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**P2P File-Sharing and
the Making Available War**

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P2P File-Sharing and the Making Available War

By Diana Sterk*

¶1 How far do the courts have to go to protect a copyright holder's right of distribution under 17 U.S.C. § 106(3), given the nature and prevalence of peer-to-peer (P2P) file sharing? Under § 106 of the Copyright Act, a copyright owner has exclusive rights to distribute copies of his work.¹ When it comes to Internet file sharing, however, distribution rights are far from straightforward. Widespread distribution of copyrighted music occurs on the Internet, causing the recording companies to make concerted efforts to curb such distribution through mass litigation. The success of these efforts depends in part on a critical doctrinal question that courts have not yet resolved definitively: what constitutes "distribution" under § 106(3) of the Copyright Act?

¶2 A string of cases in the past ten years has turned on whether simply sharing copyrighted work, or making it available to others on P2P networks, without actual transfer of the work is enough to satisfy the distribution requirement of § 106(3) of the Copyright Act.²

¶3 The debate over whether plaintiffs need to prove actual distribution arose in response to record companies and copyright holders who have been increasingly anxious about the fate of copyrighted music, as the number of people who obtain music online has exploded. Recording companies began a two-pronged attack against online file sharing of copyrighted music. First, recording companies filed suits alleging that P2P file sharing networks, like Napster³ and Grokster,⁴ were contributory infringers. Second, although several of those suits were successful, the industry moved to filing suits against individuals, because new P2P networks emerged with methods of circumventing copyright laws.

¶4 The Recording Industry Association of America (RIAA) has filed over 35,000 lawsuits against individual file sharers since 2003,⁵ many against college students,⁶ alleging that the individual file sharers have infringed on the copyright owners' exclusive

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¹ 17 U.S.C. § 106(3) (2006).

² See, e.g., *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Atl. Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551 (S.D. Tex. Mar. 12, 2008); *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006).

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

⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁵ Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, available at <http://online.wsj.com/article/SB122966038836021137.html#printMode>.

⁶ Anne Broache, *RIAA Threatens 19 Universities with Lawsuits*, CNET NEWS BLOG (Oct. 18, 2007, 11:16 AM), http://news.cnet.com/8301-10784_3-9799840-7.html.

rights to distribute under § 106(3) by making copyrighted works available through file sharing. Because it is often difficult or impossible to prove that a particular work was transferred from the shared folder of user A to user B, the industry stands to lose these suits if distribution requires such proof. As a result, the industry has argued that user A distributes the work within the meaning of the statute, if user A *makes the work available* to a group of potential users.⁷

¶15 Although the RIAA claims to be discontinuing its mass lawsuits against individual file sharers in favor of other strategies to stop illegal file sharing,⁸ suits are still ongoing.⁹ The issue has been pushed further in the last year, with the unfolding of the only two cases against individual file sharers to see a jury, both of which ended in large jury awards for the plaintiffs.¹⁰ It is inevitable that copyright holders, if not recording companies, will continue to file similar suits, due to the continued prevalence of file sharing and the seemingly increasing potential for high rewards.

¶16 The first part of this note will discuss the circuit split surrounding the “making available” issue. It concludes that the statutory language provides little support for the position that making a work available constitutes distribution within the meaning of the statute, but notes that, as a matter of policy, requiring proof of actual transfer of files from one user to another undermines important copyright objectives. Part II of this note will consider other alternatives to the making available and actual distribution standards that scholars have raised. It explores the deficiencies in the suggestion posited by several scholars that secondary liability provides adequate protection for copyright owners against people who simply make copyrighted works available.¹¹ Secondary liability is not appropriate, in theory, for dealing with file sharing, and the framework of secondary liability does not, in practice, provide any protection against file sharing. Part II will also discuss other methods used by courts to deal with the distribution problem. This article concludes that two methods can achieve protection for copyrighted recordings while not placing liability on people who could not have distributed files or people who were wholly unaware of the technological consequences of their actions. First, courts can require circumstantial evidence of actual distribution. Second, if courts interpret distribution to be synonymous with publication, those courts should determine if the intent or purpose of the defendant in sharing files was to distribute those files to other people. Although both of these methods achieve a balance, it is possible that requiring

⁷ David Kravets, *MPPAA Says No Proof Needed in P2P Copyright Infringement Lawsuits*, WIRED.COM (Jun. 20, 2008, 12:24 PM), <http://www.wired.com/threatlevel/2008/06/mpaa-says-no-pr/>.

⁸ *Id.* See also *For Students Doing Reports*, RECORDING INDUSTRY ASS'N OF AM., <http://www.riaa.com/faq.php> (last visited Apr. 17, 2011).

⁹ Chad Mumm, *RIAA Once Again Suing File-Sharers*, SWITCHED (May 8, 2009, 8:27 AM), <http://www.switched.com/2009/05/08/riaa-once-again-suing-file-sharers/print>.

¹⁰ See Greg Sandoval, *Judge Lowers Jammie Thomas' Piracy Penalty*, CNET NEWS BLOG (Jan. 22, 2010, 10:05 AM), http://news.cnet.com/8301-31001_3-10439636-261.html; see also *Sony BMG Music Entm't. v. Tenenbaum*, 672 F. Supp. 2d 217 (D. Mass. 2009); Vlad Vidaeff, *A \$675,000 Damages Award for Illegal File Sharing: Joel Tenenbaum's Ferocious Battle Against the Music Industry*, N.C. BAR ASS'N (Feb. 28, 2011), <http://intellectualpropertylaw.ncbar.org/newsletters/iplinksfeb2011/tenenbaum.aspx> (explaining the large amount of damages awarded in *Tenenbaum* and Judge Gertner's opinion finding the amount unconstitutional excessive).

¹¹ John Horsfield-Bradbury, Note, “*Making Available*” as *Distribution: File-Sharing and the Copyright Act*, 22 HARV. J.L. & TECH. 273, 297–99 (2008); see also Kristy Wiehe, Note, *Dollars, Downloads and Digital Distribution: Is “Making Available” a Copyrighted Work a Violation of the Author's Distribution Right?*, 15 UCLA ENT. L. REV. 117, 122–23 (2008).

plaintiffs to prove intent may lead to too many file sharers claiming ignorance with little effective rebuttal opportunities for copyright holders. Requiring circumstantial evidence of actual distribution, on the other hand, allows for a larger variety of evidence on both sides.

