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A Critical Analysis of the Competing Bases of Liability For Peer-to-Peer File Sharing

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I. Introduction

Peer-to-peer ("P2P") file sharing software of one type or another has been downloaded worldwide over 600 million times.

These programs, such as Gnutella, KaZaA, and BitTorrent, allow users to copy and transfer copyrighted music from one user to another, free of charge. While P2P programs represent a significant and beneficial technological achievement, they have also spawned an unprecedented era of rampant and pervasive copyright infringement of musical works. The International Federation of the Phonographic Industry ("IFPI") has stated that the ratio of unauthorized to authorized music downloads is more than 40:1. Although iTunes, the leading authorized online music distributor, has sold over six billion songs, it has been estimated that P2P file sharing accounts for over four billion songs a month—a ratio of approximately 150:1.

As a result of this unauthorized mass distribution of songs, the music industry has suffered financially. From the year 2000 to the end of 2007, Compact Disc ("CD") album sales have dropped 46% and CD singles sales have all but disappeared, declining 92%. From a monetary perspective, the Institute for Policy Innovation has estimated that illegal file sharing causes $12.5 billion of economic loss every year.

In 2003, seeking legal recourse, the Recording Industry Association of America ("RIAA")—the trade association representing the U.S. recording industry—began filing copyright infringement lawsuits against individual users of P2P programs. To date, the RIAA has sued over 18,000 individual users of P2P programs for copyright infringement. Although the RIAA has stated that it plans to discontinue filing suits against individual infringers, it also stated that it will continue to pursue those cases already in progress, and it may still decide to sue particularly egregious infringers. (Although the RIAA is probably the most prominent litigant of P2P-based lawsuits, many other copyright owners have pursued similar claims, and this article is equally applicable to those cases as well.)

The RIAA's claims are based on the Copyright Act of 1976. The Copyright Act grants copyright holders six exclusive rights. One of these is the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." This is commonly known as the "exclusive right of distribution."

There is an ongoing debate in the legal community as to what constitutes a direct violation of a copyright holder's exclusive right of distribution. On one side, there are those who argue that merely offering to distribute a copy of a copyrighted work violates this exclusive right. This is referred to as the "making available" theory. On the other side of the debate, there are those who argue that an actual transfer of the copyrighted

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work must take place for a violation of the distribution right to occur. This is known as the ''actual transfer'' theory.

While the debate is far from being settled, the current trend in the law is in favor of the ''actual transfer'' theory. This is because in the two main cases that have actually litigated this issue on the merits, the court adopted the ''actual transfer'' theory.

This current trend poses a serious threat to copyright owners' ability to protect their creative works from copyright infringement. Due to advances in P2P technology, it is very difficult for a rights owner to provide evidence that a P2P user actually transferred a song to another user. Without such evidence, if a court adopts the ''actual transfer'' theory, the rights owner may be effectively incapable of proving its case. This is a significant problem because if copyright owners are incapable of enforcing their copyright rights, then they will be less able to profit from their creative works; and if they cannot profit from their works, there will be less incentive to create those works in the first place.

II. Critical Analysis of Each Theory

Section 106(3) of the Copyright Act provides copyright owners with the exclusive right ''to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.'' In the P2P file-sharing context, the crucial issue is the appropriate interpretation of the term ''distribute.''

A. The 'Actual Transfer' Theory

Advocates of the ''actual transfer'' theory argue that for a violation of the distribution right to occur, an actual transfer of the copyrighted work must take place.

In the P2P context, there have only been two cases in which this issue was actually litigated on the merits, and in both cases, the court adopted the ''actual transfer'' theory. In addition, renowned copyright scholar William Patry supports the ''actual transfer'' theory.

Advocates of the actual transfer theory base their argument on the plain meaning rule of statutory interpretation. According to the plain meaning rule, if a statute is unambiguous, then the court should give effect to its plain, ordinary meaning. Applying this rule, the court in *Capital Records, Inc. v. Thomas* explained, ''The ordinary dictionary meaning of the word 'distribute' necessarily entails a transfer of ownership or possession from one person to another.'' Therefore, giving effect to the plain meaning of § 106(3) requires a rejection of the argument that merely making a copyrighted work available to the public is sufficient to violate the distribution right.

The plain meaning rule is supported by important policy considerations. Namely, ensuring that citizens are able to rely on what the law, as commonly understood, says is crucial to maintaining the fabric of society. Many believe that if courts continuously deviate from the plain meaning of statutory terms, people will lose faith in the legitimacy and consistency of the judicial system. In addition, increasing the scope of copyright protection to include not only actual transfers of a copyright work, but also the mere making available of a copyrighted work, would be a significant substantive change in the law. As such, many people believe these types of changes are best left to the legislature, not the courts. Balancing society's interest in providing incentives for people to innovate with society's interest in disseminating information to the public is a difficult and complicated endeavor. Congress, with its vast resources and its political connection to the public at large, is best suited for this task. Therefore, per the ''actual transfer'' theory, courts should apply the plain, ordinary meaning of the term ''distribute,'' and they should leave substantive changes in the scope of copyright protection to the democratic process.

