"Actual Transfer" vs. "Making Available:" A Critical Analysis of the Exclusive Right to Distribute Copyrighted Works (Part II)

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This discussion and analysis comprises Part II of a two-part article, with Part I having appeared in the Fall 2011 edition of* New Matter.** ***Part I introduced the central issues underlying filesharing lawsuits by providing a technological background of peer-to-peer (P2P) filesharing programs as well as the Constitutional and statutory bases of copyright law. Part I then went beyond these factual and legal fundamentals to illustrate the practical difficulties copyright owners face when attempting to prove infringement in the P2P filesharing context. As a potential solution to these difficulties, many copyright owners have advocated that when a user makes a song available on a P2P network, this is sufficient to constitute copyright infringement. Opponents, on the other hand, argue that an actual transfer of the copyrighted work must take place for infringement to occur. Part II picks up where Part I left off, introducing the "actual transfer" theory, the "making available" theory, and the arguments supporting and criticizing each.

CRITICAL ANALYSIS OF EACH THEORY

Section 106(3) of the Copyright Act provides copyright owners with the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[74] In the P2P filesharing context, the crucial issue is the appropriate interpretation of the term "distribute." This section will first introduce the "actual transfer" theory, discuss the arguments in support of this theory, and provide the main criticisms of this theory. This section will then repeat the process in regard to the "making available" theory.

The "Actual Transfer" Theory

Advocates of the "actual transfer" theory argue that for a violation of the distribution right to occur, an actual transfer of the copyrighted work must take place.[75] In the P2P context, there have only been two cases in which this issue was actually litigated on the merits, and in both cases, the court adopted the "actual transfer" theory.[76] In addition, renowned copyright scholars David Nimmer and William Patry both support the "actual transfer" theory.[77]

Advocates of the actual transfer theory base their argument on the plain meaning rule of statutory interpretation.[78] According to the plain meaning rule, if a statute is unambiguous, then the court should give effect to its plain, ordinary meaning.[79] Applying this rule, the court in *Capital Records, Inc. v. Thomas* explained, "The ordinary dictionary meaning of the word 'distribute' necessarily entails a transfer of ownership or possession from one person to another."[80] Therefore, giving effect to the plain meaning of § 106(3) requires a rejection of the argument that merely making a copyrighted work available to the public is sufficient to violate the distribution right.

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

While the arguments in favor of the "actual transfer" theory appear to be persuasive, there are two main criticisms of the "ac-

tual transfer" theory. First, it is based on a faulty premise. The plain meaning rule should only be applied if the statute is unambiguous, and the definition of "distribute" is ambiguous.[81] The court in *Thomas* cited the *Merriam-Webster's Collegiate Dictionary* for the definition, "to give out or deliver," but had the court chosen a different dictionary, it may have reached a different conclusion.[82] For example, the *Cambridge Advanced Learner's Dictionary* defines "distribute" as "to supply for sale," and the *Webster's New Collegiate Dictionary* defines the term as "to supply."[83] Because it is possible to supply something without actually transferring it to another person, these definitions call into question the "plain meaning" of the term "distribute."[84] Accordingly, because there is more than one reasonable interpretation of the term "distribute," the term cannot be considered unambiguous, and therefore the plain meaning rule should not apply.

Another criticism of the "actual transfer" theory is that by narrowly interpreting the term "distribute" to only include actual transfers of copyrighted works, courts are unnecessarily and unwisely limiting the scope of copyright protection in a time when the legal system is racing to keep pace with rapid advances in technology.[85] While perhaps, as a general rule, broadening the scope of a statute should be left to Congress, in the high technology industry of P2P filesharing, courts should use what little leeway they have in order to keep up with modern times. Ultimately, Congress should be the one to create new statutes in order to combat new threats, but the legislative process can be extremely slow, and by the time a bill is passed, the technology might have already changed. Therefore, in the face of rapid advances in P2P technology, courts should not hesitate to interpret the Copyright Act in a way that adequately addresses these new concerns.

