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THE MAKING AVAILABLE ARGUMENT: IS ACTUAL DISTRIBUTION REQUIRED TO FIND INFRINGEMENT UPON THE COPYRIGHT HOLDER'S DISTRIBUTION RIGHT?

I. INTRODUCTION

The advancement of technology has prompted a revolution that alters the amount of freely and easily accessible information.¹ The widespread use of computers, electronic networks, and the Internet have added to the wealth of readily accessible information.² The amount of information available is constantly increasing and expanding across a vast array of categories.³ Government documents, newspaper articles, college campus tours, and airplane tickets are all available with the click of a mouse.⁴ This new inventory of information is recorded on a digital medium, which allows the creation, publication, distribution, use, and reuse of information to occur faster and easier than ever before.⁵

The benefit of these technologies is the colossal growth in information available to society.⁶ Conversely, the same technologies raise difficult and controversial issues concerning intellectual property.⁷ Copyright infringement is one such issue, because the technologies that make access easy also make illegal copying and illegal distributing easy.⁸ The Internet is an information resource of extraordinary size and depth, making it one of the world's largest libraries.⁹ The Internet is also the world's largest copy machine and distributor.¹⁰ As a result, many of the copyright rules and prac-

1. COMM. ON INTELLECTUAL PROP. RIGHTS IN THE EMERGING INFO. INFRASTRUCTURE, COMPUTER SCI. AND TELLCOMM. BD., *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 23 (2000) [hereinafter *DIGITAL DILEMMA*].

2. *Id.*

3. See BRUCE J. McLAREN, *UNDERSTANDING AND USING THE INTERNET* 8 (1997 ed.) (stating that the amount of information available on the internet is unlimited).

4. *Id.*

5. *DIGITAL DILEMMA*, *supra* note 1, at 23.

6. *Id.*

7. See GRETCHEN MCCORD HOFFMAN, *COPYRIGHT IN CYBERSPACE* 2, 101 (2005) (noting technology used to make unauthorized copies of digital files). Intellectual property is a category of intangible rights, consisting primarily of trade secrets, trademarks, copyrights, and patent rights, which protect commercially valuable products of the human intellect. See MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 24-30 (4th ed. 2007).

8. See HOFFMAN, *supra* note 7, at 101 (explaining the ease of file-sharing).

9. *DIGITAL DILEMMA*, *supra* note 1, at 23.

10. *Id.*

tices that evolved in the world of physical artifacts are easily violated in a digital environment.¹¹

All media industries are affected by the outdated copyright laws of today's digital world, but the Recording Industry Association of America (RIAA) arguably has been impacted the most.¹² Alvin Toffler might describe the RIAA as residing in a state of "future shock."¹³ Future shock, as described by Toffler, is a psychological state that results when individuals and societies undergo technological change too quickly.¹⁴ Future shock is present in our society's nexus of music, digital technology, and copyright law, where our laws have failed to adequately address the legal issues that arise from their combination.¹⁵ Peer-to-peer networks, filesharing, MP3s, and Internet Protocols are terms that cannot be found in the 1976 Copyright Act; they did not even exist at the time of the Act's creation.¹⁶ The RIAA responded to its future shock by choosing to pursue litigation.¹⁷

This article examines the RIAA's claim that making a copyrighted work available for distribution over a peer-to-peer computer network—the making available argument—is a violation of the copyright holder's exclusive distribution right.¹⁸ Part II of this article focuses on the RIAA's lawsuits against users of peer-to-peer networks and the framework of the RIAA's making available theory. Part III discusses landmark decisions that

11. *Id.* at 25.

12. *See* HOFFMAN, *supra* note 7, at 102 (explaining that RIAA has used a lot of resources against those using file-sharing).

13. *See* ALVIN TOFFLER, FUTURE SHOCK 13 (1970) [hereinafter FUTURE SHOCK] (defining future shock as "the dizzying disorientation brought on by the premature arrival of the future. Future shock is. . . a product of the greatly accelerated rate of change in society."). Toffler, noted futurist and author of four books about the digital, corporate, and communications revolutions, served as Visiting Professor at Cornell University and the Russell Sage Foundation. ALVIN TOFFLER, THE THIRD WAVE 544 (1980).

14. FUTURE SHOCK, *supra* note 13, at 13.

15. DRAKE WESEMAN, FUTURE SHOCK AND THE COPYRIGHT ACT OF 1976: IS MERELY MAKING A COPYRIGHTED WORK AVAILABLE FOR DIGITAL TRANSMISSION A VIOLATION OF § 106(3) 1 (2008), *available at* http://blog.wired.com/27bstroke6/files/future_shock_making_available.pdf.

16. *See* 17 U.S.C. § 101 (2006) (listing the definitions within the Copyright Act); WESEMAN, *supra* note 15, at 1. A peer-to-peer network is a computer communication model in which computers collaboratively perform a task, such as a file transfer. DAVID BARKAI, PEER-TO-PEER COMPUTING: TECHNOLOGIES FOR SHARING AND COLLABORATING ON THE NET 305 (2001). Two identifying characteristics of peer-to-peer networks include the lack of a central control server, which allows direct communications between two users, and efficient use of the network's capacity. *Id.* An MP3, the common name of an MPEG-1 Audio Layer 3 file, is the most popular digital audio compression algorithm in use on the Internet. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999). The compression algorithm makes the audio file "smaller" by limiting the audio bandwidth without significantly reducing sound quality. *Id.*

17. *See* WESEMAN, *supra* note 15, at 2.

18. *See* 17 U.S.C. § 106(3) (2006) (listing the exclusive rights of copyright holders).

provide analyses of a copyright holder's exclusive right of distribution. Two decisions, *Capitol Records, Inc. v. Thomas*¹⁹ and *Atlantic Recording Corp. v. Howell*,²⁰ provide foundational principles for discussion and analysis of the arguments offered by both proponents and opponents of the making available argument.²¹ Finally, this article proposes that Congress amend the outdated Copyright Act.

II. THE FRAMEWORK OF MAKING AVAILABLE LITIGATION

In lawsuits filed against individual consumers, the RIAA contends, as its foundational legal theory, that making a file available for distribution constitutes copyright infringement.²² The following analysis of the making available argument will begin with an explanation of the argument's underlying law—the Copyright Act. Part C will describe a peer-to-peer network's architecture, operations, and facilitation of digital file distribution, which will serve as an introduction to the evidence the RIAA uses to support its claims.

A. THE COPYRIGHT ACT

The framers of the Constitution granted Congress the power to regulate copyright laws.²³ The constitutional provision promoting “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” bestowed that power upon Congress.²⁴ Acting on that power, Congress provided several revisions to the original Copyright Act of 1790.²⁵ The first major change occurred in the early twentieth century.²⁶ The Copyright Act of 1909 provided for several substantial changes, one of which expanded the scope of the copyright law to cover “all writings of an author.”²⁷ Additionally, the 1909 Act doubled the term of copyright protection from two fourteen-year terms to two twenty-eight year terms and protected work

19. 579 F. Supp. 2d 1210 (D. Minn. 2008).

20. 554 F. Supp. 2d 976 (D. Ariz. 2008).

21. See discussion *infra* Part III.C-D.

22. See Brief of Electronic Frontier Foundation et. al. as Amici Curiae in Support of Defendant at 1-2, *Capitol Records, Inc. v. Thomas* 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497) [hereinafter EFF *Thomas* Brief] (providing part of the jury instructions from the RIAA's first jury trial using the making available argument).

23. See U.S. CONST. art. I, § 8, cl. 8.

24. *Id.*

25. HOFFMAN, *supra* note 7, at 7.

26. *Id.*

27. *Id.*; Copyright Act of 1909, 35 Stat. 1075 (1909).

with notice of copyright immediately upon publication.²⁸ Congress amended the 1909 Act several times to keep the act current in an increasingly technological world.²⁹ The Sound Recording Act of 1971 was one such amendment.³⁰ This amendment accorded federal statutory protection to sound recordings for the first time.³¹ In 1955, Congress authorized a revision of the Copyright Act, and after twenty years, that authorization resulted in the Copyright Act of 1976.³²

The 1976 revision of the Copyright Act provided for two vital developments.³³ First, digital advancements required that the law take a new look at the scope of copyrights to determine what other types of works should be afforded copyright protections and if certain conduct should constitute infringement.³⁴ Additionally, a need existed for a new statute that would bring the United States into alignment with international copyright laws and policies.³⁵

The 1976 Copyright Act provided a copyright owner with five exclusive rights to ensure the opportunity to use the product for profit.³⁶ The five exclusive rights are: “(1) to reproduce the copyrighted work . . . ; (2) to prepare derivative works . . . ; (3) to distribute copies [of the work] . . . ; (4) . . . to perform the copyrighted work publicly; [and] (5) . . . to display the copyrighted work publicly. . . .”³⁷ The United States Copyright Act of 1976 gave copyright owners the exclusive right to distribute copies of the copyrighted work by sale, lease, or other transfer to the public.³⁸ While the language seems straightforward, it is very broad.³⁹ As a result, the statutory

28. HOFFMAN, *supra* note 7, at 7. Under the original Act, the first term renewed after expiration only if the author survived. *Id.* The original Act also required works to be registered to gain copyright protections. *Id.*

29. *Id.*

30. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.