While the arguments in favor of the ''actual transfer'' theory appear to be persuasive, there are two main criticisms of the ''actual transfer'' theory. First, it is based on a faulty premise. The plain meaning rule should only be applied if the statute is unambiguous, and the definition of ''distribute'' is ambiguous. The court in *Thomas* cited the *Merriam-Webster's Collegiate Dictionary* for the definition, ''to give out or deliver,'' but had the court chosen a different dictionary, it may have reached a different conclusion. For example, the *Cambridge Advanced Learner's Dictionary* defines ''distribute'' as ''to supply for sale,'' and the *Webster's New Collegiate Dictionary* defines the term as ''to supply.'' Because it is possible to supply something without actually transferring it to another person, these definitions call into question the ''plain meaning'' of the term ''distribute.'' Accordingly, because there is more than one reasonable interpretation of the term ''distribute,'' the term cannot be considered unambiguous, and therefore the plain meaning rule should not apply.

Another criticism of the ''actual transfer'' theory is that by narrowly interpreting the term ''distribute'' to only include actual transfers of copyrighted works, courts are unnecessarily and unwisely limiting the scope of copyright protection in a time when the legal system is racing to keep pace with rapid advances in technology. While perhaps, as a general rule, broadening the scope of a statute should be left to Congress, in the high technology industry of P2P file sharing, courts should use what little leeway they have in order to keep up with modern times. Ultimately, Congress should be the one to create new statutes in order to combat new threats, but the legislative process can be extremely slow, and by the time a bill is passed, the technology might have already changed. Therefore, in the face of rapid advances in P2P technology, courts should not hesitate to interpret the Copyright Act in a way that adequately addresses these new concerns.

B. The 'Making Available' Theory

Advocates of the ''making available'' theory argue that the act of making a copyrighted work available to the public is sufficient to constitute a violation of the distribution right. The main proponent of the ''making available'' theory is the RIAA.

However, a few courts, as well as U.S. Copyright Office General Counsel David O. Carson, also support the ''making available'' theory. In addition, although David Nimmer originally supported the ''actual transfer'' theory, he has recently ''changed course'' and endorsed the ''making available'' theory.

There are three main arguments for why courts should adopt the ''making available'' theory. First, in the legislative history of the Copyright Act of 1976, Congress appeared to treat the term ''publication'' as synonymous with ''distribution,'' and the Copyright Act defines ''publication'' to include ''offers to distribute.''

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Second, courts should adopt the making available theory for equitable reasons—namely, the inability of copyright owners to prove that a P2P user actually transferred the copyrighted work. Finally, many believe the United States' international treaty obligations require the courts to adopt the making available theory.

1. "Publication" Is Synonymous with "Distribution"

Although the Copyright Act of 1976 does not define ''distribution,'' it does define ''publication.''

''Publication'' is defined in the Act as either ''the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,'' or alternatively ''*the offering to distribute* copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.'' This is significant because in the legislative history of the Act, Congress seemed to treat the term ''distribution'' as synonymous with the term ''publication,'' often using the two terms interchangeably. Therefore, when looking for the appropriate definition of ''distribution,'' courts should turn to the definition of ''publication'' and conclude that ''distribution'' includes making copyrighted works available to the public (i.e., offering to distribute copyrighted works).

In response to this argument, Patry and a few courts have explained that equating ''publication'' with ''distribution'' is a classic example of the logical fallacy known as ''affirming the consequent.'' This fallacy is illustrated as follows: if X, then Y; Y, therefore X. Put in context, this means that just because all ''distributions'' are ''publications'' does not mean that all ''publications'' are ''distributions.'' Furthermore, the mere fact that the legislative history refers to the two terms interchangeably does not necessarily mean that that the two terms are in fact interchangeable. Congress specifically chose to define ''publication,'' and it chose not to define ''distribution.'' If Congress wanted the definition of ''publication'' to apply to ''distribution'' as well, it could have written that in the statute, but it chose not to do so. Accordingly, critics note that courts should hesitate before inferring a congressional intent to equate the two terms when there is nothing in the statute supporting such an instruction.

2. Equitable Concerns Regarding Problems of Proof Require an Expansive Interpretation of "Distribution"

In *Hotaling v. Church of Later Day Saints*, the Fourth Circuit addressed the ''making available'' issue in a non-P2P context.

In *Hotaling*, the defendant, a Church library, made unauthorized copies of Hotaling's copyrighted work and made them available to the public. The district court granted the defendant's motion for summary judgment because there was no evidence showing specific instances in which the library actually loaned the infringing copies to members of the public. The appellate court, however, reversed the lower court's decision and explained that if a plaintiff were required to show that there had been an actual act of distribution, then he would be ''prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.'' Accordingly, based on equitable concerns regarding the difficulty of proving actual distribution, the court held, ''[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.''

