyright law is to benefit the public by way of those creative works.[245] The limited monopoly merely balances the two competing interests of rewarding authors for their creativity and granting the public access to the fruits of that creativity.[246] This balance is similarly reflected in the limited scope of statutory rights granted to copyright holders.[247] With private stakeholders effectively controlling the direction and scope of copyright law, however, public interest is slowly fading from the heart of copyright law and the benefit to private interest groups is instead heralded as paramount.[248] This practice has not only upset the constitutionally-prescribed balance between copyright holders and the public, but has resulted in copyright laws that are complicated, counterintuitive, and unsuitable for the digital age.

Today, the current state of the distribution right does not make much sense in the context of P2P or Internet-enabled transfers. Old copyright laws contemplate making a copy and distributing that copy because, at the time, copies were easy to find and count and were useful benchmarks for determining infringement.[249] These measures are not as useful today. The digital age has made it nearly impossible to keep track of copies and even more impossible to witness a distribution. Because of this technological impossibility, copyright plaintiffs have attempted to stretch the law by advancing arguments, such as "making available," and other legally questionable reasoning with which many courts are quite uncomfortable.[250] In 1995, Congress was forewarned of such impeding problems with the

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244. U.S. CONST. art. I, § 8, cl. 8 (granting to Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

245. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2008).

246. *Id.* at § 1.05[D]. The balance is represented in the Constitution by the phrase "for limited Times." *Id. See also* Stewart v. Abend, 495 U.S. 207, 228 (1990) ("[T]he [Copyright] Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.") (internal quotations omitted).

247. *Aiken*, 422 U.S. at 156.

248. *See* Okediji, *supra* note 241, at 110–12. *See also* Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 185 (2004) ("[M]any would argue that the current balance favors [copyright owners] to the detriment of other competing interests and to the detriment of the public domain as a whole.") (footnotes omitted). This imbalance in favor of copyright owners could be due to the aggressive manner in which copyright owners advocate for expansive copyright protection. *See* Carroll, *supra* note 18, at 908–09.

249. *See* LITMAN, *supra* note 3, at 177.

250. *See, e.g.*, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008) (illustrating that the trial court judge instructed the jury on a "making available" instruction and later ordered a new trial based upon his "manifest error" in giving this jury instruction).

Copyright Act, but refused to take preventative measures.[251] Now that those problems have manifested themselves in the courts, Congress should choose to either embrace the technological advances, and craft adequate forward-looking copyright laws, or else fear them, as John Philip Sousa did at the turn of the twentieth century.[252]

But even with its fair share of missteps in the past, Congress, and not the courts, is still the proper venue for establishing copyright law and creating copyright policy by that law. Only Congress can successfully consider and balance the interests of the copyright holders in controlling their work with society' s competing interest in the free flow of ideas.[253] The Supreme Court has historically deferred[254] to the province of the legislative branch in enacting copyright law and has recently renewed that deference.[255] Dealing with the legal ramifications of the advent of P2P should be left in the hands of Congress. As stated by Justice Breyer in his concurrence in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*,[256] "[c]ourts are less well suited than Congress to the task of ' accomodat[ing]

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251. The NII Copyright Protection Act of 1995 was introduced to Congress as an attempt to amend the definition of publication to "explicitly include[] the distribution of copies by transmission, i.e., electronic dissemination." Chang, *supra* note 175, at 242. Although it "would have resolved the omission of transmission as a means of distribution for publication," neither the House of Representatives nor the Senate passed the Act. *Id.* at 241.

252. John Philip Sousa, a well known American composer, once stated in a 1906 Congressional hearing,

> When I was a boy . . . in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. To-day you hear these infernal machines [gramophones, phonographs, and the like] going night and day. We will not have a vocal chord [sic] left. The vocal chords [sic] will be eliminated by a process of evolution, as was the tail of man when he came from the ape.

Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright, 59th Congress 24 (1906) (statement of John Philip Sousa), *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. H at 24 (E. Fulton Brylawski & Abe Goldman eds., 1976).

253. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). *See also* Stewart v. Abend, 495 U.S. 207, 230 (1990) ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve."); Graham v. John Deere, 383 U.S. 1, 6 (1966) ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.").

254. *Sony*, 464 U.S. at 429 ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.").

255. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright [Act]'s objectives.").

256. 545 U.S. 913 (2005).

fully the varied permutations of competing interests that are inevitably implicated by such new technology.' "[257] To balance these competing interests and clarify the law and its relationship to the technology of today and of the future,[258] Congress should amend the Copyright Act in two ways.