31. *See id.*

32. HOFFMAN, *supra* note 7, at 7; see David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1236 (2004) (providing an evaluation of every provision of the 1976 Act and every adopted amendment through 2003).

33. LAURA N. GASAWAY & SARAH K. WIANT, LIBRARIES AND COPYRIGHT: A GUIDE TO COPYRIGHT LAW IN THE 1990S 17 (Special Libraries Association) (1994).

34. *Id.*

35. *Id.*; see discussion *infra* Part III.D.2 (noting the implications of international treaties on the interpretation of 17 U.S.C. § 106(3)).

36. GASAWAY & WIANT, *supra* note 33, at 19.

37. 17 U.S.C. § 106 (2006).

38. *Id.* § 106(3).

39. John M. Kernochan, *The Distribution Right in the United States of American: Review and Reflections*, 42 VAND. L. REV. 1407, 1409 (1989).

language has been the focus of many copyright infringement lawsuits filed by the RIAA against individual consumers.⁴⁰

B. LAWSUITS FILED BY THE RIAA AGAINST CONSUMERS

In 2003, the RIAA, a large, wealthy, corporate entity, began a massive litigation campaign on behalf of the four largest recording companies in the world: Vivendi/Universal, Warner Brothers Records, SONY BMG, and EMI.⁴¹ The RIAA filed two hundred sixty-one lawsuits against individuals using peer-to-peer networks.⁴² Each lawsuit alleged that users infringed on sound recording copyrights owned by the RIAA.⁴³ Each suit filed by the RIAA contained a variation of the following complaint: “Plaintiffs are informed and believe that each Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download, distribute to the public, and/or *make available for distribution* to others, certain of the Copyrighted Recordings.”⁴⁴

After the initial 261 lawsuits were filed, the RIAA sued an estimated 30,000 people in district court for copyright infringement.⁴⁵ The targets of these lawsuits included children, grandparents, unemployed single mothers, and college professors—a random sample of the millions who use peer-to-peer networks.⁴⁶ The RIAA brought at least one lawsuit against a deceased individual, who the RIAA claimed made more than 700 songs available for distribution.⁴⁷ The RIAA filed another lawsuit against a family who neither owned a computer nor had Internet access.⁴⁸ A majority of defendants in the RIAA’s lawsuits defaulted.⁴⁹ This resulted in the RIAA receiving

40. See discussion *infra* Part II.B.

41. See Ray Beckerman, *Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, 47 JUDGES J. Summer 2008, at 20 (stating that the four largest record companies have started litigation and are represented by the RIAA).

42. *Id.*

43. *Id.*

44. *E.g.*, Complaint for Copyright Infringement at 1, London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008) (No. 04cv12434-NG) (emphasis added) (indicating the RIAA argues that making a file available constitutes copyright infringement).

45. ELECTRONIC FRONTIER FOUNDATION, *RIAA V. THE PEOPLE: FIVE YEARS LATER 1* (2008), available at <http://www.eff.org/files/eff-riaa-whitepaper.pdf> [hereinafter FIVE YEARS].

46. *Id.*

47. Andrew Orlowski, *RIAA Sues the Dead 83 Year Old Deceased Woman in Copyright Violation*, THE REGISTER, Feb. 5, 2005, http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.

48. Anders Bylund, *RIAA Sues Computer-less Family, 234 Others, for File Sharing*, ARS TECHNICA, Apr. 24, 2006, <http://arstechnica.com/news.ars/post/20060424-6662.html/>.

49. Beckerman, *supra* note 41, at 20.

default judgments in amounts greater than 2,000 times the actual damages sustained by the plaintiffs.⁵⁰

Analysts have determined that the wholesale price of each song file is approximately seventy cents.⁵¹ The RIAA's actual realized damages resulting from each illegal download are estimated at thirty-five cents.⁵² Copyright owners have the option of electing to pursue actual damages or statutory damages against an infringer of their copyrights.⁵³ In lieu of proving thirty-five cents per song file in actual damages, the RIAA chooses to pursue statutory damages.⁵⁴ By statute, for each illegally downloaded song, a copyright owner is allowed to collect a sum of not less than \$750 or more than \$150,000.⁵⁵ In *Capitol Records, Inc. v. Thomas*,⁵⁶ the only case known to have gone to trial, a jury awarded the plaintiff damages that amounted to \$9,250 per song.⁵⁷ This amount represents nearly 23,000 times the actual damages.⁵⁸

Of the defendants who do not default, most agree to pay a settlement of \$3,000 to \$11,000 to avoid paying a potential \$100,000 judgment.⁵⁹ The average settlement amount is in excess of 1,000 times the plaintiff's actual damages.⁶⁰ A great number of the defendants who chose to settle likely never engaged in any form of illegal file sharing.⁶¹ Also, it has not been generally established whether the act of file sharing constitutes copyright infringement.⁶²

The reasons defendants agree to settlements with the RIAA need to be considered.⁶³ The defendants settle because the alternative is going to trial, which when drawn out, is not practical.⁶⁴ The risk of an adverse verdict results in such a large financial penalty, that even with the best defense, defendants are too fearful to fight the allegations of copyright

50. *Id.*

51. *Id.* at 29 n.3.

52. *Id.*

53. *See* 17 U.S.C. § 504 (2000 & Supp. IV 2004) (listing the possible remedies for copyright infringement).

54. Beckerman, *supra* note 41, at 29 n.3.

55. *See* 17 U.S.C. § 504(c)(1) (2006) (describing the statutory damages available for copyright infringement).

56. 579 F. Supp. 2d 1210 (D. Minn. 2008).

57. *Thomas*, 579 F. Supp. 2d at 1213. *Accord* Beckerman, *supra* note 41, at 29 n.3 (discussing the reasons defendants choose to settle their lawsuits against the RIAA).

58. Beckerman, *supra* note 41, at 29 n.3.

59. FIVE YEARS, *supra* note 45, at 5.

60. Beckerman, *supra* note 41, at 20.

61. *Id.*

62. *Id.*

63. *See id.*

64. *Id.*

infringement.⁶⁵ A Chicago court awarded a \$22,500 judgment against a woman who fought and lost a lawsuit the RIAA brought against her.⁶⁶ Similarly, an Arizona court entered a \$40,850 judgment against a man who defended himself pro se.⁶⁷ Furthermore, the only file-sharing case to be tried by a jury found the defendant liable for \$220,000 in statutory damages for making twenty-four songs available for others to download over the Internet.⁶⁸

Of the defendants who have neither defaulted nor settled, but have chosen to defend their claims, very few have had any form of legal representation.⁶⁹ These defendants represent themselves to avoid attorneys' fees from extensive litigation.⁷⁰ The actions taken by the defendants in the RIAA's lawsuits raise concerns.⁷¹ The RIAA is waging a litigious war against individuals who can ill-afford the costs of litigation.⁷² Compounding the dilemma, the claims brought by the RIAA are based on interpretations of law that are in need of clarification.⁷³ In *Elektra Entertainment Group, Inc. v. O'Brien*,⁷⁴ the Central District of California stated, "[t]he concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants."⁷⁵ To understand how the RIAA supported these allegations of copyright infringement, the next section discusses the basic framework of a peer-to-peer network.

65. *See id.*

66. FIVE YEARS, *supra* note 45, at 5.

67. *Id.*

68. *Id.*; *see* Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1212-13 (D. Minn. 2008) (providing background and history of the case).

69. Beckerman, *supra* note 41, at 20.

70. *Id.*

71. *See id.*

72. David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1689 (2005).

73. *See id.*

74. No. CV 06-5289 2007 ILRWeb (P&F) 1555 at *2 (C.D. Cal. Mar. 2, 2007), *available at* www.ilrweb.com/viewILRPDFfull.asp?filename=elektra_obrien_070302Decision.

75. *O'Brien*, 2007 ILRWeb (P&F) 1555 at *2. *O'Brien* was accused of sharing copyrighted works over a peer-to-peer network. *Id.* The RIAA filed an amended complaint adding a second defendant without providing any factual support that the defendants were in any way related to each other, acted together, or acted as a group in the infringement action. *Id.* The RIAA was ordered to show cause why the case against the defendants should not be dismissed. *Id.*

C. THE NATURE OF PEER-TO-PEER NETWORKS

Today's digital technology allows novice computer users to record audio in the form of compact discs.⁷⁶ The users may then compress the compact discs into digital files that require little storage space.⁷⁷ Consequently, these compressed sound recordings, which exhibit little to unnoticeable degradation in sound quality, are easily downloaded or uploaded via the Internet.⁷⁸ One popular way computer users transfer these sound recordings is through peer-to-peer networks.⁷⁹

There are several different forms of peer-to-peer networks, each with distinct advantages and disadvantages.⁸⁰ However, this article focuses on the "pure" peer-to-peer architecture.⁸¹ The pure, or decentralized, peer-to-peer network software allows users to communicate directly, without the need to route transmissions through a central server—thus the term "peer-to-peer" as opposed to "client-server."⁸² A user of a peer-to-peer network requires only a single connection to a current peer-to-peer user to be virtually connected to everyone with whom the current user is connected.⁸³ Once a user downloads the peer-to-peer software, the role of the software provider is terminated.⁸⁴ Due to the lack of a central server, peer-to-peer networks self-operate and continue to run even if the software provider's computer network is inaccessible.⁸⁵ As a result of the elimination of a central server, users on a peer-to-peer network may "remain relatively anonymous or pseudonymous."⁸⁶ Any file transactions occurring through peer-to-peer networks "are not easily observable by a third party."⁸⁷ When two computers interact through a peer-to-peer network, the only user-

76. Michael Suppappola, *The End of the World As We Know It? The State of Decentralized Peer-to-Peer Technologies in the Wake of Metro-Goldwyn-Mayer Studios v. Grokster*, 4 CONN. PUB. INT. L.J. 122, 126 (2004).

77. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (discussing the process of "ripping" a compact disc). Ripping software allows an individual to store the audio recordings on the disc directly on the computer's hard drive. *Id.* The ripping process converts the data on the compact disc to a compressed file format called MP3. *Id.* The compressed format of MP3s allows for accelerated transfers from one computer to another via peer-to-peer networks. *Id.*

78. Suppappola, *supra* note 76, at 124.

79. *Id.*

80. *Id.* at 125.

81. See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 159 (D. Mass. 2008).

82. Suppappola, *supra* note 76, at 126.

83. David J. Colletti, Jr., *Technology Under Siege: Peer-to-Peer Technology Is the Victim of the Entertainment Industry's Misguided Attack*, 71 GEO. WASH. L. REV. 255, 265 (2003).

84. *Id.*

85. Suppappola, *supra* note 76, at 126.

86. *London-Sire*, 542 F. Supp. 2d at 159.

87. See *id.* at 159-60 (noting that users can be easily identified by a user name).

identifying information exchanged consists of the user's Internet Protocol (IP) address and the user-name pseudonym under which each user operates.⁸⁸ The very nature of a peer-to-peer network and its corresponding software is to easily allow peer-to-peer users to control the information displayed to the world.⁸⁹ The software's simplicity and user-friendly interface allows anyone with the software and an Internet connection to participate in open peer-to-peer networks and transfers.⁹⁰

Although peer-to-peer networks are routinely used for transferring copyrighted sound recordings to other users, the networks serve many other non-illegal purposes as well.⁹¹ Many of the files transferred over peer-to-peer networks are lawful.⁹² The elimination of a central server to mediate the exchange of files allows peer-to-peer network users to complete file transfers using less bandwidth and time.⁹³ Peer-to-peer users also do not have to consider the possibility of server failure when transferring files.⁹⁴

A large quantity of copyrighted files are transferred via peer-to-peer networks as well.⁹⁵ The very nature of the peer-to-peer network has made it a viable, attractive, and practical option for individuals to share and expand their digital libraries.⁹⁶ Peer-to-peer networks create significant problems for copyright owners who have tried to enforce copyright protections.⁹⁷ Peer-to-peer networks also pose an incredible challenge for the RIAA.⁹⁸ The RIAA responded to the challenge with litigation premised on the argument that making a protected work available for distribution is an infringement of the owner's copyright.⁹⁹

88. *See id.* (summarizing the basic operation of peer-to-peer networks).

89. *Id.* at 159.

90. *Id.*

91. *See* HOFFMAN, *supra* note 7, at 101 (“[n]othing is inherently wrong with file-sharing”).

92. *London-Sire*, 542 F. Supp. 2d at 159.

93. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 920 (2005).

94. *Id.*

95. LAWRENCE LESSIG, *FREE CULTURE* 67 (2004).

96. *See London-Sire*, 542 F. Supp. 2d at 159 (noting the anonymity of its users, the inability of third-parties to observe transactions, and the limited bandwidth required for speedy transfers and its ease of use). Bandwidth is “[t]he transmission capacity of an electronic pathway such as a communications line,” and is typically used to describe how much information can be transferred over a connection. PCMAG.com, http://www.pcmag.com/encyclopedia_term/0,2542,t=bandwidth&i=38401,00.asp (last visited Aug. 11, 2009).

97. Suppappola, *supra* note 76, at 127.

98. *See id.* at 123 (noting that the RIAA's strategy of directly suing users of file sharing programs often results in suing their own customers).

99. WESEMAN, *supra* note 15, at 3-4.

D. THE MAKING AVAILABLE ARGUMENT

To combat copyright infringement over peer-to-peer networks, the RIAA relies on the theory that making copyrighted works available for distribution to others is a violation of a copyright owner's exclusive distribution right under section 106(3) of the Copyright Act.¹⁰⁰ This theory is labeled the "making available" claim.¹⁰¹ According to section 106(3): "The owner of copyright . . . has the exclusive rights to do and to authorize any of the following: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . ."¹⁰² The language the RIAA uses in its complaint of copyright infringement is mostly boilerplate and contains no facts pertaining specifically to each individual defendant.¹⁰³ The complaint alleges that a defendant infringed the sound recording copyrights owned by the RIAA by using a peer-to-peer network to download, publicly distribute, or make available for distribution a copyrighted work without the RIAA's permission or consent.¹⁰⁴ The allegation appears to be direct and clear, but defendants argue, and judges have ruled, that the allegation fails to state a claim upon which relief can be granted.¹⁰⁵

E. THE EVIDENCE

The evidence that the RIAA uses to support its claims against file sharers operating on peer-to-peer systems is gathered by a third-party investigator named MediaSentry, Inc.¹⁰⁶ MediaSentry has been hired by the RIAA to search peer-to-peer networks for other computer users who make copyrighted sound recordings available for additional peer-to-peer users to download.¹⁰⁷ When MediaSentry finds copyrighted files, it downloads the files from the computer user that made them available.¹⁰⁸ During the

100. *Id.* at 2.

101. *See* Warner Bros. Records, Inc. v. Payne, No. W-06-CA-051, 2006 WL 2844415, at *4 (W.D. Tex. July 17, 2006) (stating that the court was not prepared to rule out the RIAA's making available theory).

102. 17 U.S.C. § 106(3) (2007).

103. Interscope Records v. Rodriguez, No. 06cv2485-B (NLS), 2007 WL 2408484, at *1 (S.D. Cal. Aug. 17, 2007).

104. *E.g.*, Complaint for Copyright Infringement, *supra* note 44, at 159.

105. *See, e.g.*, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008) (admitting that the court created a manifest error of law by allowing the making available argument in his jury instructions); *Rodriguez*, 2007 WL 2408484, at *1 (denying the RIAA's motion for entry of default judgement and vacating the Court Clerk's entry of default).

106. London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 159-60 (D. Mass. 2008).

107. *Id.* at 160.

108. *Id.*

process, MediaSentry obtains information about the computer user.¹⁰⁹ The information typically includes a user-name, a list of downloaded songs, and several screen captures indicating the date and time at which the files were made available and downloaded by MediaSentry.¹¹⁰ MediaSentry also acquires the peer-to-peer user's IP number.¹¹¹

After MediaSentry downloads the files from the peer-to-peer user, it reviews a listing of the music files to determine whether they are copyrighted sound recordings.¹¹² The music files are then played to confirm that the files are indeed sound recordings whose copyrights are owned by the RIAA.¹¹³ Upon confirmation that the music files are copyrighted works owned by the RIAA, the RIAA concludes that it has enough evidence and subsequently files a lawsuit.¹¹⁴

However, several problems arise with the evidence obtained by MediaSentry.¹¹⁵ These problems limit the RIAA's allegations.¹¹⁶ One problem is that MediaSentry acts on behalf of the RIAA.¹¹⁷ Therefore, MediaSentry's downloads may be authorized and not considered copyright infringement.¹¹⁸ Additionally, the RIAA is unable to prove that the peer-to-peer user actually transferred files to another computer other than the

109. *Id.*

110. *Id.*

111. *Id.* An IP number is also known as an Internet Protocol (IP) address. *Id.* Every computer on the Internet has an IP address, which uniquely defines that computer and enables computers to find each other on the Internet. See, e.g., *America Online v. Huang*, 106 F. Supp. 2d 848, 851 (E.D. Va. 2000) (discussing the basic communication between computers on the Internet). Each IP address is represented by a series of four numbers between 0 and 255. *Id.* However, most computer users do not have a constant IP address or "static" address. *London-Sire*, 542 F. Supp. 2d at 160. Instead, many computer users connect to a network that is provided by their Internet Service Provider (ISP). *Id.* The ISP has a certain range of IP addresses that it can assign to its users, and it makes these assignments on an as-needed basis. *Id.* This process is known as "dynamic" addressing and makes the RIAA's task of discovering the identity of a particular infringer very difficult. *Id.* Difficulty arises because one IP address that records show belongs to one particular user's computer may be assigned to another user's computer. See 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). IP addresses lead the RIAA to the user's ISP, and the ISP typically records a log of the IP address assigned to each user at a particular time. *London-Sire*, 542 F. Supp. 2d at 160. However, those logs are typically purged after a short period of time. *Id.*

112. *London-Sire*, 542 F. Supp. 2d at 160 (D. Mass. 2008).

113. *Id.*

114. *Id.*

115. *Id.* at 166.

