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WHEN IS THERE DISTRIBUTION? REVISITING THE INTERPRETATION OF "DISTRIBUTE" IN COPYRIGHT INFRINGEMENT WITHIN PEER-TO-PEER FILE SHARING NETWORKS

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I. INTRODUCTION

Peer-to-peer file share networks are an alternative to traditional internet sharing networks. Instead of the traditional method of storing information on a central server, peer-to-peer networks facilitate the connection between users who make content available directly to other users on the network.[1] This facilitation has made the sharing of larger files of information faster and easier. Unfortunately, it has also made it easier for internet pirates to illegally download and distribute copyright protected works.[2] Copyright holders first brought legal action in the 1990s against file sharing networks, like MP3.com and Napster, whose purpose was to illegally store and distribute copyrighted material.[3] Copyright holders were generally successful in shutting off these file sharing networks; however, the result was more savvy file sharing networks that did not explicitly store and distribute the copyrighted materials themselves, and instead left the capability of that kind of use for the users of the network.[4]

In the beginning of the twenty-first century, the pirating of copyrighted materials on file sharing networks was still extremely prevalent.[5] It forced copyright holders to begin to take legal action against individual users that made copyrighted files available to download on a shared folder.[6] Copyright holders advocated for a "make available" theory, which gave copyright holders a cognizable action against a user who places a copyrighted file in their shared folder without having to prove an instance of actual distribution.[7] Some courts accepted the "make available" theory, relying on their interpretation of the plain meaning of the statute and public policy.[8] Other courts rejected the theory, instead relying on their own interpretation of the plain meaning of the statute and secondary sources interpreting the 1976 Copyright Act's legislative history.[9] The result was a circuit split in authority on the validity of the "make available" theory in copyright

[1] *See* Lyombe Eko, *American Exceptionalism, The French Exception, Intellectual Property Law, and Peer-to-Peer File Sharing on the Internet*, 10 J. MARSHALL REV. INTEL. PROP. L. 94, 96.

[2] Lori Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 197.

[3] *See id.* at 198.

[4] *See id.* at 200.

[5] *See id.* at 208.

[6] *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).

[7] *See id.* at 162–63.

[8] *See id.* at 170.

[9] *See id.* at 174–75.

law.[10]

Federal courts later had to interpret the meaning of "distribute" within criminal statutes in relation to peer-to-peer networks.[11] These courts have either accepted the "make available" theory or used the "make available" theory plus circumstantial evidence for the government to prove the act of distribution.[12] These courts focused on the plain meaning of "distribute" in the context of the technology of peer-to-peer file sharing networks.[13] Since these cases were decided more recently, the courts have had the luxury of a modern understanding of how peer-to-peer file sharing networks operate.[14]

This note will advance the argument that the "make available" right is present within the 1976 Copyright Act. The argument will be supported by three main arguments. First, that the plain meaning of "distribute" as used in the 1976 Copyright Act supports a "make available" right, shown in the original "make available" cases and more recent interpretations of "distribute" in other federal statutes. Second, a more extensive examination of the legislative history of the 1976 Copyright Act illustrates congressional intent to include a "make available" right, and courts in the past that rejected the "make available" theory did not look at the pertinent sections of the 1976 Copyright Act's legislative history. Lastly, public policy supports a "make available" right given the continued prevalence of copyright piracy on peer-to-peer networks, the troublesome windfalls if the theory is rejected, and the ease of enforcement it would create. This third argument will also discuss how public policy's support of "make available" rights would align U.S. copyright law with other federal statutes and the United States' treaty obligations.

Another alternative would be a "make available" plus circumstantial evidence standard. This is a compromise approach that some federal courts have adopted for peer-to-peer distribution in the criminal context.[15] It allows possibilities for better legal defenses as well as focuses enforcement towards those who are pirating large amounts of copyrighted materials.[16]

Finally, since the underlying goal of copyright law is to promote the

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[10] *See id.* at 160–61.

[11] *See* United States v. Grzybowicz, 747 F.3d 1296, 1307–08 (11th Cir. 2014).

[12] *See, e.g.*, United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009); United States v. Husmann 765 F.3d 169, 176 (3rd Cir. 2014).

[13] *See* United States v. Carani, 492 F.3d 867, 875–76 (7th Cir. 2007).

[14] *See generally* United States v. Spriggs, 666 F.3d 1284, 1288 (11th Cir. 2012).

[15] *See* Diana Sterk, *P2P File-Sharing and the Making Available War*, 9 NW. J. TECH. & INTELL. PROP. 495, 509 (2011).

[16] John Horsfield-Bradbury, Note, "*Making Available" as Distribution: File-Sharing and the Copyright Act*, 22 HARV. J.L. & TECH. 273, 298 (2008).

arts and sciences, it is important to understand how a "make available" right or a "make available" plus right would affect new technologies and innovations similar to peer-to-peer networks. This note will conclude with explaining how peer-to-peer file sharing networks could satisfy the statutory safe harbor for online service providers. As a result, a "make available" right would not destroy the peer-to-peer file sharing network technology that some fear, since the networks would be protected by the safe harbor. Individuals using the technology for legal purposes would still be able to benefit from a faster and easier technological innovation.[17]

II. BACKGROUND

A. The "Make Available" Theory

The original case courts cite when applying the "make available" theory is the Fourth Circuit decision in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*,[18] with the Third and Fifth circuits being the main courts to have adopted the *Hotaling* holding.[19] In *Hotaling*, the court stressed that in order to find distribution, the plaintiff "must show that an unlawful copy was disseminated to the public."[20] This marked a major shift, as plaintiffs were no longer required to show evidence of specific instances of the library loaning out the infringing copies. Rather, plaintiffs had to show the library held the unauthorized copies in their collections, making the unauthorized copies "available to the public," which was "sufficient to establish distribution within the meaning of the statute."[21] The court reasoned "[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." Thus, the court rejected the defendant's argument that this was merely an "offer to distribute the work."[22]

The Fifth Circuit has extended the logic of the "make available" theory found in *Hotaling* from the context of public libraries to the

[17] Aric Jacover, Note, *I Want My MP3!: Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Application*, 90 GEO. L.J. 2207, 2225 (2002).