The "Making Available" Theory

Advocates of the "making available" theory argue that the act of making a copyrighted work available to the public is sufficient to constitute a violation of the distribution right.[86] The main proponent of the "making available" theory is the RIAA. However, a few courts, as well as U.S. Copyright Office General Counsel David O. Carson, also support the "making available" theory.[87]

There are three main arguments for why courts should adopt the "making available" theory. First, in the legislative history of the Copyright Act of 1976, Congress appeared to treat the term "publication" as synonymous with "distribution," and the Copyright Act defines "publication" to include "offers to distribute."[88] Second, courts should adopt the making available theory for equitable reasons—namely, the inability of copyright owners to prove that a P2P user actually transferred the copyrighted work.[89] Finally, many believe the United States' international treaty obligations require the courts to adopt the making available theory.[90]

"Publication" Is Synonymous with "Distribution"

Although the Copyright Act of 1976 does not define "distribution," it does define "publication." "Publication" is defined in the Act as either "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending," or alternatively "*the offering to distribute* copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display."[91] This is significant because in the legislative history of the Act, Congress seemed to treat the term "distribution" as synonymous with the term "publication," often using the two terms interchangeably.[92] Therefore, when looking for the appropriate definition of "distribution," courts should turn to the definition of "publication" and conclude that "distribution" includes making copyrighted works available to the public (*i.e.,* offering to distribute copyrighted works).

In response to this argument, Patry and a few courts have explained that equating "publication" with "distribution" is a classic example of the logical fallacy known as "affirming the consequent."[93] This fallacy is illustrated as follows: if X, then Y; Y, therefore X. Put in context, this means that just because all "distributions" are "publications" does not mean that all "publications" are "distributions." Furthermore, the mere fact that the legislative history refers to the two terms interchangeably does not necessarily mean that that the two terms are in fact interchangeable. Congress specifically chose to define "publication," and it chose not to define "distribution." If Congress wanted the definition of "publication" to apply to "distribution" as well, it could have written that in the statute, but it chose not to do so. Accordingly, critics note that courts should hesitate before inferring a congressional intent to equate the two terms when there is nothing in the statute supporting such an instruction.

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

In *Hotaling v. Church of Later Day Saints*, the Fourth Circuit addressed the "making available" issue in a non-P2P context.[94] In *Hotaling*, the defendant, a Church library, made unauthorized copies of Hotaling's copyrighted work and made them available to the public.[95] The district court granted the defendant's motion for summary judgment because there was no evidence showing specific instances in which the library actually loaned the infringing copies to members of the public. The appellate court, however, reversed the lower court's decision and explained that if a plaintiff were required to show that there had been an actual act of distribution, then he would be "prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission."[96] Accordingly, based on equitable concerns regarding the difficulty of proving actual distribution, the court held, "[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or

browsing public, it has completed all the steps necessary for distribution to the public."[97]

Advocates of the "making available" theory argue that the Fourth Circuit's holding is directly applicable to the RIAA's predicament, and therefore the same reasoning should apply.[98] Just as the plaintiff in *Hotaling* was unable to prove that an actual transfer of the copyrighted work took place, the RIAA is equally incapable of doing so. As discussed in Part II.B. above, some courts hold that the evidence obtained by MediaSentry is insufficient to prove a violation of the distribution right because a copyright owner's agent cannot infringe the owner's own copyright rights. Furthermore, even in those jurisdictions where MediaSentry's evidence would be sufficient, those users sharing files through BitTorrent are effectively insulated from liability because of the way BitTorrent operates.[99] Accordingly, just as the Fourth Circuit held that when a public library adds a work to its collection and makes the work available to the public it has completed all the steps necessary for distribution, so too should courts hold likewise when addressing this issue in the P2P context. That is, when a P2P user makes a copyrighted song available for other users to download, that "making available" should be sufficient to violate the distribution right.

Advocates of the "actual transfer" theory respond to this argument by stating that the general trend, as evidenced by the decisions in *Howell* and *Thomas*, is in favor of allowing MediaSentry's evidence to be used to prove violations of the distribution right, and therefore the RIAA's inability to prove its case in that respect is unfounded.[100] In regard to the RIAA's inability to prove its case because of programs like BitTorrent and other advances in P2P technology, some argue that the RIAA is simply not trying hard enough. Ray Beckerman, a lawyer who frequently represents defendants in RIAA lawsuits, has stated that there are "several organizations such as BigChampagne, NPD, BayTSP, and the investigator hired in the *Thomas* case, [which] all claim to possess expertise in tracking filesharing traffic."[101] Accordingly, courts should not be so quick to relieve the RIAA of the burden of proving actual distribution when there is significant evidence that the RIAA is perfectly capable of proving its case on its own.

