Dollars, Downloads and Digital Distribution: Is "Making Available" a Copyrighted Work a Violation of the Author's Distribution Right?

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I. INTRODUCTION

Recent litigation initiated by members of the Recording Industry Association of America ("RIAA") asserts that "making available" a copyrighted sound recording on a peer-to-peer ("P2P") file-sharing network is a violation of the copyright holder's exclusive right of distri-

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bution.[1] This article will explore the "making available" argument, starting by defining "making available" and illustrating where it applies in the Copyright Act. Next, it will outline the legal stance adopted by the RIAA and the rebuttal to the RIAA's legal arguments. Finally, it will propose a solution both to the narrow legal issue as well as to the broader business issues facing the recording industry today.

II. The Position of the RIAA

A. *What Is "Making Available"?*

According to RIAA briefs,[2] a user who lists copyrighted works on an index that is uploaded to a P2P file-sharing network is violating the exclusive right of distribution set forth in section 106(3) of the Copyright Act.[3] In most instances, these lists are not user-created; they are generated automatically by the P2P software after the software scans the user's hard drive for files. Once the scan is completed, the software generates a list of files that will be of potential interest to remote users of the P2P network. That list then becomes part of an aggregated, searchable index of P2P network users' files that other users can download.

"Making available" a file for others to download means having a copyrighted file stored on a hard drive, allowing locally-installed P2P software to index that file, and connecting to the Internet so that the P2P software can add the files to the aggregated searchable index of users' files. According to Richard Gabriel, one of the plaintiffs' attorneys in *Elektra v. Barker*, the copyrighted file that is being offered for

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[1] *See, e.g.*, Elektra Ent. Group, Inc. v. Barker, No. 05-7340 (S.D.N.Y. 2007); *see also* Atlantic Recording Corp. v. Howell, 2006 WL 2920371 (D. Ariz.) (Argued Dec. 14, 2007).

[2] Including, *inter alia*, Elektra Ent. Group, Inc. v. Barker, No. 05-7340 (S.D.N.Y. 2007) (Brief for Respondent).

[3] 17 U.S.C. § 106 states: The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

upload through the P2P network does not have to be an unauthorized copy in order to violate the 106(3) right of distribution.[4] In other words, a user can legally download a sound recording (e.g., from iTunes), store the file on the hard drive, and launch P2P file-sharing software. According to the RIAA, once the legally obtained file is indexed on the P2P network (and thus "made available"), the user is violating the exclusive right to distribution.[5]

B. *The Plain Language of the Copyright Act Establishes that "Making Available" is an Exclusive Right of the Copyright Owner*

Under 17 U.S.C. § 106(3), the owner of a copyright in a sound recording has the exclusive right to "distribute copies. . . to the public by sale or other transfer of ownership, or by rental, lease or lending." Although the Copyright Act does not directly define "distribute" or "distribution," it does define the terms within its definition of "publication":

> The distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership by rental, lease, or lending. *The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.*[6]

This definition of "publication" is cited frequently by courts when determining the scope of the distribution right, and "publication" has been equated with "distribution."[7]

C. *Case Law Supports an Interpretation of the Copyright Act to Include "Making Available" as a Violation of the Right of Distribution*

The strongest language supporting the RIAA's view of infringement is found in case law from 2001, stating that "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."[8] Moreover, courts have held that no actual

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[4] Transcript of Oral Argument at 27, Elektra Ent. Group, Inc. v. Barker, No. 05-7340 (S.D.N.Y. 2007) (Argued Jan. 27, 2007; available at http://www.ilrweb.com/viewILRPDF.asp?filename=elektra_barker_070126OralArgument).

[5] *Id.*

[6] 17 U.S.C. § 101 (emphasis added).

[7] *See* Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 299 (3rd Cir. 1991) (noting that "publication and the exclusive right protected by section 106(3) are for all practical purposes synonymous").