116. *Id.*

117. *Id.*

118. See *id.* ("Arguably . . . MediaSentry's own downloads are not themselves copyright infringements because it is acting as an agent of the copyright holder, and copyright holders cannot infringe their own rights."). The court did not reach the issue in *London-Sire*. But see *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (finding that downloads performed by MediaSentry were unauthorized).

computer used by MediaSentry during its investigations.¹¹⁹ Finally, the evidence gathered by MediaSentry cannot ascertain that the files on the peer-to-peer user's computer are illegitimate copies of music "space-shifted" from the peer-to-peer user's own CD collection to the user's computer hard drive.¹²⁰ Therefore, the only claim generally supported by the direct evidence obtained by MediaSentry is the RIAA's making available claim.¹²¹ Due to the fact that the RIAA is unable to establish actual distribution between two individual peer-to-peer users, the RIAA is forced to pursue their claims using the making available theory.¹²² The adoption of this interpretation of the Copyright Act without an unequivocal expression of congressional intent will have many disruptive consequences.¹²³

F. THE IMPORTANCE OF PROPER INTERPRETATION: WHAT IS AT STAKE

Several reasons exist to interpret and understand the Copyright Act in the way Congress intended.¹²⁴ One such reason derives from the immense penalties provided by law to an individual who is guilty of copyright infringement.¹²⁵ Claims of copyright infringement are broadly construed to contain two elements: (1) proof of ownership, and (2) proof of a use in violation of one or more exclusive statutory rights, provided to the owner.¹²⁶ Since copyright cases do not require proof of actual damage, satisfying the two required elements leads to statutory damages that are

119. See *London-Sire*, 542 F. Supp. 2d at 175-76 (holding a file that was downloaded at least once sufficient to make out a prima facie case).

120. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). "Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the [Audio Home Recording Act of 1992]." *Id.* Congress created the Audio Home Recording Act of 1992 "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use." S. REP. NO. 102-294, at 86 (1992). The *Diamond* court used the term "space-shifting" in reference to a copyright law concept that would allow owners of a copyrighted work to convert the work from one format to another, such as converting an audio compact disc to MP3 files. *Diamond*, 180 F.3d at 1079. The court analogized space-shifting to the term "time-shifting" used in *Sony Corp. of America v. Universal City Studio, Inc.*, 464 U.S. 417, 455 (1984). In *Sony Corp.*, the United States Supreme Court held that the time-shifting of copyrighted television shows with VCRs constitutes fair use under the Copyright Act and thus is not an infringement. *Sony Corp.*, 464 U.S. at 455.

121. See EFF *Thomas* Brief, *supra* note 22, at 2 (stating that the RIAA is unable to properly prove that copies of protected works have been distributed and that harm was inflicted on the copyright owner).

122. *Id.*

123. *Id.* at 13.

124. *Id.* at 2.

125. *Id.*

126. *Id.*

exceedingly out of proportion to any actual harm the copyright holder realizes.¹²⁷ Considering the serious consequences that arise from copyright infringement's strict liability damages system, the Electronic Frontier Foundation urges courts to be cautious not to expand copyright protections beyond the scope of Congress' intent.¹²⁸

There are two types of copyright infringement: direct copyright infringement and secondary copyright infringement.¹²⁹ Under direct infringement, the plaintiff must show proof of ownership of a valid copyright and proof that the defendant created a copy.¹³⁰ The copying requirement can be satisfied by either of two ways.¹³¹ It can be satisfied by submitting direct evidence of copying or by presenting evidence establishing the defendant was able to access the copyrighted work and that the copy is substantially similar to the original work.¹³² After meeting the initial requirements, the plaintiff must establish that the defendant violated one of the copyright holder's exclusive protections.¹³³ Knowledge or intent to infringe is not required to find direct copyright infringement.¹³⁴

Secondary copyright infringement applies when defendants do not personally engage in the violating activity but still take a share of responsibility for the infringement.¹³⁵ Secondary copyright infringement falls into two categories: contributory and vicarious copyright infringement.¹³⁶ Contributory copyright infringement requires that a defendant "has knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."¹³⁷ Vicarious copyright infringement re-

127. *See id.* (stating that in *Thomas*, the defendant was found statutorily liable by the jury for more than \$222,000 for allowing the public to download various copyrighted songs from her shared folder); *see also* 17 U.S.C. § 504(C)(1) (2004) (describing the statutory damages available for copyright infringement).

128. EFF *Thomas* Brief, *supra* note 22, at 16. The Electronic Frontier Foundation is donor-funded nonprofit organization based in California that works to protect the public interest in issues related to technology that affect an individual's fundamental and digital rights. About EFF: Electronic Frontier Foundation, <http://www.eff.org/about> (last visited Apr. 18, 2009).

129. Mark E. Harrington, *On-line Copyright Infringement Liability for Internet Service Providers: Context, Cases & Recently Enacted Legislation*, 1999 B.C. INTELL. PROP. & TECH. F. 60499, ¶ 13 (1999).

130. Harrington, *supra* note 129, ¶ 14.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* ¶ 15.

136. *Id.*

137. *Gershwin Publishing Corp. v. Columbia Artists*, 443 F.2d 1159, 1162 (2d Cir. 1971).

quires the defendant to have the right and ability to control the infringer's acts and to receive a direct financial benefit from the infringement.¹³⁸

By accepting the making available theory, courts could make the copyright laws so complex they jeopardize the legitimate interests of consumers and technology innovators alike.¹³⁹ Broadcasters rely on compulsory and negotiated licenses that entitle them to publicly broadcast copyrighted works over the air.¹⁴⁰ If courts find the distribution right to support the RIAA's making available argument, questions would be raised whether broadcasters are required to obtain additional distribution licenses.¹⁴¹ For example, in *Atlantic Recording Corp. v. XM Satellite Radio*,¹⁴² the RIAA used the making available argument against XM Satellite Radio.¹⁴³ The RIAA alleged that the radio service infringed upon its copyrights by distributing copyrighted sound recordings to the public through satellite radio transmission, even though XM had a license to do so.¹⁴⁴ The idea that distribution occurs when a copyrighted work is made available puts the distinction between public performance and distribution in peril.¹⁴⁵ Therefore, webcasters and broadcasters are potentially exposed to massive infringement liability.¹⁴⁶

Other attempts to use expansive interpretations of distribution focus on transferring secondary liability claims to direct infringement claims.¹⁴⁷ In *Perfect 10, Inc. v. Amazon.com, Inc.*,¹⁴⁸ the Ninth Circuit Court of Appeals heard the argument of Perfect 10 that the Internet search engine Google infringed on Perfect 10's distribution right.¹⁴⁹ Perfect 10 accused Google of making Perfect 10's copyrighted photographs available to the public on

138. *Id.* at 1162.

139. EFF Thomas Brief, *supra* note 22, at 13.

140. *Id.*

141. *Id.*

142. No. 1:06-cv-03733-DAB, 2007 WL 136186 (S.D.N.Y. Jan. 19, 2007).

143. See *XM Satellite Radio*, 2007 WL 136186, at *1-2 (alleging XM's portable "Inno" device, which was marketed highlighting the device's recording and library capabilities, induced contributory infringement). Atlantic and XM reached an undisclosed settlement in December 2007, but other RIAA companies continued to pursue litigation. JONATHAN D. HART, INTERNET LAW: A FIELD GUIDE 274 (6th ed. 2008); EFF Thomas Brief, *supra* note 22, at 14.

144. *XM Satellite Radio*, 2007 WL 136186, at *1-2.

145. EFF Thomas Brief, *supra* note 22, at 14.

146. *Id.* (citing *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) ("It is clear that merely transmitting a sound recording to the public on the airwaves does not constitute a distribution.")).

147. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007) (alleging Google's internet search engine was violating Perfect 10's distribution right by making links to files of Perfect 10's copyrighted work, which were uploaded to the internet by third-parties, available to the public).

148. 508 F.3d 1146 (9th Cir. 2007).

149. *Perfect 10*, 508 F.3d at 1162.

Google's search engine.¹⁵⁰ Perfect 10 sought a direct infringement claim against Google even though the photographs were uploaded to the Internet by third parties without any evidence that users actually copied the photographs.¹⁵¹ Similar direct infringement claims could be made against other businesses that have created systems to aid individuals in finding copyrighted works via the Internet.¹⁵²

If the meaning of distribution should be expanded to include the RIAA's making available argument, that expansion should derive from Congress, not the courts.¹⁵³ It is sound policy, and supported by history, for courts to yield judgment and defer to Congress when significant advances in technology raise questions concerning copyright law.¹⁵⁴ Numerous cases before the United States Supreme Court emphasized the need for congressional guidance before courts rule and expand the statutory rights under the Copyright Act.¹⁵⁵

*Teleprompter Corp. v. Columbia Broadcasting System, Inc.*¹⁵⁶ is an example of such a case.¹⁵⁷ In *Teleprompter*, producers of a copyrighted television show alleged the owners and operators of a community antenna television (CATV) system infringed on the producer's copyrights by intercepting the television show's broadcast and rechanneling it through their CATV system to paying subscribers.¹⁵⁸ In making its ruling, the Supreme Court noted that the growth of the communications industry can not be controlled through litigation based on the 1909 Copyright Act where neither broadcast television nor cable television had yet been conceived.¹⁵⁹ The court further noted that an ultimate resolution to the sensitive and important problems found in the explosive development of cable television must be left for Congress to decide.¹⁶⁰

Another example is *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*¹⁶¹ In *Bonito*, the Supreme Court declined to allow a state statute to provide for

150. *Id.*

151. *Id.*

152. *See* A&M Records v. Napster, Inc., 239 F.3d 1004, 1019-20 (9th Cir. 2001).

153. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

154. *Id.*

155. *Id.*

156. 415 U.S. 394 (1974).

157. *See Teleprompter*, 415 U.S. at 414 ("Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.").

158. *Id.* at 396-97.

159. *Id.* at 414.

160. *Id.* at 414, 422.

161. 489 U.S. 141 (1989).

greater industrial design protections.¹⁶² In reaching its decision, the Court noted Congress' explicit refusal to alter copyright law, despite the fact that Congress has been subject to years of criticism regarding its refusal to expand copyright protections.¹⁶³

Additionally, The Electronic Frontier Foundation suggests that the making available argument acts to undermine civil procedure and labels the argument as a "thinly veiled attempt to avoid the burden of proving their case."¹⁶⁴ Thousands of cases in all areas of law are annually dismissed because plaintiffs are unable to present the necessary evidence required to establish what would otherwise be a meritorious case.¹⁶⁵ Although it may be difficult for the RIAA to obtain the proper and necessary evidence required to prove actual distribution, alleviating the RIAA's difficulties is not a reason to expand the law's plain statutory language.¹⁶⁶

III. ANALYSIS THROUGH LANDMARK DECISIONS

The cases discussed in this part of the article provide important analyses on how to interpret section 106(3). *National Car Rental Systems, Inc. v. Computer Associates International, Inc.*¹⁶⁷ is notable because it provided an interpretation of section 106(3) and provided a framework for subsequent cases.¹⁶⁸ Next, *Hotaling v. Church of Jesus Christ of Latter-Day Saints*¹⁶⁹ issued a ruling that broadened copyright protections and provided a foundation for the RIAA's making available theory.¹⁷⁰ *Atlantic Recording Corporation v. Howell* addressed the definition of distribution, whether distribution is synonymous with publication, the admissibility of evidence obtained by MediaSentry, and if digital transfers meet the definition of exchanges found within the Copyright Act.¹⁷¹ Finally, *Capitol*

162. *Bonito*, 489 U.S. at 168 (holding a Florida statute that provided a patent-like protection of ideas pre-empted by the Supremacy Clause).

163. *Id.* at 167-68.

164. EFF *Thomas* Brief, *supra* note 22, at 14.

165. Expert praises, criticizes, Atlantic v. Howell decision, <http://government.zdnet.com/?p=3783> (Apr. 30, 2008, 22:17 EST) (citing posting of William Patry to The Patry Copyright Blog). William Patry, author of the blog, is regarded as one of the leading copyright commentators and has published a seven volume treatise on copyright law. *Id.*; William F. Patry—Biography, <http://west.thomson.com/about/keyauthor/patry.aspx>.

166. See EFF *Thomas* Brief, *supra* note 22, at 13-14 (expressing the opinion that the law should not be interpreted to further aid the RIAA in filing lawsuits against consumers engaging in noncommercial activity within their own homes).

167. 991 F.2d 426 (8th Cir. 1993).

168. See discussion *infra* Part III.A.

169. 118 F.3d 199 (4th Cir. 1997).

170. See discussion *infra* Part III.B.

171. See discussion *infra* Part III.C.

Records, Inc. v. Thomas addressed how an expanded definition of distribution, the impact of international treaty agreements, and large statutory damage awards affect the Copyright Act.¹⁷²

A. NATIONAL CAR RENTAL SYSTEM, INC. V. COMPUTER ASSOCIATES INTERNATIONAL, INC.

In *National Car Rental Systems, Inc. v. Computer Associates International, Inc.*, the Eighth Circuit Court of Appeals addressed the issue of whether National Car Rental Systems, Inc. (National), violated the Copyright Act and its license agreement with Computer Associates International, Inc. (Computer Associates), when National used a computer program licensed by Computer Associates to process data for other companies.¹⁷³ Computer Associates created software and licensed its software for other businesses to use.¹⁷⁴ National used licensed software from Computer Associates.¹⁷⁵ By the terms of the licenses, National could use the software for its own internal operations only, and in no event could National use the software to process the data of a third party.¹⁷⁶

Computer Associates filed suit against National, alleging that National used the program to the benefit of a third party.¹⁷⁷ Computer Associates further alleged that National's breach of contract constituted an infringement of Computer Associates' copyright because it created an unauthorized copy of the software.¹⁷⁸ In order to address the complaint, the court was required to determine whether National's improper usage of Computer Associates' program violated a right equivalent to one of the exclusive rights under the Copyright Act.¹⁷⁹ The Eighth Circuit Court of Appeals concluded that contractual restrictions regulating the use of programs was a supplemental requirement and withdrew the cause of action for copyright protection.¹⁸⁰ Therefore, the court held that making programs available for use by third parties did not constitute distribution.¹⁸¹ The court stated, "even with respect to computer software, the distribution right is only the right to distribute *copies* of the work. As Professor Nimmer has stated,

172. See discussion *infra* Part III.D.

173. *National Car Rental Sys. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 427-28 (8th Cir. 1993).

174. *Id.* at 427.

175. *Id.*

176. *Id.* at 428.

177. *Id.*

178. *Id.*

179. *Id.* at 430-31.

180. *Id.* at 432.

181. *Id.* at 432-33.

“[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.”¹⁸²

National Car Rental System, although not directly related to the copyright infringement of peer-to-peer networks, established precedent in the Eighth Circuit on how section 106(3) should be interpreted.¹⁸³ Several courts have relied on *National Car Rental System* in making their determinations on how to interpret section 106(3) in the context of peer-to-peer network downloading.¹⁸⁴ In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, the Fourth Circuit Court of Appeals cited to the *National Car Rental System* court’s determination of how to establish “distribution.”¹⁸⁵

B. HOTALING V. CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, a library owned by the Church of Jesus Christ of Latter-Day Saints (Church) made unauthorized copies of a copyrighted microfiche file authored and copyrighted by the Hotalings.¹⁸⁶ Several of the Church’s branch libraries, located throughout the United States, received unauthorized copies.¹⁸⁷ The Hotalings learned of the unauthorized copies and filed a copyright infringement lawsuit against the Church.¹⁸⁸

The Hotalings asserted that the Church’s libraries infringed upon their copyright protections by distributing the unauthorized copies of their work to the public.¹⁸⁹ Although the Hotalings were unable to prove that anyone viewed the unauthorized copies in the Church’s libraries, they argued that because the libraries held the unauthorized copies in their collection and made them publically available, there was sufficient evidence to establish distribution within the meaning of section 106(3).¹⁹⁰ The Church argued that holding a work in a library collection open to the public was considered nothing more than an offer to distribute.¹⁹¹ In order to establish actual

182. *Id.* at 434 (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A], at 8-124.1 (2001)).

183. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1223 (D. Minn. 2008).

184. *See, e.g., Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 982 (D. Ariz. 2008) (including a lengthy analysis of *National Car Rental System*); *Thomas*, 579 F. Supp. 2d at 1223 (dedicating a section of the opinion to an analysis of *National Car Rental System*).

185. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

186. *Id.* at 201.

187. *Id.*

188. *Id.* at 201-02.

189. *Id.* at 203.

190. *Id.* The libraries did not keep a record of the public’s use of the microfiche files. *Id.*

191. *Id.*

distribution, evidence must prove that a member of the public accepted such an offer.¹⁹²

The Fourth Circuit Court of Appeals concluded when a public library includes a work in its collection, lists the work in its indexing system, and makes the work accessible to the public, all the requirements of a distribution to the public have been met.¹⁹³ The court also noted that if the library's actions did not establish a distribution, copyright holders would be prejudiced by a library that does not keep records of the public's use.¹⁹⁴ Courts have interpreted *Hotaling* to conclude that making a file available for others to download over a peer-to-peer network constitutes distribution.¹⁹⁵

C. ATLANTIC RECORDING CORPORATION V. HOWELL

In *Atlantic Recording Corporation v. Howell*, Atlantic Recording Corp. (Atlantic) filed a copyright infringement claim against Jeffery Howell on August 29, 2006.¹⁹⁶ The RIAA's investigator, MediaSentry, discovered that Howell had 2,329 sound recordings, including specific sound recordings to which Atlantic owned copyrights, in his computer's shared folder available to peer-to-peer users.¹⁹⁷ Evidence of Howell's infringement consisted only of screenshots of Howell's shared folder, his peer-to-peer username, and his IP address.¹⁹⁸ With this evidence, Atlantic moved for summary judgment, claiming there was no disputed issue of material fact.¹⁹⁹ Atlantic alleged that Howell violated its exclusive distribution right by placing these files in his peer-to-peer shared folder and making them available for all other peer-to-peer users to download.²⁰⁰

The United States District Court granted Atlantic's summary judgment motion.²⁰¹ In making this determination, the court cited *Perfect 10* and

192. *Id.*

193. *Id.*

194. *Id.*

195. See, e.g., *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *3-4 (W.D. Tex. July 17, 2006) ("Listing unauthorized copies of sound recordings using an on-line file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right of distribution."); see also *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718-19 (9th Cir. 2007) (holding that under the *Hotaling* analysis, if an owner of a work makes the work openly available to the public, the owner will be deemed to have distributed copies of the work).

196. *Howell*, 2007 WL 2409549, at *1.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at *6.