I. BACKGROUND

¶7 Since Napster entered the scene in 1999, millions of Americans have engaged in the sharing of copyrighted music.¹² In 2004, the number of file sharers was estimated at around seventy million.¹³ Many of these file sharers are college students or younger.¹⁴ P2P networks allow people to share copyrighted music with ease. A person who has a song or video on his computer can place that file into his shared folder on his computer. When he places copyrighted files into the shared folder on a P2P network, third parties can then access the files through P2P networks and download them for their own uses.¹⁵

¶8 File sharers have several reasons for illegally sharing and downloading music. Most obviously, many people want music for their own enjoyment without having to pay for such use. Copyright holders, clearly, do not support this kind of use. But not all file sharing may damage copyright holders. Some people simply want to sample music before buying CDs or MP3s. By downloading a version of a song from someone else's shared folder, a person can hear the music in order to make a more informed subsequent purchase. Others own the material in non-digital format (cassette, record, etc) and want to update their current collections to digital. Also, many people would not have purchased the music if it were not free, so the recording companies are not losing money from those downloads. In fact, many new artists find that file sharing increases their popularity, and, in turn, increases their music sales.¹⁶ Although it is possible that illegal file sharing has not hurt record sales, it is reasonable for copyright holders to fear such an effect.¹⁷

¶9 Concerns about the prevalence of illegal file sharing stem from both the Constitution and the goal of copyright law itself. Financial incentives may be necessary to assure that works continue to be produced. Therefore, the issue is not simply about

¹² Ray Delgado, *Law Professors Examine Ethical Controversies of Peer-to-Peer File Sharing*, STANFORD REP. (Mar. 17, 2004), <http://news-service.stanford.edu/news/2004/march17/fileshare-317.html>; see also *Seven Million 'Use Illegal Files'*, BBC NEWS (May 28, 2009, 12:01 AM), <http://news.bbc.co.uk/2/hi/technology/8073068.stm> (discussing the number of file-sharers in the U.K.).

¹³ Delgado, *supra* note 122.

¹⁴ See *Impact of Internet Music File Sharing & CD Burning*, AUSTRALIAN RECORDING INDUSTRY ASS'N (Jul. 16, 2003), <http://www.aria.com.au/pages/CurrentIssueInternetMusicFileSharingCDBurning.htm> (showing that a high percentage of file sharing occurs amongst people under the age of 25).

¹⁵ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011–12 (9th Cir. 2001).

¹⁶ *Shakira Hits Back at Lily Allen in Illegal Downloading Row as She Claims File Sharing 'Brings Me Closer to Fans'*, MAIL ONLINE (Oct. 20, 2009, 11:10 AM), <http://www.dailymail.co.uk/tvshowbiz/article-1221639/Shakira-hits-Lily-Allen-illegal-downloading-row-claims-file-sharing-brings-closer-fans.html> (discussing that Shakira supports illegal file sharing, and Nelly Furtado and Norah Jones are not against file-sharing); Robert Taylor, *Piracy and Rock Music: An Investigation into Illegal Downloading Within Alternative Music*, SUITE101 (Nov. 1, 2007), <http://www.suite101.com/content/piracy-and-rock-music-a34641>; *Trent Reznor and Saul Williams Discuss Their New Collaboration, Mourn OiNK*, VULTURE (Oct. 30, 2007, 6:00 PM), http://nymag.com/daily/entertainment/2007/10/trent_reznor_and_saul_williams.html.

¹⁷ See generally Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007).

giving money to copyright holders because they feel entitled to it. The Constitution provides Congress with the power to “promote the Progress of . . . useful Arts, by securing . . . to Authors . . . the exclusive Right to their respective Writings”¹⁸ The purpose behind this clause, and behind subsequent copyright laws, is to provide incentives for artists to create works.¹⁹ If the artists do not benefit, they will be less likely to want to expend the energy, time, and money necessary to create the work. Copyright holders believe that file sharing removes this financial incentive.

¶10 The question the courts have been asked to decide is whether the person who has copyrighted files in his shared folder is liable for copyright infringement without any proof that third parties have actually downloaded the files. If so, many more people with shared music or video folders would be open to suits by music labels and companies, thus making them liable for jury awards between \$750 and \$30,000 for each song or video upon which the file sharer infringes.²⁰

¶11 Despite the RIAA’s claims that “there is legal clarity about what users can and can’t do on peer to peer networks,”²¹ district and appellate courts have not come to a consensus on whether a user who makes files available is liable for copyright infringement. The large number of suits filed has not generated a large number of decisions. Most of these suits are settled very early in the litigation process.²² Several blogs reported that the RIAA even created a website through which those accused could make pre-litigation payments.²³ Only two lawsuits have actually made it to a jury.²⁴ Most of the court opinions, therefore, are in response to motions for summary judgment²⁵ or Rule 12(b)(6) motions for failure to state a claim.²⁶ District courts have ruled inconsistently, with some refusing to dismiss, but deferring the decision of whether

¹⁸ U.S. CONST. art. I, § 8, cl. 8.

¹⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

²⁰ 17 U.S.C. § 504(c) (2006). In *Sony BMG Music Entertainment v. Tenenbaum*, the jury awarded the plaintiffs \$675,000, or \$22,500 per song for 30 songs, see Debbie Rosenbaum, *Gerter’s Ruling on Damages*, JOEL FIGHTS BACK, <http://joelfightsback.com/2010/07/gertners-ruling-on-damages/> (last visited Apr. 16, 2010), and in *Capitol Records, Inc. v. Thomas*, a jury awarded the plaintiffs \$222,000 in the first trial and \$1.9 million in the retrial. See Sandoval, *supra* note 10. Although this note will not discuss the issue of whether these statutory damages are excessive or unconstitutional, it is important to keep the implication of these damages in mind.

²¹ See *The IRAA*, FACEBOOK (last visited Apr. 16, 2007), http://www.facebook.com/note.php?note_id=145043792218609.

²² See Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, available at <http://www.nytimes.com/2007/10/05/business/media/05music.html>.

²³ See Robert J. Ambrogi, *Five Years, 30,000 Lawsuits, and Counting*, LEGAL BLOG WATCH (Sept. 8, 2008, 1:52 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2008/09/five-years-3000.html; Meg Marco, *RIAA Bullies College Students with P2PLawsuits.com*, THE CONSUMERIST, (Mar. 1, 2007, 10:22 PM), <http://consumerist.com/consumer/riaa/riaa-bullies-college-students-with-p2plawsuitscom-240877.php>; *RIAA’s Online Settlement Receipt: Thanks for Your Money*, TORRENT FREAK (May 3, 2007), <http://torrentfreak.com/riaas-online-settlement-receipt-thanks-for-your-money/>.

²⁴ Ashby Jones, *Copy-Wrong! Unpacking the \$1.92M Downloading Verdict*, WALL ST. J.L. BLOG (June 27, 2009, 10:30 AM), <http://blogs.wsj.com/law/2009/06/27/copy-wrong-unpacking-the-192m-downloading-verdict/tab/print>; Ian Paul, *Second RIAA Piracy Trial Starts*, TECHWORLD (July 29, 2009, 12:19 AM), http://www.techworld.com.au/article/312724/second_riaa_piracy_trial_starts/.

²⁵ See FED. R. CIV. P. 56.

²⁶ See FED. R. CIV. P. 12(b)(6).

making available constitutes distribution until hearing evidence at trial,²⁷ leaving the question unanswered.