Advocates of the ''making available'' theory argue that the Fourth Circuit's holding is directly applicable to the RIAA's predicament, and therefore the same reasoning should apply. Just as the plaintiff in *Hotaling* was unable to prove that an actual transfer of the copyrighted work took place, the RIAA is arguably equally incapable of doing so. Some courts hold that the evidence obtained by the RIAA's investigators is insufficient to prove a violation of the distribution right because a copyright owner's agent cannot infringe the owner's own copyright rights. Furthermore, even in those jurisdictions where this evidence would be sufficient, those users distributing files through BitTorrent are effectively insulated from liability because of the way BitTorrent operates. Accordingly, just as the Fourth Circuit held that when a public library adds a work to its collection and makes the work available to the public it has completed all the steps necessary for distribution, so too should courts hold likewise when addressing this issue in the P2P context. That is, when a P2P user makes a copyrighted work available for other users to download, that ''making available'' should be sufficient to violate the distribution right.

Advocates of the ''actual transfer'' theory respond to this argument by stating that the general trend, as evidenced by the decisions in *Howell* and *Thomas*, is in favor of allowing MediaSentry's evidence to be used to prove violations of the distribution right, and therefore the RIAA's inability to prove its case in that respect is unfounded. In regard to the RIAA's inability to prove its case because of programs like BitTorrent and other advances in P2P technology, some argue that the RIAA is simply not trying hard enough. These advocates argue that there are ''several organizations such as BigChampagne, NPD, BayTSP, and the investigator hired in the *Thomas* case, [which] all claim to possess expertise in tracking file-sharing traffic.'' Accordingly, courts should not be so quick to relieve the RIAA of the burden of proving actual distribution when there is significant evidence that the RIAA is perfectly capable of proving its case on its own.

3. The United States' International Treaty Obligations Require Courts to Adopt the "Making Available" Theory

The very phrase ''making available'' comes from two international treaties that the United States not only signed, but also played a significant role in formulating.

The two treaties are the World Intellectual Property Organization (''WIPO'') Copyright Treaty (''WCT'') and the WIPO Performances and Phonograms Treaty (''WPPT''), commonly known together as the WIPO Internet Treaties.

With regard to these treaties, David O. Carson has stated, ''The general consensus within the Copyright Office and the Patent and Trademark Office, the two expert agencies involved in the negotiations and the formulation of implementing legislation, was that [the United States's] distribution right covered the making available of copies for electronic transmission.'' And courts in other countries that have expressly incorporated the ''making available'' right into their domestic laws have found that file sharing violated the making available right.

Justifiably assuming that the WIPO treaties apply to P2P file sharing, advocates of the ''making available'' theory argue that the ''Charming Betsy'' doctrine requires U.S. courts to interpret the Copyright Act to include a ''making available'' right. As the Supreme Court explained in *Murray v. Schooner Charming Betsy*, when a court is faced with competing interpretations of a statute, the court should construe the statute in a way that does not conflict with international treaty obligations whenever it would be reasonable to do so. Applying this doctrine, the United States is a signatory to the WIPO treaties, the WIPO treaties provide that copyright owners have the exclusive right to make their copyrighted works available to the public, and making copyrighted songs available to the public through P2P file-sharing programs constitutes a violation of this right. Therefore, when a court is faced with this issue, it should follow the Supreme Court's rule and interpret the distribution right to include the making available of copyrighted works to the public. By doing so, the court would ensure that the United States is complying with its international obligations.

In response, supporters of the ''actual transfer'' theory argue that the Charming Betsy doctrine only applies when the alternative interpretation would be reasonable, and based on the plain meaning of the term ''distribute,'' the ''making available'' theory is simply not reasonable. As the *Thomas* court explained, ''The Charming Betsy doctrine is a helpful tool for statutory construction, but it is not a substantive law. . . Here, concern for U.S. compliance with the WIPO treaties and the FTAs cannot override the clear congressional intent in § 106(3).'' Accordingly, ''actual transfer'' advocates believe that if U.S. law does not currently comply with the country's international obligations, the solution is for Congress to amend the Copyright Act, as it would be unreasonable for the courts to ignore the plain meaning rule and interpret the Act in such an expansive manner.

III. Conclusion

Peer-to-peer file sharing programs are a beneficial technological advancement, but the law has been slow to keep up, and this has cost copyright owners hundreds of millions of dollars.

The debate over the ''making available'' theory and the ''actual transfer'' theory marks an opportunity for courts to adapt the Copyright Act of 1976 to the year 2012. While significant, substantive changes in the scope of copyright law must come from Congress, interpreting an ambiguous statute to allow copyright holders the opportunity to better defend their intellectual property rights would not amount to judicial lawmaking. Given the equitable concerns regarding the RIAA's inability to prove that a P2P user actually transferred a song to another user, as well the United States' international obligations to provide copyright owners with an exclusive right to make their works available to the public, adopting the ''making available'' theory is the best course of action.

Accordingly, when faced with this issue, courts should reject the ''actual transfer'' theory, adopt the ''making available'' theory, and further the constitutionally mandated policy goal of intellectual property law—promoting the creation of artistic and literary works.

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