Hotaling and held that the distribution of copyrighted material did not require a physical transfer.²⁰² Furthermore, if an individual makes copyrighted works available to the public, that individual may be deemed to have distributed the works in violation of section 106(3).²⁰³ The court concluded that peer-to-peer users commit direct infringement when using peer-to-peer networks to make copyrighted works available to other users.²⁰⁴ Additionally, whether an individual directly oversees the unauthorized distribution is relevant.²⁰⁵ The court concluded that no genuine issue of material fact existed because Howell admitted at his deposition that sound recordings were distributed from his peer-to-peer shared folder.²⁰⁶

Howell argued that he owned the compact discs of the song recordings in question, and simply converted the discs into digital music files on his computer for personal use.²⁰⁷ However, the fact that Howell owned authorized copies of the sound recordings was irrelevant.²⁰⁸ What was relevant was whether he distributed the copies of the recordings without authorization.²⁰⁹ Howell's right to use the copyrighted sound recordings purchased for personal enjoyment did not grant him the right to distribute those sound recordings to others without the copyright holder's authorization.²¹⁰

The court granted the RIAA's summary judgment motion and awarded statutory damages in the amount of \$40,500.²¹¹ Howell filed a Motion to Reconsider on August 30, 2007.²¹² The court granted the motion and called

202. *Id.* at *3 (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718-19 (9th Cir. 2007), *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-14 (9th Cir. 2001)).

203. *Id.*

204. *See id.* (citing *Interscope Records v. Duty*, No. 05CV3744-PHX-FJM, 2006 WL 988086, at *2 (D. Ariz. Apr. 14, 2006)) (noting that possession of copyrighted sound recordings in a peer-to-peer shared folder may constitute copyright infringement); *Warner Brothers Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *4 (W.D. Tex. July 17, 2006) (finding that the placement of music files in a peer-to-peer shared folder was a publication under 17 U.S.C. § 101 because the act is either a distribution or an offer of distribution where further distribution can occur); *Arista Records LLC v. Gruebel*, 453 F. Supp. 2d 961, 969 (N.D. Tex. 2006) (ruling that screenshots, which show the contents of a defendant's peer-to-peer shared folder, constituted a cognizable claim for copyright infringement under 17 U.S.C. § 106(3)).

205. *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 986 (D. Ariz. 2008).

206. *Id.* at 979.

207. *Id.*

208. *Id.* at 983.

209. *Id.*

210. *Id.*

211. Order at 7, *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 876 (D. Ariz. 2008) (No. CV-06-02076-PHX-NVW).

212. *See* Motion to Reconsider at 3, *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008) (No. 2:06-CV-02076-PHX-NVW) (disputing Howell's deposition statements and

for further briefing in April 2008.²¹³ On April 29, 2008, the court delivered a four-part analysis of the RIAA's making available argument, and ultimately concluded that the claim failed to establish unlawful distribution.²¹⁴ The *Howell* court's analysis serves as a framework for how courts interpret several components of the RIAA's making available argument.²¹⁵ The analysis focuses on the following: (1) how the courts should define "distribution;" (2) determining if distribution is synonymous with publication; (3) evaluating whether evidence obtained by an investigator hired by the RIAA is admissible; and (4) considering whether digital transmissions constitute exchanges as required by the Copyright Act.²¹⁶

1. *Defining Distribution*

The *Howell* court's analysis notes that section 106(3) does not define the term "distribute," and that the courts must interpret the statutory meaning of the word.²¹⁷ The court determined that an abundance of authority exists to support the general rule that infringement of the distribution right requires an actual dissemination of a copy.²¹⁸ The *Howell* court also noted that different jurisdictions have found that making a work available for download on a peer-to-peer network established distribution.²¹⁹ Most courts, however, avoid addressing the making available argument by denying a defendant's motion to dismiss even though the plaintiff failed to prove actual distribution.²²⁰ The *Howell* court noted, "unless a copy of work

arguing that Howell never placed the copyrighted sound recordings in his peer-to-peer shared folder or authorized the sharing of those files).

213. *Howell*, 554 F. Supp. 2d at 979.

214. *See id.* at 986.

215. *See* discussion *infra* Part III.C.1-4.

216. *See* discussion *infra* Part III.C.1-4.

217. *Howell*, 554 F. Supp. 2d at 981 (citing 17 U.S.C. § 106(3)).

218. *Id.* (citing Nat'l Car Rental Sys. v. Computer Assocs. Int'l. Inc., 991 F.2d 426, 434 (8th Cir. 1993)); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168-69 (D. Mass. 2008); *Musical Prods., Inc. v. Roma's Record Corp.*, No. 05-CV-5903(FB)(VVP), 2007 WL 750319, at *1 (E.D.N.Y. Mar. 7, 2007); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005); *Paramount Pictures Corp. v. Labus*, No. 89-C-797-C, 1990 WL 120642, at *4 (W.D. Wis. Mar. 23, 1990); 2 NIMMER, *supra* note 182, 8-149 (2007); 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9, 13-13 (2007); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.5.1, 7:125 to 7:126 (3d ed. 2005)).

219. *Howell*, 554 F. Supp. 2d at 983 (citing *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006) and *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007)).

220. *Howell*, 554 F. Supp. 2d at 983 (citing *Warner Bros. Records Inc. v. Payne*, 2006 WL 2844415, at *4 (W.D. Tex. July 17, 2006)) ("[T]he Court is not prepared at this stage of the proceedings to rule out a possible ground for imposing liability."); *Interscope Records v. Duty*, 2006 WL 988086, at *3 n.3 (D. Ariz. Apr. 14, 2006) ("To be clear, we do not conclude that the presence of copyrighted sound recordings in Duty's share file constitutes copyright infringement.");

changes hands in one of the designated ways, a ‘distribution’ under section 106(3) has not taken place.”²²¹ Furthermore, the court reiterated its position, stating the sole act of making a file publically available to download does not violate a copyright holder’s exclusive right of distribution.²²² The court acknowledged that evidence showing an individual made a work available for distribution to the public can support an inference that a copy was likely transferred to another individual.²²³ However, on its own, the evidence establishes only that an individual attempted to distribute a copy, thereby failing to prove that a copy actually changed hands.²²⁴

2. *Determining Whether Distribution Is Synonymous With Publication*

The second question in the *Howell* court’s analysis asked whether an offer to distribute constitutes distribution.²²⁵ The RIAA argued that even though the term “distribution” is not precisely defined in title 17 of the United States Code, it should be considered synonymous with the term “publication.”²²⁶ The RIAA’s argument thus provided that if an individual offered to distribute copyrighted works to other individuals for the purpose of further distribution, the individual distributed the works as a matter of law within the meaning of section 106(3).²²⁷ The court disagreed, and concluded that there was no contextual support for equating distribution and publication.²²⁸

Arista Records v. Greubel, 453 F. Supp. 2d 961, 969 (N.D. Tex. 2006) (denying the motion to dismiss because the complaint must be viewed in the light most favorable to Plaintiffs at early stage of proceedings)).

221. *Howell*, 554 F. Supp. 2d at 983.

222. *Id.*

223. *Id.* at 984.

224. *Id.*

225. *Id.*

226. *Id.* The statutory definition of “publication” is “[t]he offering to distribute copies or phonorecords to a group of persons for the purposes of further distribution. . . .” 17 U.S.C. § 101 (2006).

227. *Howell*, 554 F. Supp. 2d at 983.

228. *Id.* at 984. The court acknowledged that the terms were synonymous within the context of first publication. *Id.*; see also *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (holding that publication of portions of a work that is soon to be published does not qualify as “fair use”). The fair use doctrine allows for certain uses of copyrighted works, without permission or payment, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. 17 U.S.C. § 107 (2006). Fair use generally allows a user, contingent upon the licensing agreement, to make a digital backup copy of a copyrighted work such as software, music, or a movie. See *id.* (noting that the character, purpose and economic impact of the use are factors taken into consideration in determining fair use). However, it is illegal to share with or give to others backed up copies of copyrighted works. *Id.*

The court found that under section 101, all distributions to the public constitute publications, but not all publications are distributions.²²⁹ The court reasoned that if the two words were truly synonymous, the statute's definition of "distribution" would be unsatisfactory, because it could be read that distribution meant "'distribution' or an offering to distribute."²³⁰ A plain reading of section 106(3) indicates that a distribution requires a "sale or other transfer of ownership" or a "rental, lease, or lending" of a copy of the work.²³¹ The statute, as interpreted by the *Howell* court, requires an identifiable copy of a copyrighted work to change possession in a prescribed way for distribution to occur.²³² Therefore, the court found that the RIAA failed to prove an actual distribution of any of the forty-two copyrighted sound recordings at issue.²³³

3. *The Admissibility of Evidence From the RIAA's Investigator*

Next, the *Howell* court considered whether the RIAA may rely on the twelve downloads its investigator, MediaSentry, received from Howell to establish proof of actual distribution.²³⁴ The Electronic Frontier Foundation argued that a copyright owner cannot infringe upon its own copyright.²³⁵ Therefore, downloads from an individual's shared folder by MediaSentry, an agent of the copyright holder, cannot be considered infringement because MediaSentry acted on the owner's behalf.²³⁶ The court addressed this issue and determined that the RIAA did not license MediaSentry to

229. *Howell*, 554 F. Supp. 2d at 984 (citing *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008)).