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

distribution needs to occur; simply making something available for distribution is sufficient to violate the right.[9]

III. REBUTTAL TO THE RIAA'S INTERPRETATION OF 17 U.S.C. § 106(3)

Numerous defendants sued by copyright holders assert that merely making available copyrighted works for download by others does not, by itself, violate the copyright owners' right to distribution.[10] Nevertheless, copyright law dictates that "[i]nfringement of the distribution right requires an *actual dissemination* of . . . copies."[11] The RIAA's "making available" theory, however, would not require copyright owners to present any evidence of actual unauthorized transfers of music files between P2P network users. Instead, the "making available" theory suggests that the mere identification and listing of works available constitutes unauthorized distribution without any further showing that a copyrighted file was actually copied or transferred.

A. *The Plain Language of Section 106(3) of the Copyright Act Narrowly Defines the Distribution Right*

The statutory language of section 106(3) has three important elements.[12] The provision states that the owner of a copyright has the exclusive right: "to distribute [1] copies or phonorecords of the copyrighted work [2] to the public [3] by sale or other transfer of ownership, or by rental, lease, or lending." In shaping the statutory language, Congress chose to limit the right of distribution to *copies or phonorecords* rather than expansively to the copyrighted work itself.[13] The distinction is critical because the Copyright Act defines both "copies" and "phonorecords" to be "material objects" in which copyrighted works

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[9] *See* Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997) (holding that even in the absence of proof that the work had actually been provided to the public, it was sufficient that the title of the work had been included in an index and that the work could have been obtained by a member of the public).

[10] Brief of Petitioner at 5, Elektra Ent. Group, Inc. v. Barker, No. 05-7340 (S.D.N.Y. 2007). *See also In Re* Napster, Inc., 377 F.Supp.2d 802, 805 (holding that plaintiffs' "indexing" theory falls short of meeting the requirements for establishing direct copyright infringement).

[11] Arista Records, Inc. v. MP3Board, Inc., 2002 U.S. Dist. LEXIS 16165 at *14 (S.D.N.Y. Aug. 29, 2002) (emphasis added).

[12] Brief for Computer Communications Industry Association et. al. as Amici Curiae Supporting Petitioners ("CCCI Brief") at 12, Elektra Ent. Group, Inc. v. Barker, No. 05-7340 (S.D.N.Y. 2007).

[13] *Compare* 17 U.S.C. §§ 106(4)-(6) (granting the exclusive right to perform or display "the copyrighted work" publicly).

are fixed.[14] Distribution of copies or phonorecords, therefore, means distribution of *material objects*. Because material objects are not being transferred in the case of "making available" copyrighted works, there is no violation of the 106(3) distribution right.

Moreover, the 106(3) distribution right limits distribution to "sale or other transfer of ownership, or by rental, lease, or lending." Because a "transfer of ownership" suggests a substitution of one owner for another—rather than the addition of owners—the 106(3) distribution right is not implicated when someone makes copyrighted works available over a P2P network.[15]

B. *Case Law Rejects an Expansion of Section 106(3)*

The RIAA relies heavily on *A&M v. Napster*: "users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."[16] Although this language is powerful on its face, the statement is dictum because the existence of direct infringement was never disputed by the defendant in the preliminary injunction appeal.[17] Moreover, in a subsequent proceeding in the same case, the plaintiffs argued that this dictum meant that "making available" copyrighted works violated section 106(3) even in the absence of actual copying. The district court rejected this argument, holding that there could be no infringement without actual copying or transfer.[18]

C. *Expansion of the Distribution Right Threatens Commerce by Blurring a Previously Well-Defined Right*

The RIAA's "making available" theory would abolish the requirement of demonstrating an actual "sale or other transfer" of a "copy" of each allegedly infringed work. It would also graft onto section 106(3) a previously unrecognized right to disallow a mere "offer to distribute."[19] In addition to expanding the scope of the statutorily defined copyright privileges, the "making available" argument would annex the other

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[14] *See* 17 U.S.C. § 101; *see also* 17 U.S.C. § 202 (distinguishing ownership of work from ownership of copies); H.R. Rep. No. 94-1476 (emphasizing the "fundamental distinction" between the intangible copyrighted work and the material objects in which it can be embodied).