II. PART I

¶12 This part will focus on the differing interpretations of § 106(3) of the Copyright Act and will argue that the making available interpretation of distribution under that Act is inconsistent with statutory language. Next, it will briefly outline the court decisions on either side of this debate to give a framework for the two evidentiary standards employed by the courts in peer-to-peer cases: (1) proof of actual distribution to others and (2) proof of copyrighted titles in a shared folder.

¶13 Section 106(3) states, “the owner of copyright . . . has the exclusive rights . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership”²⁸ The statute, however, does not define distribution. Due to this omission, courts differ on how to interpret the word.²⁹ Some courts and scholars have looked to the definition of publication, which is defined in the statute, for guidance on how to interpret distribution, because the definition of publication sounds almost identical to the language used in § 106(3) for distribution.³⁰ Although the Fourth Circuit and other district courts have held that making works available is prohibited, the strength of the courts’ plain language arguments requiring actual distribution outweigh the policy concerns in favor of a making available interpretation.

A. *The Case for Making Available*

1. Statutory Definition

¶14 Plaintiffs argue, and many courts accept, that publication and distribution are synonymous within the Copyright Act, because the language in the definition of publication is substantially similar to the language in § 106(3). The first sentence of the definition of publication uses exactly the same wording as § 106(3) when it describes distribution: “distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending” constitutes publication.³¹

²⁷ Warner Bros. Records, Inc. v. Payne, No. W-06-CA-051, 2006 U.S. Dist. LEXIS 65765, at *11 (W.D. Tex. July 17, 2006) (“[T]he Court is not prepared at this stage of the proceedings to rule out the Plaintiffs’ ‘making available’ theory as a possible ground for imposing liability. A more detailed understanding of the Kazaa technology is necessary and Plaintiffs may yet bring forth evidence of actual uploading and downloading of files, rendering use of the ‘making available’ theory unnecessary.”); Interscope Records v. Duty, No. 05-CV-3744-PHX-FJM, 2006 U.S. Dist. LEXIS 20214, at *6–7 nn.2–3 (D. Ariz. Apr. 14, 2006); see also Arista Records LLC v. Greubel, 453 F. Supp. 2d 961, 971 (N.D. Tex. 2006) (comparing the case to *Payne* and *Duty* in finding denying the motion to dismiss because the plaintiffs alleged that Greubel had “actively reproduced and/or distributed the copyrighted recordings.”).

²⁸ 17 U.S.C. § 106(3) (2006).

²⁹ Compare, e.g., *Atl. Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551, at *7 (S.D. Tex. Mar. 12, 2008), and *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, at *13 n.38 (E.D. Pa. Feb. 16, 2007) (finding publication and distribution synonymous), with *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008), and *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (finding that distribution and publication have different meanings).

³⁰ See, e.g., *Atl. Recording*, 2008 WL 2316551, at *7.

³¹ 17 U.S.C. § 101 (2006).

However, the definition also includes offers to distribute, stating, “The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”³² Plaintiffs argue that because Congress included both distribution and offering to distribute within the definition of publication, Congress intended distribution in § 106(3) to also include offering to distribute.³³ Offering to distribute is the same as making works available. Therefore, distribution in § 106(3) contemplates that simply making works available should constitute infringement.

¶15 This interpretation is bolstered by the Supreme Court’s language in *Harper & Row Publishers, Inc. v. Nation Enterprises*.³⁴ In that case, the Court called the distribution right in § 106(3) the “right of first publication.”³⁵ The Court did not go so far as to say that § 106(3) includes offers to distribute or that the definition of publication in § 101 is applicable to distribution, but other courts have created that connection.³⁶ The Court also quoted the House Committee on the Judiciary, calling distribution “the exclusive right of publications.”³⁷

¶16 In *Atlantic Recording Corp. v. Anderson*, the District Court for the Southern District of Texas used the statute itself and the interchangeable use of distribution and publication in *Harper & Row* to find the words synonymous.³⁸ In *Atlantic Recording*, as in most other P2P infringement cases, the recording company hired MediaSentry, a digital piracy investigator, who detected someone distributing thirty-one copyrighted recordings.³⁹ MediaSentry obtained the IP address of the user’s computer, contacted the Internet Service Provider (ISP) for the name of that user, and subsequently filed suit against the user.⁴⁰ The court granted summary judgment to the recording company, because the defendant admitted to sharing copyrighted files on Kazaa, an act that constituted offering to distribute, or making works available.⁴¹

¶17 In *Motown Record Co. v. DePietro*, the District Court for the Eastern District of Pennsylvania also relied, at least in part, on the statute itself to find an exclusive making available right.⁴² In a footnote, the court cited a letter from the Register of Copyrights that stated, “[M]aking [a work] available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as the production right.”⁴³ The court used this letter to equate publication and distribution. Although the court did not grant plaintiff’s request for summary judgment, the denial was

³² *Id.*

³³ *See, e.g., Atl. Recording*, 2008 WL 2316551, at *7.

³⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

³⁵ *Id.* at 552.

³⁶ *See id.*

³⁷ *Id.* *See also* H.R. REP. NO. 94-1476, at 61 (1976) (calling the bundle of five rights in § 106 the exclusive rights of “reproduction, adaptation, *publication*, performance, and display”) (emphasis added).

³⁸ *Atl. Recording*, 2008 WL 2316551, at *7.

³⁹ *Id.* at *2.

⁴⁰ *Id.*

⁴¹ *Id.* at *7–8.

⁴² *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, at *13 n.38 (E.D. Pa. Feb. 16, 2007).

⁴³ *Id.* (quoting Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Rep. from the 28th Dist. of Cal. (Sept. 25, 2002)).

due to the remaining question of fact as to whether the defendant had been misidentified, not whether whoever had shared the songs was liable.⁴⁴

2. Using *Hotaling* and *A & M Records* for Support

¶18 Various other courts have also reached the conclusion that making available is barred by § 106(3) without focusing on the statutory definition of publication. These courts, instead, relied on the Fourth Circuit's holding in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*⁴⁵ and the Ninth Circuit's decision in *A&M Records, Inc. v. Napster, Inc.*⁴⁶

¶19 Although *Hotaling* did not involve the Internet, the Fourth Circuit found that making unauthorized copies of genealogical material on microfiche available in a church library constituted infringement.⁴⁷ The church owned one authorized copy, so making an unauthorized copy of the work they owned was permissible, as long as the unauthorized copy was only used as a replacement in case the original was damaged.⁴⁸ The church was found liable for infringement, however, because it distributed the copies that it had created to its branch libraries and added the copyrighted works to its catalog, thereby making the works available to the public.⁴⁹ In *Hotaling*, as in file sharing cases, the plaintiffs could not prove that anyone actually used the unauthorized works, because the library did not keep records of microfiche use.⁵⁰ However, the court found that the church had “completed all the steps necessary for distribution to the public,” and therefore held that it had violated § 106(3).⁵¹

¶20 *Napster*, on the other hand, directly involved P2P networks. In *Napster*, the Ninth Circuit explicitly stated, “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”⁵² Because uploading files does not show that a third party actually copied the files, this statement by the court seemed to embrace the making available standard. In *Napster*, however, the court’s decision did not hinge on the making available theory, because the plaintiffs had established direct infringement.⁵³ The district court found that Napster users were actually downloading the songs that others had uploaded,⁵⁴ so the finding of distribution did not need to rely on the making available theory.