230. *Id.* at 985.

231. *Id.* (quoting 17 U.S.C. §106(3) (2006)).

232. *Id.*

233. *Id.* The court in *London-Sire Records* reached the same determination when it noted that the statute clearly suggests distribution is not synonymous with publication. *London-Sire*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008). The *London-Sire* court provided a simple but detailed example to illustrate its holding that all distributions are publications, but not all publications are distributions:

For example, suppose an author has a copy of her (as yet unpublished) novel. If she sells that copy to a member of the public, it constitutes both distribution and publication. If she merely offers to sell it to the same member of the public, that is neither a distribution nor a publication. And if the author offers to sell the manuscript to a publishing house for purposes of further distribution, but does not actually do so, that is a publication but not a distribution. Plainly, publication and distribution are not identical. And Congress' decision to use the latter term when defining a copyright holder's rights in 17 U.S.C. § 106(3) must be given consequence.

Id. at 169.

234. *Howell*, 554 F. Supp. 2d at 985-86.

235. Brief for Electronic Frontier Foundation as Amici Curiae Supporting Defendant at 11-13, *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008) (No. 05-CV-7340) [hereinafter EFF *Howell* Brief].

236. *Id.*

authorize distribution or reproduce copies of the copyrighted works.²³⁷ Instead, the RIAA licensed MediaSentry to attempt to stop infringement.²³⁸ Therefore, the court concluded MediaSentry should not be considered a copyright owner and any copies obtained by MediaSentry are a result of an unauthorized distribution.²³⁹ However, the court determined a disputed issue of fact existed regarding Howell's responsibility for making the files available, and thus the court could not conclusively determine that Howell was responsible.²⁴⁰

4. *Determining if Digital Transmissions Constitute Exchanges*

The fourth and final step of the *Howell* court's analysis explored the nature of digital transmissions and file exchanges.²⁴¹ The court concluded that the RIAA failed to prove that an individual who places a copyrighted work into a shared folder on a peer-to-peer network distributes the file when a third-party downloads the copyrighted work.²⁴² Under the court's analysis, the owner of the shared folder never makes or distributes an unauthorized copy of the work.²⁴³ The owner's copy of the work resides in the owner's shared folder on the owner's hard drive, and at no time during the file transfer process does that copy leave its location.²⁴⁴ Instead, a third party makes a copy of a file located in the shared folder.²⁴⁵ The court determined this was insufficient to establish primary liability for copyright infringement of the distribution right, but noted that this potentially creates secondary liability.²⁴⁶ The court faulted the RIAA for its failure to establish the distribution requirement.²⁴⁷ The RIAA failed to explain the framework of peer-to-peer networks in enough detail for the court to determine if the owner of the shared folder actually distributed a copy of the work or simply provided a third party with the ability to make a copy on the third party's own accord.²⁴⁸ The court further concluded that even if contributory liabil-

237. *Howell*, 554 F. Supp. 2d at 986.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* ("Technically, 'third parties are reaching into the individuals' hard drive and taking an electronic file,' so 'the individual who has the work on his or her hard drive [can potentially be sued] for contributory infringement of the reproduction right' but not primary infringement of the distribution right." (quoting PATRY, *supra* note 218, at 13)).

247. *Howell*, 554 F. Supp. 2d at 986.

248. *Id.*

ity applies, the RIAA must prove that a third party actually downloaded an unauthorized copy of the copyrighted work.²⁴⁹ Congress did not intend the language of section 106, “to do and to authorize,” to establish a new form of liability for authorization detached from the legal consequences of authorized conduct.²⁵⁰

D. CAPITOL RECORDS, INC. V. THOMAS

In *Capitol Records, Inc. v. Thomas*, Jammie Thomas, a single mother from Minnesota, became the subject of the RIAA’s litigation against digital piracy facilitated through peer-to-peer networks.²⁵¹ On April 19, 2006, Capitol Records filed a lawsuit against Thomas, alleging that she violated section 106(3) by illegally downloading and distributing sound recordings over a peer-to-peer network.²⁵² Thomas downloaded 1,702 copyrighted music files in her computer’s shared folder, all of which were available to other peer-to-peer users for download.²⁵³ The RIAA alleged that Thomas downloaded a majority of the music files without obtaining permission from the copyright owners.²⁵⁴ Unusually, this case was not decided by summary judgment, default, or settlement.²⁵⁵ On October 2, 2007, the case became the first making available case tried by a jury.²⁵⁶

At trial, Thomas challenged the RIAA’s proposed jury instruction regarding the definition of distribution under the Copyright Act.²⁵⁷ The instruction read, “[t]he act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violated the copyright owners’ exclusive right of distribution, regardless of whether actual distribution has been shown.”²⁵⁸ After argument by the parties, the court used the RIAA’s proposed instruction as written.²⁵⁹ The instruction required the jury to find infringement if the jury determined that Thomas made the files available for distribution.²⁶⁰ The jury did not need to find actual distribution.²⁶¹ The

249. *Id.* at 987.

250. *Id.*

251. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1212-13 (D. Minn. 2008).

252. *Id.*

253. Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, at 3, *Capitol Records, Inc. v. Thomas* 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-2497).

254. *Thomas*, 579 F. Supp. 2d at 1212.

255. *Id.* at 1213.

256. *See id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

jury returned a verdict finding that Thomas willfully infringed the copyright on all twenty-four music files at issue.²⁶² As a result, the jury awarded the recording company statutory damages in the amount of \$9,250 for each act of infringement, totaling \$222,000.²⁶³ The court entered the judgment on October 5, 2007.²⁶⁴

However, on May 15, 2008, the court issued an Order requiring the parties to submit briefs regarding whether the court committed a manifest error of law and stating that the court was considering granting a new trial.²⁶⁵ The court's concern of committing a manifest error of law was based upon the use of the RIAA's proposed jury instructions, which allowed for the RIAA's making available argument.²⁶⁶ The court ultimately concluded that it committed an error of law and vacated the RIAA's favorable verdict.²⁶⁷ This decision repudiated the RIAA's only success at trial in its five-year copyright infringement litigation campaign.²⁶⁸

The court addressed many of the same issues and arguments articulated in *Howell*, and its conclusions did not significantly differ from the determinations in *Howell*.²⁶⁹ One argument *Thomas* expanded upon was the definition of distribution in the Copyright Act.²⁷⁰ Further analysis of *Thomas* also facilitates discussion of the implications of international treaties on the interpretation of the Copyright Act.²⁷¹ This article's analysis of *Thomas* concludes with a discussion on the large statutory damages awards allowed by the Copyright Act.²⁷²

261. *Id.*

262. *Id.*

263. *Id.* at 1213, 1227.

264. *Id.* at 1213.

265. *Id.*

266. *Id.* Jury Instruction 15 contained the making available claim. *Id.*

267. *Id.* at 1228.

268. David Kravets, *Judge Declares Mistrial in RIAA-Jammie Thomas Trial*, Wired.com, Sept. 24, 2008, <http://www.wired.com/threatlevel/2008/09/Not-for-publica/> (last visited October 13, 2008).

269. *Compare Thomas*, 579 F. Supp. 2d at 1216 (discussing the effect of an expanded definition of distribution, international treaties, and large statutory damages) *with* Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008) (providing analysis on how to interpret the definition of distribution).

270. See discussion *infra* Part III.D.1.

271. See discussion *infra* Part III.D.2.

272. See discussion *infra* Part III.D.3.

1. *Expanded Definition of Distribution*

The court based part of its determination on how to properly define “distribute.”²⁷³ Generally, the United States Supreme Court requires a “strong presumption” that the plain language of a statute reflects Congress’ intent and should only be rebutted in “rare and exceptional circumstances.”²⁷⁴ Under the plain language of section 106(3), Congress clearly states that distribution may be effected by sale, transfer of ownership, rental, lease or lending.²⁷⁵ The *Thomas* court observed that Congress’ language in section 106(3) does not suggest that merely making a work available for any of the listed activities constitutes a distribution.²⁷⁶

The *Thomas* court next looked to the ordinary dictionary meaning of the word “distribute” to conclude that the word necessarily requires a transfer of ownership or possession.²⁷⁷ Furthermore, the leading copyright treatises state that making a work available is insufficient to establish distribution.²⁷⁸ Alternatively, the Register of Copyrights, Marybeth Peters, opined to Congress in a 2002 letter that making a copyrighted work available violates the distribution right.²⁷⁹ However, the *Thomas* court noted that the rulings of the Register of Copyrights are not binding but are worth noting because of their persuasiveness.²⁸⁰

The *Thomas* court also considered how other provisions of the United States Code describe or define distribution, and in doing so the court found that in at least one other provision Congress clearly defined distribution to include offers to distribute.²⁸¹ But other provisions in the Copyright Act limit distribution to a physical transfer of copyrighted material.²⁸² After analyzing the differing definitions of distribution found within the

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

274. *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008).

275. 17 U.S.C. § 106(3) (2006).

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

277. *Id.* at 1217. The *Thomas* court cited Merriam-Webster’s Collegiate Dictionary (10th ed. 1999) (“defining ‘distribute’ as, among other things, ‘1: to divide among several or many: APPORTION’ and ‘b: to give out or deliver esp. to members of a group’”). *Id.*

278. *See, e.g.*, 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.11[A] (2008) (stating that infringement of the distribution right requires an actual dissemination of copies); 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:11.50 (2009) (concluding that making a work available is insufficient to establish distribution).