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

The very phrase "making available" comes from two international treaties that the United States not only signed, but also played a significant role in formulating. The two treaties are the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), commonly known together as the WIPO Internet Treaties. Article 8 of the WCT provides:

> [A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[102]

Similarly, Article 10 of the WPPT, entitled "Right of Making Available of Fixed Performances," states:

> Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at time individually chosen by them.[103]

In addition, the United States, using language similar to that of the WIPO treaties, has committed to provide for a "making available" right in eight separate free trade agreements.[104]

While this language certainly appears to provide for a "making available" right, the WIPO treaties were adopted in 1996 (three years before Napster was even created); therefore, the question remains whether this right applies in the P2P filesharing context. The probable answer to this question is that the WIPO treaties do provide for a "making available" right in the P2P filesharing context. Professor Jane Ginsburg and Professor Silke von Lewinski, both of whom are international copyright scholars, have written articles concluding that "the offering of a copy to other users of a peer-to-peer filesharing network constitutes an act of making available under the WIPO treaties."[105] Furthermore, David O. Carson stated, "The general consensus within the Copyright Office and the Patent and Trademark Office, the two expert agencies involved in the negotiations and the formulation of implementing legislation, was that [the United States's] distribution right covered the making available of copies for electronic transmission."[106] Finally, courts in other countries that have expressly incorporated the "making available" right into their domestic laws have found that filesharing violated the making available right.[107]

Justifiably assuming that the WIPO treaties apply to P2P filesharing, advocates of the "making available" theory argue that the "Charming Betsy" doctrine requires U.S. courts to interpret the Copyright Act to include a "making available" right. As the Supreme Court explained in *Murray v. Schooner Charming Betsy*, when a court is faced with competing interpretations of a statute, the court should construe the statute in a way that does not conflict with international treaty obligations whenever it would be reasonable to do so.[108] Applying this doctrine, the United States is a signatory to the WIPO treaties, the WIPO treaties provide that copyright owners have the exclusive right to make their copyrighted works available to the public, and making copyrighted songs available to the public through P2P filesharing programs constitutes a violation of this right.[109] Therefore, when a court is faced with this issue, it should follow the Supreme Court's rule and interpret the

distribution right to include the making available of copyrighted works to the public. By doing so, the court would ensure that the United States is complying with its international obligations.

In response, supporters of the "actual transfer" theory argue that the Charming Betsy doctrine only applies when the alternative interpretation would be reasonable, and based on the plain meaning of the term "distribute," the "making available" theory is simply not reasonable. As the *Thomas* court explained, "The Charming Betsy doctrine is a helpful tool for statutory construction, but it is not a substantive law.... Here, concern for U.S. compliance with the WIPO treaties and the FTAs cannot override the clear congressional intent in § 106(3)."[110] Accordingly, if U.S. law does not currently comply with the country's international obligations, the only solution is for Congress to amend the Copyright Act, as it would be unreasonable for the courts to ignore the plain meaning rule and interpret the Act in such an expansive manner.

COURTS SHOULD UNIVERSALLY ADOPT THE "MAKING AVAILABLE" THEORY

When a court is presented with a case involving P2P filesharing, and it is forced to decide the issue of whether the "making available" theory or the "actual transfer" theory controls, the court should adopt the "making available" theory. To begin with, the plain meaning rule is inapplicable because the definition of "distribute" is ambiguous. Turning to ordinary dictionary definitions may appear to be a reasonable solution, but it does not resolve the problem because there are several varying definitions of "distribute." Furthermore, while the argument that Congress intended "publication" to be synonymous with "distribution" does not firmly resolve the issue in favor of the "making available" theory, it at least calls into question the appropriate interpretation of the distribution right. Accordingly, given that there are legitimate arguments supporting both interpretations of the term "distribute," it would be imprudent for a court to hold that § 106(3) is unambiguous and simply end its analysis with the plain meaning rule. The statute is ambiguous, and courts should consider other pertinent factors before making a decision.