[15] CCCI Brief at 10.

[16] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).

[17] Petitioners' Reply Brief at 10, Elektra v. Barker; brief of the Electronic Frontier Foundation as Amicus Curiae in Support of Petitioners ("EFF Brief") at 7.

[18] *In Re* Napster, 377 F.Supp.2d at 802 ("there is no dispute that merely listing a copyrighted musical composition or sound recording in an index of available files falls short of satisfying these 'actual dissemination' or 'actual transfer' standards").

[19] Reply Brief of Petitioners at 12, Elektra Ent. Group, Inc. v. Barker, No. 05-7340 (S.D.N.Y. 2007).

rights of a copyright owner, bringing them under the expanded umbrella of distribution.[20]

Under current copyright law, companies and individuals often enter into contracts that pertain to only one of the several rights in a particular work.[21] Relying on the distinctions enumerated in section 106 of the Copyright Act, private parties have arranged their business affairs with reference to these statutory categories.[22] If all instances of "making available" are considered part of the "distribution" right in section 106(3), then licensees of the public performance rights under sections 106(4) or 106(6) or the public display right under section 106(5) would fall into a trap.[23]

For example, cable and satellite television broadcasters rely on a statutory license that permits them to transmit copyrighted programming to their subscribers.[24] That statutory license is limited to public performance and does not encompass section 106(3).[25] But millions of cable subscribers routinely use digital video recorders to turn those transmissions into downloads, invoking the same process of transmission and reproduction used in digital music downloads. Under the RIAA's proposed expansion of the 106(3) distribution right, cable and satellite providers could now be implicated as infringers. Such an expanded reading of the Copyright Act could severely undermine the business contracts and expectations in the media and broadcasting industries.[26]

IV. SOLUTIONS

A. *Legal: Copyright Owners Do Not Need "Making Available" to Constitute Distribution Infringement Because They Have Adequate Protections Under Other Provisions of Copyright Law*

Existing copyright law gives copyright holders plenty of statutory weapons with which to fight copyright infringers. Copyright owners are already protected against infringing downloaders and uploaders by the exclusive right of reproduction enumerated in section 106(1).

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[20] CCCI Brief at 12.

[21] *See* M. NIMMER & D. NIMMER, 2 NIMMER ON COPYRIGHT, § 8.01[A] (2005) (illustrating that the owner of all rights can license the individual rights separately).

[22] EFF Brief at 12.

[23] CCI Brief at 12.

[24] *See* 17 U.S.C. §§ 111, 122.

[25] EFF Brief at 13.

[26] *Id.*

Downloaders clearly directly violate the 106(1) right by making an unauthorized copy; uploaders violate 106(1) under a theory of contributory liability.[27] Furthermore, copyright owners may seek up to $150,000 per work infringed—without having to prove actual harm.[28] Yet despite these existing protections, the RIAA would like to expand the Copyright Act to include "making available" as a violation of the 106(3) distribution right. Doing so would eliminate their requirement to prove that the actual uploading of copyrighted works ever took place, thus significantly lowering the bar to bring a claim under the Copyright Act.[29]

B. *Business: Copyright Owners Must Provide an Economic Rationale for Consumers to Purchase Music*

Even with judicial victories amassed, the RIAA is losing the overall war of preserving recorded music as a viable revenue stream. Although there are compelling legal and moral reasons for consumers to pay for copyrighted sound recordings, there are currently few economic incentives. In fact, the widespread availability of free (illegal) copies creates a powerful economic *disincentive* for consumers to pay for music. The RIAA is hoping that litigating against everyday infringers will address the problem; their goal is to solve a business problem with a legal solution. But this approach is backwards—the overall purpose of imposing legal protections on copyrighted sound recordings is to ensure the economic function of the music business. Thus, the legal questions of the music industry must be answered with business solutions.