¶21 Although neither *Hotaling* nor *Napster* involved claims against individual P2P network users, courts have used the language in those opinions to conclude that proof of actual distribution is not required in the file-sharing arena under § 106(3), but rather that

⁴⁴ *Id.* at *15–16.

⁴⁵ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

⁴⁶ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The *DePietro* court also cites this decision as one of its reasons for finding an exclusive making available right.

⁴⁷ *Hotaling*, 118 F.3d at 204–205.

⁴⁸ *Id.* at 204. Section 108(c) provides limited reproduction exemptions for libraries, including allowing libraries to create replacement copies. 17 U.S.C. § 108(c) (2006).

⁴⁹ *Hotaling*, 118 F.3d at 203.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001).

⁵³ *Napster* additionally deals with the issue of secondary liability. *See id.* at 1019–24.

⁵⁴ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 909–11 (N.D. Cal. 2000) *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001).

proof of copyrighted works made available to the public is sufficient to establish liability.⁵⁵ In *Sony BMG Music Entertainment v. Doe*, the District Court for the Eastern District of North Carolina said *Hotaling* constituted binding precedent and stood for the interpretation that distribution included “making a protected work available to the public.”⁵⁶ The holding against the defendant was based simply on the “date on which defendant made copyrighted works of plaintiffs publically available, the specific works involved, and the [P2P network] by which they were made publically available.”⁵⁷ Additionally, in *Universal City Studios Productions v. Bigwood*, a case with substantially similar facts to *Doe*, the District Court for the District of Maine granted summary judgment to the plaintiffs, relying on both *Hotaling* and *Napster* for the conclusion that simply making works available on P2P networks constitutes distribution.⁵⁸

¶22 Courts on this side of the debate have not generally detailed the reasoning behind making available and have not discussed the statutory definition of publication. These courts simply cite earlier cases like *Hotaling* and *Napster*, which also do not fully explain such a standard.⁵⁹ In *Motown Record Co. v. DePietro*, for example, the court stated only briefly, in a footnote, the sources on which it relied with no further discussion.⁶⁰ Considering the lack of in-depth explanation of the making available doctrine in most of the early cases favoring the doctrine, it is not hard to imagine that courts are using their powers to devise a rule that may be more equitable than the statute may allow.

B. The Case Against Making Available—Actual Distribution

¶23 Equating distribution and publication is problematic for two reasons. First, the words are different. If Congress had wanted § 106(3) to include publication, rather than distribution, Congress could have done so. Second, by distinguishing between distribution and offers to distribute within the definition of publication, Congress recognized that the two should be treated separately. As a result, a number of courts have rejected making available claims in favor of a showing of actual distribution.

¶24 In *London-Sire Records, Inc. v. Doe I*, the District Court for the District of Massachusetts bluntly stated, “[E]ven a cursory examination of the statute suggests that

⁵⁵ See *Sony BMG Music Entm’t v. Doe*, No. 5:08-CV-109-H, 2008 U.S. Dist. LEXIS 106088, at *12–13 (E.D.N.C. Oct. 21, 2008); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190–91 (D. Me. 2006). A few courts have acknowledged that the *Hotaling* decision represents a making available standard, but have declined to dismiss or issue summary judgment based on that standard in the pleading stage. See *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 969–72 (N.D. Tex. 2006) (declining to dismiss because “courts have recognized that making copyrighted works available to others may constitute infringement by distribution in certain circumstances,” and the plaintiffs alleged that the defendant “actively reproduced and/or distributed the recordings”); *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 U.S. Dist. LEXIS 65765, at *11 (W.D. Tex. Jul. 17, 2006). The court in *Arista Records, Inc. v. MP3Board, Inc.*, on the other hand, used *Hotaling* for the premise that plaintiffs must show actual dissemination, unless they can show that “proof [was] impossible to produce because the infringer [had] not kept records of public use,” as was the situation in *Hotaling*. No. 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165, at *14 (S.D.N.Y. Aug. 28, 2002).

⁵⁶ *Doe*, 2008 U.S. Dist. LEXIS 106088, at *12–13.

⁵⁷ *Id.* at *14.

⁵⁸ *Bigwood*, 441 F. Supp. 2d at 190–91.

⁵⁹ *UMG Recordings, Inc. v. Alburger*, No. 07-3705, 2009 U.S. Dist. LEXIS 91585, at *10–11 n.41 (E.D. Pa. Sept. 29, 2009) (citing *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, at *13 n.38 (E.D. Pa. Feb. 16, 2007)).

⁶⁰ *Motown Record Co.*, 2007 U.S. Dist. LEXIS 11626, at *13 n.38.

the terms are not synonymous.”⁶¹ The court reasoned that although publication encompasses distribution, distribution does not include publication.⁶² The court also emphasized that Congress chose to use distribution in § 106(3), not publication, so plaintiffs must show that the work actually changed hands.⁶³ Similarly, the court in *Atlantic Recording Corp. v. Howell* rejected the plaintiffs’ claim that distribution in the context of § 106(3) can mean either distribution or offering to distribute.⁶⁴ Instead, the *Howell* court found that the plain meaning of the statute required that a work actually change hands and cited a wide array of authority from cases to treatises in support of its finding.⁶⁵

¶25 Courts also reject the making available argument based on the Eighth Circuit decision in *National Car Rental System, Inc. v. Computer Associates International, Inc.*, which required actual distribution of copies of software for the infringement claim.⁶⁶ Like *Hotaling*, *National Car Rental* is a non-Internet case that has been applied to the P2P setting. In *National Car Rental*, the issue was whether the Copyright Act preempted Computer Associates International, Inc.’s (CA) claim for breach of contract.⁶⁷ National Car Rental System, Inc. (National Car Rental) had a licensing agreement with CA for a computer program, restricting National Car Rental’s use of the program to the internal operations of its own company.⁶⁸ CA brought the suit after learning that National Car Rental had used the program to process data of other companies.⁶⁹ In holding that the claim was not preempted, the court found that the Copyright Act was less restrictive on National Car Rental than the license agreement. The court held that unlike the license agreement, “infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.”⁷⁰ The court went further to say that the Copyright Act does not protect the functionality of software, but “only the right to distribute *copies* of the work.”⁷¹

¶26 Although the facts of the case are not analogous to those in the file sharing cases because National Car Rental did not offer to make copies of the program for the other companies or provide the companies with an opportunity to make copies of the program themselves, many courts have applied the language to file sharing. The most publicized of this line of cases is *Capitol Records, Inc. v. Thomas*, the first P2P file sharing case to reach a jury.⁷² Although the jury found that Thomas infringed Capitol Records’ copyrights, the district court judge overturned the verdict because he found a jury

⁶¹ *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008).