One significant factor courts should consider is the equitable concern regarding the RIAA's inability to prove that an actual transfer of a copyrighted work took place on a P2P network. As the law stands right now, some courts still hold that MediaSentry's evidence cannot be used to prove a violation of the distribution right, and although the current trend may be moving away from this rule, it is nonetheless a real problem that has cost the RIAA many cases that it probably should have won. Furthermore, P2P programs like BitTorrent make it practically impossible for the RIAA to prove an actual transfer took place, and, as advances in P2P technology continue to occur, P2P users will likely become even more insulated from liability. Unless courts are willing to interpret the Copyright Act in a manner that keeps pace with the rapidly changing technology of filesharing programs, copyright owners may soon be completely incapable of enforcing their rights online and preventing their works from being unlawfully distributed to the public via the Internet. If copyright owners are unable to profit from their works, they will lose the incentive to create these works in the first place. Therefore, adopting the "making available" theory is the best way to ensure the Copyright Act fulfills the utilitarian rationale of intellectual property law, as mandated by Article 1, Section 8 of the United States Constitution.

If the equitable concerns are not enough to convince a court that the "making available" theory is the appropriate interpretation of § 106(3), the Charming Betsy doctrine should remove all doubt. The United States signed both WIPO treaties, thereby assuring the international community that U.S. law would enforce the exclusive rights granted in those treaties. According to the Charming Betsy doctrine, as dictated by the Supreme Court of the United States, when a court is faced with an ambiguous statute, it should interpret the statute in the way that complies with international treaty obligations if it is reasonable to do so. Given the varying definitions of the term "distribute," as well as the equitable concerns regarding the RIAA's inability to prove an actual transfer occurred, it is reasonable to adopt the "making available" theory. Therefore, in the face of ambiguity, courts should interpret § 106(3) to include an exclusive right to make copyrighted works available to the public.

Assuming the "making available" theory is universally adopted by the courts, it is important to consider the implications this will have on the RIAA's campaign to stop copyright infringement, as well as on the P2P industry as a whole. The RIAA has recently stated that it will no longer actively pursue infringement claims against individual users, but it will continue to prosecute those cases already filed, and it may choose to file suits against particularly egregious infringers.[111] Therefore, at least with respect to these cases, adopting the "making available" theory will provide the RIAA with a fair opportunity to receive compensation for the unlawful distribution of their copyrighted works. Moving forward, the RIAA's new plan is to work with Internet service providers ("ISP") to coordinate a method of locating and preventing unlawful filesharing. However, this does not render the "making available" issue moot.[112] The RIAA and ISP's efforts are based on the assumption that P2P users are committing copyright infringement by violating copyright owners' exclusive right of distribution. Therefore, adopting the "making available" theory will solidify the legal basis on which the RIAA and the ISPs will be acting.

As for the effect on the P2P industry as a whole, adopting the "making available" theory will allow the RIAA to effectively litigate its claims against infringers, which in turn should significantly deter unlawful filesharing. When this occurs, legal risk will outweigh the benefits to P2P users and those users who would usually down-

load copyrighted songs unlawfully will turn to legitimate programs, such as iTunes or Napster 2.0. As a result of this shift, the market for legitimate P2P programs will see an increase in demand, which will increase competition, and thus innovation, in the P2P filesharing industry. Furthermore, because these legitimate programs would compensate copyright owners for the use of their intellectual property, the utilitarian rationale would be better satisfied and artistic creation will continue to flourish.

Unfortunately, there might also be negative implications of adopting the "making available" theory. The most notable, and troubling, of which is that by allowing the RIAA to more effectively pursue its claims, more people would be held liable for violating a statute that was not intended to deter "small time" individual infringers.[113] As a result, these individual users will potentially face disproportionately large damage awards. For example, in *Thomas* the defendant, a single mother, was found guilty of willfully distributing twenty-four copyrighted songs.[114] Although it was clear that Thomas was using the P2P program for her own personal use (*i.e.*, enjoyment of free music) and was not seeking to profit from her infringing activity, the jury awarded the RIAA statutory damages of $80,000 for each song, thus amounting to $1.92 million. Most songs on iTunes can be purchased for $.99. Therefore, forcing a defendant to pay 80,000 times that amount is egregiously disproportionate. While statutory damages are meant to not only compensate the plaintiff, but also deter future infringement, individual P2P users can be adequately deterred at a level far lower than 80,000 times the amount of actual damages. Accordingly, strengthening the RIAA's ability to effectively litigate these claims will expose more "small-time" individual users to extremely disproportionate damage awards.