First, Congress should amend the distribution right of § 106(3) to expressly include digital transmissions. The language should be amended to read: "(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, or by any means of transmission now known or later developed, regardless of a transfer of ownership,"[259] Second, Congress should add to § 101 a definition for "distribution." The language should read: "Distribution" is the transfer or transmission, by any means now known or later developed, of a copy or phonorecord of a copyrighted work to the public."

VIII. CONCLUSION

The "scorched earth campaign" of the RIAA and its constituent record companies has done no more than alienate key markets and drain those record companies of their resources.[260] From this perspective, it has been an epic failure. In the wake of P2P litigation, the state of the law on digital distributions is less clear to all parties involved. To remedy these legal uncertainties, Congress should take action commensurate with the proposed solution above.

The two amendments this Note proposes would solidify that an actual distribution is required for a violation of § 106(3) and that a "publication"

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257. *Id.* at 965 (Breyer, J., concurring) (quoting *Sony*, 464 U.S. at 431) (alteration in original).

258. As Justice Stewart stated in *Aiken*, "[w]hen technological change has rendered [copyright law's] literal terms ambiguous, [copyright law] must be construed in light of its basic purpose" in balancing the interests of copyright holders and the public. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

259. The term "digital transmission" is not used, even though it is defined in § 101, to anticipate future non-digital technologies and methods of transmission. *See* 17 U.S.C. § 101 (2006) ("A 'digital transmission' is a transmission in whole or in part in a digital or other non-analog format.").

260. According to the 2005 and 2006 tax returns for the RIAA, the RIAA's anti-piracy recoveries in 2005 and 2006 totaled a mere $551,816 and $614,239, respectively, while its legal fees in 2005 and 2006 amounted to an outrageous $15,125,544 and $17,341,694, respectively. RIAA, 2006 TAX RETURN, http://beckermanlegal.com/Documents/RIAA2005TaxReturn.pdf [hereinafter RIAA, TAX RETURN 2006]; RIAA, 2005 TAX RETURN, http://beckermanlegal.com/Documents/RIAA2004TaxReturn.pdf [hereinafter RIAA, TAX RETURN 2005]. In addition to these numbers, the RIAA's investigative operations in 2005 and 2006 totaled $3,155,671 and $3,569,390, respectively, and the RIAA's online enforcements in 2005 and 2006 cost $1,849,460 and $1,886,171, respectively. RIAA, TAX RETURN 2006; RIAA, TAX RETURN 2005. Manipulating these numbers, the RIAA's return on investment in 2005 and 2006 was (-97.2%) and (-97.3%), respectively.

is not equivalent to a "distribution," such that an offer to distribute is not actionable as a distribution. The amendments would also affirm that a digital transmission is a distribution within the meaning of § 106(3). The goal of these amendments is merely to adapt the law to present and future technological changes and to restore the intended balance between the public and the copyright owners intended by the Constitution. The amendments *do not* create a new right[261] but only recognize that a digital transmission implicates the distribution right in the same way it already implicates the reproduction, public performance, and public display rights.[262]

Under this revised scheme, a violation of the distribution right would still require a transmission *to the public* regardless of method. While a transmission from one friend to another of a copyrighted work in a private e-mail message would not constitute a distribution to the public,[263] a blind distribution over a massive P2P network of copyrighted works would be most certainly an infringing distribution. By the addition of a few simple words to a much-litigated section of the Copyright Act, Congress could make clear to plaintiff record companies, defendant file-sharers, and most importantly the courts, that although file sharing of copyrighted works is common, it is still infringement.[264] Without these changes, the statute serves little purpose other than to inspire debate, leaving all parties involved to question, "What actually is a distribution?"

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261. With the tension mounting between copyright owners and public users, the last thing copyright law needs is an expansion of owners' rights. In the future, when it comes time once again to expand owners' rights, however, Congress should correspondingly expand users' rights to account for the numerous ways in which digital content can be subject to fair use. *See* Okediji, *supra* note 241, at 113. With parallel expansion, Congress can maintain a balance between promoting public welfare and incentivizing production of copyrighted works in cyberspace.

262. Likewise, the distribution right encompassing transmissions will not diminish the public performance right. If a work is publicly performed by transmission, there has been a public performance, regardless of whether the distribution right is implicated. *See* WHITE PAPER, *supra* note 1, at 214 n.536.

263. *See id.* at 215.

264. Although statutory damages are outside the scope of this Note, the damages levied against individual infringers, who seek no profits from their actions, are the same as those applied to global securities brokers that infringe copyrights to profit in the securities market. *See* Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008). Perhaps Congress should create a separate provision for noncommercial users such that the damages bear a reasonable relationship to the actual damages of which the infringers have allegedly deprived the record companies. *See* Beckerman, *supra* note 26, at 18.