279. *Thomas*, 579 F. Supp. 2d at 1217.

280. *Id.*

281. *Id.* at 1217-18; *see* 17 U.S.C. § 901(a)(4) (2006) (“to ‘distribute’ means to sell, or to lease, bail, or otherwise transfer, or to offer to sell, lease, bail or otherwise transfer”).

282. *Thomas*, 579 F. Supp. 2d at 1217; *see* 17 U.S.C. § 115(c)(2) (2006) (“For this purpose, and other than as provided in [Section 115(c)(3)], a phonorecord is considered ‘distributed’ if the person exercising the compulsory license has voluntarily and permanently parted with its possession.”).

Copyright Act, the *Thomas* court concluded that a uniform definition of the word does not exist.²⁸³ Congress demonstrated that when it intends for the definition of distribution to include “making available” or “offers to transfer,” it will explicitly list a definition of the term within the statute.²⁸⁴ By all interpretations, the plain meaning of distribution requires actual dissemination, and simply making a work available does not fit within that meaning.²⁸⁵

2. *Impact of International Treaty Agreements*

In a separate part of its analysis, the *Thomas* court examined the implications of international law.²⁸⁶ The United States is a party to the World Intellectual Property Organization (WIPO) and subscribes to the organization’s World Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT).²⁸⁷ The WCT and WPPT recognize and provide for a making available right that does not require evidence establishing that copies of a copyrighted work were actually transferred to particular individuals.²⁸⁸ Considering both the executive and legislative branches of the government agreed to adopt and ratify these treaties, it appears that American law is in compliance with the treaties, and thus recognizes a making available right.²⁸⁹ Additionally, under *Murray v. Schooner Charming Betsy*,²⁹⁰ the United States Supreme Court established the *Charming Betsy* doctrine, which requires courts to adopt a reasonable interpretation of the law so as to ensure that the United States is in compliance with its treaty obligations.²⁹¹

The court noted in its application of the *Charming Betsy* doctrine that the WIPO treaties are neither self-executing nor legally binding, aside from their implementation in the Copyright Act.²⁹² Since a non-self-executing

283. *Thomas*, 579 F. Supp. 2d at 1217-18.

284. *Id.* at 1218.

285. *Id.* at 1218-19.

286. *Id.* at 1225.

287. *Id.*

288. *Id.* (citing WIPO Copyright Treaty, art. 6(1), art. 8, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121; World Performances and Phonograms Treaty, art. 12(1) & (14), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 203).

289. *Thomas*, 579 F. Supp. 2d at 1225.

290. 6 U.S. 64 (1804).

291. *See Charming Betsy*, 6 U.S. at 118. (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

292. *Thomas*, 579 F. Supp. 2d at 1226 (citing *Medellín v. Texas*, 128 S. Ct. 1346, 1365 (2008)). A self-executing treaty is law that becomes effective immediately in domestic courts of the United States without requiring the implementation of an ancillary act of Congress or federal law. 2 VED P. NANDA & DAVID K. PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 10.7 (2006).

treaty requires legislation to make it law in the United States, the WIPO treaties do not establish an enforceable making available right in peer-to-peer file sharing cases.²⁹³ Only if section 106(3) is found ambiguous will the treaty's relevance be acknowledged.²⁹⁴ The doctrine creates a helpful tool for the purpose of statutory construction, but "clear congressional action trumps customary international law and previously enacted treaties."²⁹⁵ The court concluded its international treaty analysis by stating that compliance with the WIPO treaties would be improper because the United States cannot override the clear congressional intent in section 106(3).²⁹⁶

3. *Oppressive Statutory Damages Awards*

In its Memorandum and Order, the *Thomas* court petitioned Congress to review the outdated Copyright Act and amend it to address both the liability and statutory damages that derive from peer-to-peer network cases.²⁹⁷ The court described the large statutory damage awards resulting from copyright cases as oppressive and grossly misapplied when applied to individual consumers.²⁹⁸ The numerous cases cited by the RIAA in support of upholding the large statutory damages awards involve corporate or business defendants.²⁹⁹ In context, large damage awards deter future illegal commercial conduct.³⁰⁰ Significantly, the recent barrage of peer-to-peer copyright infringement cases filed by the RIAA name individual consumers as defendants.³⁰¹ Individual consumer infringement is motivated by the simple desire to have the music for personal use and enjoyment.³⁰² Consumers do not attempt to seek profit from their acts of infringement.³⁰³

Thomas neither received commercial gain from her alleged infringement, nor sought any form of profit.³⁰⁴ The court noted that large statutory damages are partly justified in copyright cases because the damages act as a deterrent to infringement by making the penalty for infringing substantially

293. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (defining the effect of a self-executing treaty on the laws of the United States).

294. *Thomas*, 579 F. Supp. 2d at 1226.

295. *Id.* (quoting *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005)).

296. *Id.*

297. *Id.* at 1227.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

outweigh any potential gain.³⁰⁵ A particularly enticing lure that draws commercial entities to engage in copyright infringement is the potential realization of a tremendous increase in revenues.³⁰⁶ Alternatively, consumers who infringe on peer-to-peer networks by downloading copyrighted music benefit by receiving access to free music, not the possibility of hundreds of thousands of dollars in profits.³⁰⁷

Courts do not condone copyright infringement actions of individual consumers, such as *Thomas* and *Howell*.³⁰⁸ Instead, the *Thomas* court simply labeled it absurd to compare the actions of consumers to those of global commercial businesses and corporations.³⁰⁹ Awarding \$220,000 in damages against an individual who downloads twenty-four songs from a peer-to-peer network, which is the approximate equivalent of three CDs costing less than \$60, is “unprecedented and oppressive.”³¹⁰

Congress wrote the Copyright Act with the intent to allow statutory damages in amounts substantially more than the actual cost of the infringed work.³¹¹ These damages accomplish the goal of Congress to deter infringement and encourage the legitimate purchase of copyrighted work.³¹² However, statutory damages awards of hundreds of thousands of dollars are above and beyond the amount necessary to accomplish deterrence in individual consumer cases.³¹³ Damages reaching approximately one hundred times the cost of an infringed work act as an effective deterrent in actions involving individual consumers.³¹⁴

IV. CONCLUSION

Courts should not respond to technological advancements by expanding the copyright protections established in the Copyright Act beyond Congress’ intent.³¹⁵

Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 1227-28.

311. *Id.* at 1227.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 987 (D. Ariz. 2008).

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.³¹⁶

Courts recognized long before the 1976 Act that copyright protections, as well as remedies for infringement, were entirely statutory.³¹⁷ The United States Supreme Court stressed through cases such as *Teleprompter* and *Bonito* that a need for congressional guidance exists before courts rule and create rights that are not explicit in the Copyright Act.³¹⁸ In light of the history of the Copyright Act and subsequent case law, the proper way to handle questionable issues is to let Congress address them through the legislative process.³¹⁹

Congress must revisit the Copyright Act of 1976 and modify the act to suit today's technological questions.³²⁰ The United States' judicial system would benefit if Congress would address the act's ambiguous language.³²¹ Congress would be prudent to define what exactly constitutes a distribution in the age of the Internet, to determine if digital transmissions are truly distributions, and to address the constitutionality of the large statutory damages awarded against individual consumers.³²² Additionally, the question of whether making a copyrighted work available for distribution is intended to be an independent right or if circumstantial evidence is sufficient to prove distribution requires an answer.³²³ This answer should come from the legislative branch, not the judicial.³²⁴

A clear definition of distribution is vital, especially in relation to the prospectively large statutory damages awards likely to be encountered by individual consumers accused of copyright infringement.³²⁵ Individual con-

316. *Sony Corp. of Am. v. United City Studios, Inc.*, 464 U.S. 417, 431 (1984).

317. *Id.*

318. Memorandum of Amicus Curiae Intellectual Property Institute of William Mitchell College of Law in Support of Defendant's Motion for a New Trial at 21, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) [hereinafter William Mitchell *Thomas* Brief]; *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 414 (1974); *Bonito Boats, Inc., v. Rural Telephone Service Co., Inc.*, 489 U.S. 141, 167-68 (1991).

319. See William Mitchell *Thomas* Brief, *supra* note 318.

320. See *id.* at 20-22 (stating that the proper recourse for the RIAA is to engage Congress through the legislative process).

321. See *id.* (indicating that cases consistently explain that courts should refrain from creating rights that are not explicit in the Copyright Act).

322. *Id.*

323. See *id.* (stating that any future making available right should be left for Congress to create and not the courts).

324. *Id.*

325. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

sumers do not engage in infringement with the intention of gaining great monetary profits, but do so because they desire to expand their personal collections of music.³²⁶ Regardless of intentions, the actions of copyright infringing consumers are not justified, but as the court stated in *Thomas*, statutory damages awards of hundreds of thousands of dollars is above and beyond the amount necessary to accomplish deterrence in individual consumer cases.³²⁷ “[S]urely [the] damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent” in infringement actions involving individual consumers.³²⁸ Congress must amend the Copyright Act of 1976 to better regulate an increasingly technological world.³²⁹

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326. *Id.*

327. *Id.*

328. *Id.*

329. WESEMAN, *supra* note 15, at 1.

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