However, the disproportionate damage awards problem may be less troubling than it seems. Under Section 504(c)(2) of the Copyright Act, courts have the authority to reduce damage awards for equitable reasons. This power, known as *remittitur*, can be exercised if the court feels that the damages award is so disproportionate that it shocks the conscience.[115] Notably, this is exactly what the *Thomas* court did.[116] After Thomas was found liable for $1.92 million, the court, exercising its power of remittitur, reduced the damages to $54,000.[117] While $2,250 per song is arguably still disproportionate, it is a far fairer penalty than that Thomas originally would have had to pay. Therefore, while the problem of individual P2P users being held liable for extremely disproportionate damages is both serious and legitimate, it is not unmanageable. If other courts follow the *Thomas* court's lead and exercise their power of remittitur, these awards can be reduced to far more reasonable amounts.

CONCLUSION

Peer-to-peer filesharing programs are a beneficial technological advancement, but the law has been slow to keep up, and this has cost copyright owners hundreds of millions of dollars. The debate over the "making available" theory and the "actual transfer" theory marks an opportunity for courts to adapt the Copyright Act of 1976 to the year 2011. While significant, substantive changes in the scope of copyright law must come from Congress, interpreting an ambiguous statute to allow copyright holders the opportunity to defend their intellectual property rights would not amount to judicial lawmaking. Given the equitable concerns regarding the RIAA's inability to prove that a P2P user actually transferred a song to another user, as well the United States' international obligations to provide copyright owners with an exclusive right to make their works available to the public, adopting the "making available" theory is the best course of action. Accordingly, when faced with this issue, courts should reject the "actual transfer" theory, adopt the "making available" theory, and further the constitutionally mandated policy goal of intellectual property law—promoting the creation of artistic and literary works. ◀◀

The views expressed in this article are personal to the author and do not necessarily reflect the views of the author's firm, the State Bar of California, or any colleagues, organization, or client.

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Endnotes

74. 17 U.S.C. § 106(3).
75. *National Car Rental System v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993); *Atlantic Recording v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008); *Capital Records, Inc. v. Thomas*, 579 F. Supp 2d. 1210 (D. Minn. 2008); *London-sire*, *supra* note 18; *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 281–82 (D. Conn. 2008).
76. *See Howell*, 544 F. Supp. 2d at 985; *see Thomas*, 579 F. Supp. 2d at 1216.
77. 4 William F. Patry, Patry on Copyright § 13:11.50 (2010) ("[A] mere offer to distribute a copyrighted [sic] work does not violate section 106(3)."); 2 David Nimmer & Melville B. Nimmer, Nimmer on Copyright § 8.11[A], at 8-149 (2007) ("Infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.").
78. *See Howell*, 544 F. Supp. 2d at 985; *see Thomas*, 579 F. Supp. 2d at 1216.
79. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).
80. *Thomas*, 579 F. Supp. 2d at 1216 (citing Merriam-Webster's Collegiate Dictionary (10th ed. 1999) (defining "distribute" as, among other things, "1: to divide among several

or many: APPORTION ... 2 ... b: to give out or deliver esp. to members of a group").