⁶² *Id.* at 169.

⁶³ *Id.*

⁶⁴ *Atl. Recording Corp v. Howell*, 554 F. Supp. 2d 976, 984–85 (D. Ariz. 2008).

⁶⁵ *Id.* at 985.

⁶⁶ *Nat’l Car Rental Sys. v. Computer Assoc. Int’l, Inc.*, 991 F.2d 426 (8th Cir. 1993).

⁶⁷ The claim would be preempted by the Copyright Act, if the claimed breach of the contract “protects a right equivalent to one of the exclusive copyright rights.” *Id.* at 430–31.

⁶⁸ *Id.* at 427.

⁶⁹ *Id.* at 428.

⁷⁰ *Id.* at 434 (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A], at § 8-124.1 (1992)).

⁷¹ *Id.* at 434.

⁷² *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). After a jury awarded the plaintiffs a \$222,000 verdict, the district judge issued a mistrial. The retrial ended with a jury verdict of \$1.92 million, which Judge Davis has recently reduced to \$54,000. Sandoval, *supra* note 10.

instruction invalid.⁷³ The instruction stated, “The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown.”⁷⁴ Relying in part on *National Car Rental*, a binding Eighth Circuit precedent, the District Court for the District of Minnesota, *sua sponte*, found that its own instruction incorrectly stated the law, because the plaintiffs, indeed, needed to prove actual distribution.⁷⁵ The court discussed that the plain language of the statute does not state that offers to distribute constitute distribution. Further, the court found that a dictionary definition of distribution requires a transfer of ownership and rejected the argument that publication and distribution are synonymous.⁷⁶ Then, after comparing *National Car Rental* and *Hotaling*, the court found *National Car Rental* more consistent with the statutory language, stating that the *Hotaling* court’s lack of analysis under § 106(3) showed that it was “guided by equitable concerns.”⁷⁷ Similarly, the courts in *Doe 1* and *Howell* also found that *National Car Rental* stood for the holding that distribution requires actual dissemination of a copyrighted work.⁷⁸

C. *Elektra* Interpretations of the Distribution Right

¶27 The court in *Elektra Entertainment Group v. Barker* found that the statute prohibits two actions: distribution and offering to distribute for the purposes of further distribution, performance, or display.⁷⁹ Although the court rejected the making available doctrine, it found that distribution and publication were synonymous in the Copyright Act.⁸⁰ Unlike proponents of the making available doctrine, however, the court “hesitate[d] in equating this avenue of liability with the contourless ‘make available’ right proposed by Plaintiff.”⁸¹

¶28 The court paid special attention to the last portion of the publication definition: “offering to distribute copies . . . for purposes of further distribution, public performance, or public display.”⁸² If the offer isn’t for purposes of further distribution, then there is no violation of the distribution right.⁸³ Because the plaintiffs did not allege that Barker shared files for the purpose of further distribution,⁸⁴ the portion of the complaint alleging

⁷³ *Capitol Records*, 579 F. Supp. 2d at 1226–27.

⁷⁴ *Id.* at 1213.

⁷⁵ *Id.* at 1227.

⁷⁶ *Id.* at 1217, 1219–20.

⁷⁷ *Id.* at 1224–25.

⁷⁸ *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 167 (D. Mass. 2008); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008).

⁷⁹ *Elektra Entm’t Grp. V. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008).

⁸⁰ *Id.* at 240–43. The court found the words synonymous due to several House committee reports stating that § 106(3) provided the exclusive right of publications and listing publication within the bundle of five rights provided by the statute, the decision in *Harper & Row Publishers*, and decisions of several other courts. At the same time, the court rejected the argument that the letter from Marybeth Peters, the Register of Copyrights, which said the two words were synonymous should be given any weight. *Id.* at 242 n.7. The court also rejected *Hotaling*’s holding that making available constitutes distribution as “not grounded in the statute” and simply “motivated by equitable principles.” *Id.* at 243.

⁸¹ *Id.*

⁸² 17 U.S.C. § 101 (2006) (emphasis added); *Elektra*, 551 F. Supp. 2d at 244–45

⁸³ *Id.*

⁸⁴ *Id.* at 245.

infringement due to defendant's making available files failed to state a claim.⁸⁵ Elektra Entertainment hired investigators who found that the defendant was sharing 611 files on Kazaa, some of which the plaintiff claimed to have copyright ownership.

¶29 Unlike other courts, the *Elektra* court rejected the making available argument despite finding distribution and publication synonymous.⁸⁶ Because it found the two words synonymous, the court held that the entire definition of publication must apply.⁸⁷ Publication includes not simply offering to distribute, but offering to distribute for the purposes of further distribution.⁸⁸ Although the court partially dismissed the complaint, with respect to Elektra's making available claim, because Elektra Entertainment had not shown that Barker had purposes of further distribution,⁸⁹ the court did not discuss what a plaintiff needs to prove in order to show purposes of further distribution. It is possible that courts could develop this requirement into a standard that balances the concerns of the RIAA and uninformed file sharers. Part II will further discuss the possible implications of the *Elektra* decision.

D. Policy Arguments

¶30 The Internet is flooded with websites, articles, and blogs denouncing the RIAA and its litigation craze.⁹⁰ Scholars also strongly criticize the RIAA and the making available interpretation.⁹¹ Many argue that using a making available standard unfairly penalizes people with little awareness of the workings of the Internet and their computers.⁹² Copyright holders have tried to rely on screen shots showing the list of files that a particular user is sharing, but these screen shots do not show which of the shared files have been distributed to other users. Without showing that someone actually copied shared files, actual distribution is uncertain, and therefore courts should not deem the files distributed.

¶31 Although, the RIAA, through its mass lawsuits, has garnered a reputation of being a bully and has put file sharers like Jammie Thomas in the sympathy limelight, the ability for copyright holders to protect their creations remains important. As P2P networks

⁸⁵ *Id.* at 244–45. The complaint was not completely dismissed because the plaintiff also alleged that Barker had downloaded copyrighted files from others on Kazaa, thereby violating the plaintiff's exclusive reproduction right. *Id.* at 247.

⁸⁶ *Id.* at 244.

⁸⁷ *Id.*

⁸⁸ 17 U.S.C. § 101 (2006).

⁸⁹ *Elektra*, 551 F. Supp. 2d at 245.

⁹⁰ See, e.g., *Our Mission*, BOYCOTT-RIAA.COM, <http://www.boycott-riaa.com/mission> (last visited Apr. 16, 2011); Mike Masnick, *Oh Look... RIAA Still Filing Lawsuits...*, TECH DIRT (Mar. 6, 2009, 3:14 AM), <http://www.techdirt.com/articles/20090305/2316484014.shtml>; *Outrageous Lawsuits, RIAA Sued Small Children and People with Cancer*, STOP RIAA LAWSUITS, <http://www.stopriaalawsuits.com/lawsuit.html> (last visited Apr. 16, 2011).