Rampant illegal P2P downloading still occurs because there is very little economic incentive for users to pay a dollar for something they can easily obtain for free.[30] Although other competitors with free alternatives (e.g., cable television and bottled water) eventually became economically viable business models, there is a substantial difference in scale in the instance of music downloads. Someone who downloads only a few songs per month might pay a dollar for the song because the cost is offset by quality and convenience. On the other hand, someone who downloads 100 songs per month will likely choose an illegal download site because the sheer volume of downloads makes the cost of legally purchasing music prohibitive.

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[27] CCCI Brief at 13.

[28] *See* 17 U.S.C. § 504(c)(2).

[29] CCCI Brief at 13.

[30] The combination of negligible production costs (e.g., copying music files) and perfect competition (e.g., millions of networked users) drives the perceived value of an individual song file down to zero.

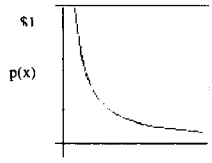
Accordingly, users who consume in bulk are more likely to choose the free, illegal option. If the copyright holders want to gain revenue from these consumers—and clearly, given the right economic model, these consumers could end up generating the *most* revenue—then the architects of legal download models will have to construct an incentive for the bulk users to pay for their purchases. Ultimately, if it makes economic sense to consumers to purchase recorded music, they will do so. Thus the music business will only retain recorded music as a viable revenue stream if it can make the legal purchase of music economically attractive.

One possible business model is an incrementally declining price point. With each purchase, the price of a download decreases on the *next* purchase by a certain percentage point.

Clearly, users who are trafficking thousands of files every month will end up paying a price per song that is asymptotically approaching zero. Nevertheless, that price would still be *greater* than zero, and aggregated among *all* files of *all* bulk users, the revenue generated would be a nontrivial amount—especially compared to what the labels would receive if those users were to choose illegal free alternatives.[31]

let x = number of song downloads per month

let $p(x)$ = the price per song



$\lim_{x \to \infty} p(x) = 0$ (price collapses to zero)

let M = the monthly cost of the aggregated song downloads

Assume k to be the maximum price users will pay for legal downloads per month.

$$M = \sum_{n=1}^{\infty} p(n) = k.$$

From this point, basic mathematical modeling will allow us to determine the function $p(x)$.

V. Conclusion

The advent of free P2P file-sharing has caused the music business to hemorrhage money. As a result, the RIAA is litigating against infringers in a desperate attempt to discourage consumers from seeking free (illegally downloaded) music. But litigating against these infringers is costly, requiring extensive investigations into connections, file

[31] At this end of the spectrum, the download model closely resembles a subscription system.

transfers, and network addresses. Expanding the 106(3) right to include "making available" copyrighted works greatly reduces the burden on plaintiff copyright holders, allowing them to win judgments without showing any actual unauthorized reproduction.

Although sympathy for the copyright holders may initially seem to lend credence to the RIAA's position, the debate over the expanded interpretation in the Copyright Act is not a mere exercise in formalism. Rather, it channels the legal discussion into the narrow rights enumerated in section 106 of the Copyright Act, preventing any one right (e.g., distribution) to commandeer or cannibalize the others. After all, many devices in the digital age involve similar functions of transmission and reproduction. Blurring the lines between the rights as clearly defined in section 106(1)-(6) will further confuse and frustrate technology innovators.

Moreover, the attempt to solve a business issue with a half-baked legal remedy is the RIAA's effort to rearrange deck chairs on the *Titanic*. The solution to the problems of the music industry cannot be effective without being creative and cooperative. Thus, rather than fighting the very consumers who were (up until recently) the lifeblood of the music business, copyright holders should be finding creative solutions to induce consumers' legal purchase of music. By making it economically rational for consumers to pay for music, the industry will stop the gushing loss of digital download revenue.