81. *See Carson*, *supra* note 15, at 151.
82. *Thomas*, 579 F. Supp. 2d at 1217 (citing Merriam Webster's Deluxe Collegiate Dictionary 531 (10th rev. ed. 1998)).
83. Cambridge Advanced Learner's Dictionary 362 (3d ed. 2003); Webster's New Collegiate Dictionary 333 (1980).
84. For example, if a magazine company places stacks of its magazines at every major subway station in the city of New York, it has supplied (or made available) the magazines to the public regardless of whether anyone actually picks up a magazine (thus constituting an actual transfer of ownership).
85. *See generally Carson*, *supra* note 15.
86. *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Motown Record Co. v. DePietro*, 2007 WL 576284 (E.D. Pa. 2007); *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008); *see generally* David O. Carson, *Making the Making Available Right Available 22nd Annual Horace S. Manges Lecture*, 33 Colum. J.L. & Arts 135 (Feb. 3, 2009).
87. *See* cases cited *supra* note 86.
88. 17 U.S.C. § 101; H.R. Rep. No. 94-1476, at 61–62 (1976); S. Rep. No. 94-473, at 57–58 (1975).
89. *Nicholds*, *supra* note 3, at 993; *see also* Plaintiffs' Supplemental Brief Pursuant to May 15, 2008 Order at 2, *Capital Records, Inc. v. Thomas*, 579 F. Supp 2d. 1210 (D. Minn. 2008) (No. 06-1479) ("Copyright owners typically have no way to monitor—much less prove—the actual transfer of those files.").
90. *See Carson*, *supra* note 15, at 161–62.
91. 17 U.S.C. § 101 (emphasis added).
92. *See* H.R. Rep. No. 94-1476, at 61–62 (1976); S. Rep. No. 94-473, at 57–58 (1975).Columbia article FM 89.
93. *Patry*, *supra* note 19; *London-Sire*, *supra* note 18, at 168–69; *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 984–85 (D. Ariz. 2008).
94. *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997).
95. *Id.* at 201–02.
96. *Id.* at 203–04.
97. *Id.*
98. *Nicholds*, *supra* note 3, at 993; *see also* Plaintiffs' Supplemental Brief Pursuant to May 15, 2008 Order at 2, *Capital Records, Inc. v. Thomas*, 579 F. Supp 2d. 1210 (D. Minn. 2008) (No. 06-1479) ("Copyright owners typically have no way to monitor—much less prove—the actual transfer of those files.").
99. As discussed in Part II.B., on BitTorrent, an entire song is never downloaded from a single user. Rather, tiny fractions of the song are downloaded from multiple users at the same time. Therefore, there essentially is no one user that can be held accountable for the distribution, and even if a plaintiff could discover all the users that contributed to the song (which is highly unlikely), the defendants would have a strong argument that they only transferred a *de minimis* portion of the song, thus rendering them free from liability.
100. *Nicholds*, *supra* note 3, at 933.
101. *Id.*
102. WIPO Copyright Treaty art. 8, Dec, 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121 [*hereinafter* "WCT"], available at http:// www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.
103. WIPO Performances and Phonograms Treaty, art. 10, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 203 [*hereinafter* "WPPT"], available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.
104. Australia Free Trade Agreement, U.S.-Austl., art. 17.5, May 18, 2004, 43 I.L.M. 1248,available at http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; Bahrain Free Trade Agreement, U.S.-Bahr., art. 14.5, Sept. 14, 2004, 44 I.L.M. 544,available at http:// www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text; Chile Free Trade Agreement, U.S.-Chile, art. 17.5(2), June 6, 2003, 42 I.L.M. 1026,available at http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text; Dominican Republic-Central America Free Trade Agreement, art 15.6, Aug. 5, 2004, 43 I.L.M. 514,available at http:// www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text; Morocco Free Trade Agreement, U.S.-Morocco, art. 15.6, June 15, 2004, 44 I.L.M. 544,available at http:// www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text; Oman Free Trade Agreement, U.S.-Oman, art. 15.5, Jan. 19, 2006, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text; Peru Trade Promotion Agreement, U.S.-Peru, art. 16.5(4), Apr. 12, 2006, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; Singapore Free Trade Agreement, U.S.-Sing., art. 16.4(2)(a), May 6, 2003, 42 I.L.M. 1026,available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.
105. Jane C. Ginsburg, *The (New?) Right of Making Available to the Public* 9, Columbia Law Sch. Pub. Law & Legal Theory Working Papers, Paper No. 0478, (2004), available at http://lsr.nellco.org/columbia/pllt/papers/0478; Silke von Lewinski, *Study for the Thirteenth Session of the Intergovernmental Copyright Committee, Certain Legal Problems Related to the making Available of Literary and Artistic Works and Other Protected Subject Matter Through Digital Networks*, P 2.2, e-Copyright Bulletin, (Jan.-Mar. 2005), available at http://portal.unesco.org.
106. *Carson*, *supra* note 15, at 146.
107. Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 Fordham Intell. Prop. Media & Ent. L.J. 1, 35-36 (2007)(noting European cases finding that filesharing infringes making available right).
108. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804)("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").
109. The Copyright Act does not explicitly provide for a "making available" right, yet the United States signed the treaty under the belief that this right was already implicitly granted under current U.S. copyright law.
110. *Capital Records, Inc. v. Thomas*, 579 F. Supp. 2d. 1210, 1218 (D. Minn. 2008).

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