⁹¹ See Shana Dines, Note, *Actual Interpretation Yields "Actual Dissemination": An Analysis of the "Make Available" Theory Argued in Peer-to-Peer File Sharing Lawsuits, and Why Courts Ought to Reject It*, 32 HASTINGS COMM. & ENT. L.J. 157, 158 (2009) (commenting on the "reign of terrorizing lawsuits against peer-to-peer file sharers using P2P programs"); Horsfield-Bradbury, *supra* note 11, at 299 (stating, "Courts should not be swept up in the RIAA's legal wrangling as it twists the text of the statute to meet its needs" and describing the making available doctrine as "nonsensical"); see generally Jonathan R.H. Law, "Making Available": When an Offer to Distribute is Equivalent to Distribution (Dec. 9, 2008) (unpublished article), available at <http://ssrn.com/abstract=1305599>.

⁹² See, e.g., Horsfield-Bradbury, *supra* note 11, at 275.

continue to grow, and new technologies for file sharing emerge, if courts do not find a way to hold infringers liable, there will be no way to protect the works of copyright holders. Several articles suggest market methods to help solve this problem.⁹³ While those methods may be effective, the goal of copyright laws is to protect copyright holders without placing all of the burdens of protection on the copyright holders themselves.

¶32 Copyright holders argue that the statute provides little to no protection if it requires them to show actual distribution.⁹⁴ Proof of actual dissemination is nearly impossible to attain.⁹⁵ Programs like Kazaa and Napster do not keep track of which shared files have been copied. In addition, the prevalence of BitTorrent sites, which allow users to download pieces of the same file directly from multiple different users, as opposed to a central server, means that one person's shared file may not ever be copied as a whole.⁹⁶ Recording companies have hired investigators to download copyrighted files from these lists themselves,⁹⁷ but courts are not necessarily willing to view these as unauthorized downloads, since the companies have, in fact, authorized the downloads.⁹⁸ Copyright holders continue to argue that these measures should be sufficient to impose liability.

¶33 If more evidence is required, then file sharers will rarely be found liable and will be able to share copyrighted material with little restriction. Without technology advances that allow third parties, like the recording companies, to see whether a file has been downloaded and by whom, evidence of actual distribution will remain elusive. In the face of such a dearth of evidence, forcing recording companies to prove actual distribution could provide a windfall to file sharers at the expense of copyright holders. On the other hand, allowing recording companies to show mere making available of works through a screenshot of a person's list of shared files may give the recording companies an unfair advantage and may penalize people who knew that their shared works were either protected or corrupted and, therefore, could not be copied.

¶34 Assuming that the statute does not support the making available doctrine, recording companies and courts must search for other methods of holding file sharers liable for infringement in order to protect the goal of copyright law—providing incentives for artists to produce works.

⁹³ E.g., Joel C. Boehm, Note, *Copyright Reform for the Digital Era: Protecting the Future of Recorded Music Through Compulsory Licensing and Proper Judicial Analysis*, 10 TEX. REV. ENT. & SPORTS L. 169, 192–200 (2009).

⁹⁴ Jacqui Cheng, *MPAA: Actual P2P Distribution Often "Impossible" to Prove*, ARS TECHNICA (June 23, 2008, 11:50 AM), <http://arstechnica.com/tech-policy/news/2008/06/mpaa-actual-p2p-distribution-often-impossible-to-prove.ars>.

⁹⁵ See Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145, 1152 (2008).

⁹⁶ See *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW, 2009 U.S. Dist. LEXIS 122661, at *7–8 (C.D. Cal. Dec. 21, 2009).

⁹⁷ E.g., *UMG Recordings, Inc. v. Alburger*, No. 07-3705, 2009 U.S. Dist. LEXIS 91585, at *3–4 (E.D. Pa. Sept. 29, 2009) (discussing how plaintiffs hired third party investigators, MediaSentry, to detect possible copyright violations and download files in shared folders to determine whether they were audio files).

⁹⁸ See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 166 (D. Mass. 2008).

III. PART II: HOW DO WE DEAL WITH THE PROBLEM OF DISTRIBUTION?

¶35 Although copyright holders and recording companies may be able to determine out of court strategies to deal with the problems that P2P file sharing may cause,⁹⁹ they should be able to appeal to the courts to protect their property. In order to adequately deal with copyright holders' suits, the courts need a unified approach that is consistent with the language of the statute. This section evaluates the feasibility of paths that courts could follow in order to deal with the problem of distribution.

A. Secondary Liability

¶36 Several scholars have suggested using secondary liability to punish file sharers who make works available via P2P networks.¹⁰⁰ This part will first discuss whether using secondary liability is practically feasible.

¶37 Even if we accept that there may be theoretical reasons to adopt a secondary liability framework for people who make copyrighted works available on P2P networks,¹⁰¹ the feasibility of such a framework in these cases is difficult. Secondary liability has two forms: contributory and vicarious.¹⁰² Contributory infringement is when a person induces or materially contributes to the infringing conduct of another person and has reason to know of the infringement.¹⁰³ Vicarious infringement is found when a person "profit[s] from direct infringement while declining to exercise a right to stop or limit it."¹⁰⁴ For individual file sharers, only contributory liability would be an option, as individuals do not profit from others copying their files.

¶38 The problem with fitting file sharers into a contributory liability framework is that proof of direct infringement is a prerequisite for contributory (and vicarious) liability.¹⁰⁵ Plaintiffs would have to prove that a third party copied the defendant's files in order to impose contributory liability. Proving direct infringement, or copying by a third party, seems to raise the same problems that led to the making available debate. The plaintiffs will encounter the same evidentiary drought in showing that a third party copied files

⁹⁹ One example of a possible strategy is creating licensing agreements with Internet service providers. See Matthew Hofmeister, *The RIAA and Online Piracy: Why Bundling Access to Digital Music With Other Products and Services Would Give the Industry Greater Control Over Downloading*, 28 ENT. & SPORTS LAW. 1, 32 (2010).

¹⁰⁰ See, e.g., 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:11.50 (2009); William Henslee, *Money for Nothing and Music for Free? Why the RIAA Should Continue to Sue Illegal File-Sharers*, 9 J. MARSHALL REV. INTELL. PROP. L. 1, 17 (2009); Horsfield-Bradbury, *supra* note 11, at 299; Kasunic, *supra* note 95, at 1163.

¹⁰¹ William Patry argues that putting files in a shared folder, even if it is clear that others downloaded those files, does not constitute distribution because it is not active "giving" and that contributory liability would be more fitting. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:11.50. See also Horsfield-Bradbury, *supra* note 11, at 299. Patry's theory is flawed, however, because a person who shares a copyrighted file through a P2P network and tells his friend to download that file seems no less liable for infringement than the person who sent a copy of the file through email. The ease of online transfers, as opposed to other modes of copying, should not create a different standard for liability. See David O. Carson, *Making the Making Available Right Available*, 33 COLUM. J.L. & ARTS 135, 137–38 (2010).

¹⁰² See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005).

¹⁰³ 3-12 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 (2009).

¹⁰⁴ *Grokster*, 545 U.S. at 930.

¹⁰⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001).

from a given individual's shared folder as they have when attempting to prove distribution under § 106(3).

¶39 In the secondary liability cases involving P2P networks, direct infringement has been shown by evidence that users of the networks, as a whole, copied and distributed copyrighted works.¹⁰⁶ The evidence of users' copying copyrighted works through P2P networks is so extensive that P2P networks have admitted to such violations of reproduction and distribution rights.¹⁰⁷ The known widespread direct infringement (copying) eliminated the need for plaintiffs to show any specific instances of such infringement.

¶40 In the case of individual defendants, however, the question is narrower. The only direct infringement that is relevant to an individual file sharer's liability is third party copying of the individual's own files, rather than the general copying that takes place on the P2P network. The Supreme Court said a contributory infringer is someone "in a position to control the use of copyrighted works by others and [has] authorized the use without permission from the copyright owner."¹⁰⁸ The only copyrighted works that an individual user can possibly control on P2P networks are those on his own computer. If proof of a third party copying a defendant's files from the user is required, as it seems to be, then we reach the same problems that the RIAA encountered in direct liability cases—the same problems that led to the making available doctrine. Proof of specific acts of copying is difficult, if not impossible, to obtain.

¶41 Courts could take the stance that infringement is so widespread, and, therefore, if a person is merely sharing a copyrighted file, someone must have copied it. However, this again, brings us back to making assumptions that are disputed in the current debate. If we assume that proof of illegal copying on the P2P network as a whole is enough to satisfy a showing of direct infringement, however, it may still be difficult to show that file sharers: a) have knowledge that another person copied his files; and b) substantially contribute to or intentionally induce infringement on the network as a whole. First, it would be a hard case to show that file sharers intentionally induce such infringement because, unlike P2P networks, individuals have no profit motive, such as selling advertising space, to induce infringement.¹⁰⁹ Second, although showing substantial contribution to the infringement may not be difficult, it would be difficult to show that the file sharer had knowledge that other people were copying his specific files. If plaintiffs cannot prove that another person copied the file sharer's files, then plaintiffs likely would not have an effective way to show that the file sharer knew whether others were copying his files.

¹⁰⁶ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000) (holding that the "[p]laintiffs have established a prima facie case of direct copyright infringement" because "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music; as much as eighty-seven percent of the files available on Napster may be copyrighted"), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

¹⁰⁷ *E.g., Grokster*, 545 U.S. at 923.

¹⁰⁸ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 (1984).

¹⁰⁹ *Grokster*, 545 U.S. at 936, 40. An individual may reap benefits from other users *uploading* copyright works (putting files on the network), because the individual would then have easy access to these works if he wanted to engage in illegal copying. The question for contributory liability, however, is not whether an individual induced uploading, but whether he induced *downloading* of copyrighted music.

¶42 Secondary liability, therefore, is unlikely to be helpful in finding a way to hold infringers liable without running into the same issues of proof of actual distribution for primary liability, as outlined in Part I. The only argument in favor of using secondary liability is that if a low standard is used, at least the damages awarded against the defendant may not be as great as under primary liability.¹¹⁰ Using a making available standard to prove distribution in contributory liability may seem fair if the damages are not as harsh. Despite this weak equitable consideration, using a making available standard in the contributory liability realm, and not for primary liability, would likely create more problems and questions than it answers.

B. Deemed Distribution and Circumstantial Evidence

¶43 Requiring circumstantial evidence of file transfers to prove distribution is another approach that some courts have taken in P2P file sharing cases. The evidentiary standards that these courts require, however, differ drastically. While courts using a deemed distribution standard require little, if any, more than evidence of copyrighted files in a shared folder in order to infer distribution, other courts would require more, and allow defendants to present evidence leaning against distribution.

¶44 Several courts have interpreted *Hotaling* to represent a concept of deemed distribution.¹¹¹ In *London-Sire Records, Inc. v. Doe 1*, the court explained that deemed distribution explicitly allows the fact finder to draw an inference that distribution occurred “where the defendant has completed all the necessary steps for a public distribution.”¹¹² The Ninth Circuit, in *Perfect 10, Inc. v. Amazon.com, Inc.*, discussed that this deemed distribution doctrine did not apply to Google as it had applied in *Hotaling* and *Napster*, because Google did not own copies of the infringing images involved in the dispute.¹¹³

¶45 The deemed distribution doctrine contrasts from the making available doctrine because it acknowledges that actual distribution is required by the statute and simply chooses a low standard of circumstantial evidence—a standard that only requires a showing that copyrighted files were in a shared folder on a P2P network. In practice, however, the deemed distribution doctrine does not look different from the making available doctrine. The low evidentiary standard presents the same undesirable consequences as the making available doctrine—liability for some people who could not have distributed files, despite the files sitting in a shared folder.

¹¹⁰ 17 U.S.C. § 504 allows for statutory damages of up to \$150,000 per infringed work/song, but does not discuss application to secondary infringers as opposed to direct infringers. It may be possible, therefore, for courts to interpret statutory damages to only apply to direct infringers. See Symposium, *21st Century Copyright Law in the Digital Domain*, 13 MICH. TELECOMM. & TECH. L. REV. 247, 275–76 (2006); Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC’Y U.S.A. 265, 303–04 (2009) (discussing how statutory damages for secondary infringement deters innovations, but also noting that the legislative history of the Digital Theft Act of 1999 contained “no mention of how such statutory damages would apply to those held liable for secondary copyright infringement”). This is an issue on which courts have not yet ruled.

¹¹¹ E.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007).

¹¹² *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008).

¹¹³ *Perfect 10*, 508 F.3d at 1162–63.

¶46

The court in *Capitol Records, Inc. v. Thomas*, on the other hand, ventured further away from the making available doctrine when it said, “Plaintiffs are free to employ circumstantial evidence to attempt to prove actual dissemination.”¹¹⁴ Several scholars have also discussed this alternative to more definite proof of distribution.¹¹⁵ Circumstantial evidence should be required because screenshots, alone, of the files a person is sharing (the only evidence required by making available courts) can be misleading. For example, shared files may not be able to be copied or may not actually be copyrighted. It is possible that the name of a file is not what is actually contained within it,¹¹⁶ a low bandwidth setting will not allow downloads,¹¹⁷ or a file is corrupted, making it unusable.¹¹⁸ In fact, many record companies (and iTunes), at some point, used Digital Rights Management (DRM) technology that prevents copying of files;¹¹⁹ so, even if those DRM-protected files were listed in a shared folder, they could not actually be copied. These obstacles to actual distribution make it difficult to know not only whether a work has been copied, but also whether a work is even capable of being copied. Requiring circumstantial evidence to rule out some of these possibilities would create more of a balance between copyright holders and file sharers.

¶47

Although using circumstantial evidence to prove a fact is not a novel idea,¹²⁰ courts have not discussed its use much in regards to file sharing. If circumstantial evidence were used to prove actual dissemination, judges and juries could look to a number of factors, including (1) how long the files had been shared, (2) the bandwidth settings on the computer, (3) the amount of activity on the P2P network used by the defendant, (4) the quality of the actual files allegedly copied, amongst other relevant data. Relying more heavily on circumstantial evidence would also give the defendants more of a chance to rebut the presumption against them caused by the plaintiffs showing the lists of shared, copyrighted files. Although the circumstantial evidence may not conclusively prove that the files were actually copied by other users, requiring such evidence would help to reach a better balance than the making available doctrine, which seems to require no proof other than a screenshot of song listings.¹²¹

¹¹⁴ *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008).

¹¹⁵ *E.g.*, Kasunic, *supra* note 95; Boehm, *supra* note 93, at 185–187.

¹¹⁶ See Nicolas Christin et al., *Content Availability, Pollution and Poisoning in File Sharing Peer-to-Peer Networks*, 2005 PROCEEDINGS OF THE 6TH ACM CONFERENCE ON ELECTRONIC COMMERCE 68 (describing how people can poison the P2P networks by purposely introducing decoy files with the name and information of copyrighted works, but with “actual content [that] is unreadable, corrupted, or altogether different from what the user expects”); Andrew Orlowski, “*I Poisoned P2P Networks for the RIAA*” — *Whistleblower*, THE REGISTER (Jan. 17, 2003, 1:01 PM), http://www.theregister.co.uk/2003/01/17/i_poisoned_p2p_networks/.

¹¹⁷ *Disabling File Sharing*, MONTCLAIR STATE U., <http://oit.montclair.edu/resnet/disable.html> (last visited Mar. 1, 2011) (giving directions for setting bandwidth to zero in order to disallow downloads of shared files).

¹¹⁸ See Chadwick Schnee, Note, *A ‘Sound’ Policy? The RIAA and the Copyright Act*, 9 U. PITT. J. TECH. L. & POL’Y 1, 20–21 (2009), <http://tlp.law.pitt.edu/wp-content/uploads/2009/10/SchneeVolX.pdf>; Christin, Weigend & Chuang, *supra* note 1166.

¹¹⁹ Julia Layton, *How Digital Rights Management Works*, <http://computer.howstuffworks.com/drm1.htm/printable> (last visited Mar. 1, 2011).

¹²⁰ See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946).

¹²¹ A suggestion to use presumptions against defendants in file sharing suits, see generally Joe Weissman, Note, *Distribution, I Presume: A Role for Presumptions in Establishing the “Making Available” Right*, 27 CARDOZO ARTS & ENT. L.J. 737 (2010), is similar to this circumstantial evidence approach. Under the presumption approach, the courts would assume that copyrighted works in shared

C. The Elektra Method

¶48 As discussed in Part I, the *Elektra* court accepted the premise that distribution and publication are synonymous, but did not accept that the definition of publication provided a making available right.¹²² The court elaborated that the plaintiffs had to show that when the defendant offered to distribute (or made works available on a P2P network), she made the works available “for the purpose of further distribution.”¹²³ The court, however, did not discuss how a plaintiff would show such a purpose. Seizing upon the *Barker* court’s reasoning, other courts may have an opportunity to devise an equitable solution to the making available debate that balances the interests of the RIAA and file sharers. By creating a standard for the purpose of further distribution that accounts for the intent of the file sharer, courts could dismiss claims against defendants who had no knowledge of the technology, those who accidentally shared files, and others who are similarly situated. It is this group of people that generates the most public outrage when sued by the RIAA.¹²⁴ By requiring record companies to at least prove intent when they are unable to prove actual dissemination, courts could protect “innocent” file sharers from liability while still punishing those who are aware of their actions.¹²⁵ In order to make out a prima facie case, the plaintiff would have to either establish proof of intent of further distribution or actual transfer of ownership.

¶49 The court in *Atlantic Recording Corp. v. Anderson* already missed an opportunity to use this standard, however, in its decision granting plaintiffs’ motion for summary judgment. The *Anderson* court found that making a copyrighted work available on a P2P network constitutes an offer to distribute and that “making copyrighted works available for download via a peer-to-peer network contemplates ‘further distribution,’ and thus constitutes a violation of the copyright owner’s exclusive ‘distribution’ right under 17 U.S.C. § 106(3).”¹²⁶ The *Anderson* court and other courts that want plaintiffs to be able to win these infringement cases could easily link sharing files to further distribution, because that often is the purpose of file sharing.¹²⁷ However, as with using the making available doctrine, the court assumed too much when it said that every person who shares files contemplates further distribution.

¶50 Despite the holding in *Anderson*, courts still have an opportunity to use the definition of publication to create a standard that may prove to be more equitable than

folders had been distributed, but the defendants could present evidence to disprove distribution. *Id.* at 747. The presumption approach, however, places a lighter initial burden on the copyright holders, requiring them, at least initially, to show nothing more than the making available of works and places a heavier burden on users.

¹²² *Elektra Entm’t Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 240–41 (S.D.N.Y. 2008).

¹²³ *Id.* at 244.

¹²⁴ See Horsfield-Bradbury, *supra* note 11 at 296; Justin Ryan, *RIAA Preys on Teen in Need of Transplant*, LINUX J. (Dec. 9, 2008), <http://www.linuxjournal.com/content/riaa-preys-teen-need-transplant>.

¹²⁵ Although some people think the results and jury awards in *Thomas* and *Tenenbaum* also seem inequitable, both defendants appear to have willingly infringed the copyrights of the plaintiffs and should not be completely absolved of liability just because file-sharing is prevalent. The question of appropriate damages is separate question.

¹²⁶ *Atl. Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551, at *7 (S.D. Tex. Mar. 12, 2008).

¹²⁷ See Boehm, *supra* note 93, at 184 (discussing how if the goal is to allow plaintiffs to win, courts will allow an inference that file sharing promotes further distribution due to the nature of the networks or import a different broad meaning).

either requiring proof of actual dissemination or allowing the making available of works to constitute infringement.

IV. CONCLUSION

¶51 Neither the making available doctrine, nor requiring proof of actual dissemination reach an optimum balance between the rights of copyright holders and the file sharers who may actually be innocent of infringement. Courts, therefore, should either adopt the reasoning of *Elektra* and then require some form of intent to show a purpose of further distribution or should require a showing of actual distribution, but with the caveat that circumstantial evidence can be sufficient to show such distribution.