[18] 118 F.3d 199 (4th Cir. 1997).

[19] *See* Arista Records LLC, v. Greubel, 453 F. Supp.2d 961, 969 (N.D. Tex. 2006); *see* Warner Bros. Records, Inc. v. Payne, No. 06-CA-051, 2006 WL 2844415, at *4 (W.D. Tex. 2006).

[20] *Hotaling*, 118 F.3d at 203.

[21] *Id.*

[22] *Id.*

context of peer-to-peer file sharing networks.[23] The court held that many of the public policy concerns found in *Hotaling* are present in cases involving peer-to-peer networks, especially the concern that if the "make available" theory was denied, "a copyright holder would be prejudiced by a [defendant] that does not keep records of public use, and the [defendant] would unjustly profit by its own omission" in addition to the fact that "piracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder."[24]

These three circuits (Third, Fourth, and Fifth) concluded that a defendant who took all the necessary steps for distribution and made the infringing copy available to the public, did enough for the defendant's actions to constitute distribution.[25] These circuits similarly equated "distribution" with "publication,"[26] which includes "offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display."[27] The court in *Warner Bros. Records, Inc v. Payne*, found that a user listing a file on an online file-sharing system contemplates "further distribution" since it makes the file "available to countless users of a peer-to-peer system for free" that in fact "encourages further distribution, both on the internet and elsewhere."[28]

B. Criticism of the "Make Available" Theory

While there are circuits that still accept the "make available" theory, other circuits have rejected it in favor of a stricter interpretation of "distribute" within the 1976 Copyright Act, requiring actual distribution for infringement.[29] One leading case analyzing and ultimately rejecting the "make available" theory is *Capitol Records Inc. v. Thomas*.[30] The

[23] *See* Arista Records LLC v. Greubel, 453 F. Supp. 2d 961 (N.D. Tex. 2006); *see also* Warner Bros. Records, Inc v. Payne, 2006 WL 2844415 (W.D. Tex. 2006).

[24] Warner Bros. Records, Inc. v. Payne, 2006 WL 2844415 at *3 (quoting Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F. 3d 199, 203 (4th Cir. 1997)).

[25] *See Hotaling*, 118 F.3d at 203; *Warner Bros.*, 2006 WL 2844415, at *3; Motown Record Co. v. DePietro, 2007 WL 576284, at *3, *5 (E.D. Pa. 2007).

[26] *Warner Bros.*, 2006 WL 2844415, at *3 (citing Harper & Row Publ'g, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985)).

[27] 17 U.S.C. § 101 (2011).

[28] 2006 WL 2844415 at *4 (distinguishing from UMG Recordings, Inc. v. Hummer Winblad Venture Partners, 377 F. Supp. 2d 796 (N.D. Cal. 2005)).

[29] *See generally* Nat'l Car Rental Sys., Inc. v. Comput. Assocs. Int'l, Inc., 991 F. 2d 426 (8th Cir. 1993); Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976 (D. Ariz. 2008) (Ninth Circuit rejecting "make available" theory); London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153 (D. Mass. 2008) (First Circuit rejecting "make available" theory).

[30] Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn 2008).

Thomas court relied mostly on the plain meaning interpretation of 17 U.S.C. § 106(3), focusing on how there is no explicit statement that an offer to distribute or making a work available constitutes distribution.[31] The court took note that Congress outlined "the manners in which distribution can be effected: sale, transfer of ownership, rental, lease, or lending."[32] This led the *Thomas* court to infer, since the "provision does not state that an offer [for sale, transfer of ownership, rental, lease, or lending] constitutes distribution" and "[n]or does § 106(3) provide that making a work available for any of these activities constitutes distribution," that Congress did not intend "distribution" to cover "making available."[33] The court also relied on leading treatises analyzing some of the legislative history of the 1976 Copyright Act.[34] These treatises concluded that making a work available is "insufficient to establish distribution."[35] In addition, the Court held that "[t]he ordinary dictionary meaning of the word 'distribute' necessarily entails a transfer of ownership or possession from one person to another" and does not include offers or making available.[36]

In making its decision, the Court considered the opinion of Marybeth Peters, the Register of Copyrights, who "opined to Congress that making a copyrighted work available violates the distribution right," but the Court rejected it since it determined "opinion letters from the Copyright Office to Congress on matters of statutory interpretation are not binding."[37] Finally, the *Thomas* court took notice of "the use of the term 'distribution' in other provisions of the Copyright Act, as well as the evolution of liability for offers to sell in the analogous Patent Act," and used it to reach "the conclusion that the plain meaning of the term 'distribution' does not include[] making available and, instead, requires actual dissemination."[38]

C. C. Federal Courts' Interpretation of "Distribution" Under 18 U.S.C. § 2252(a)(2)

The Copyright Act is not the only federal statute that does not include a definition of the term "distribute." 18 U.S.C. Ch. 110 addresses the criminal statutes involving sexual exploitation and other

[31] *Id.* at 1217.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* (citing 2–8 DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.11[A] (2008); 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 13.11.50 (2008)).
[36] *Thomas*, 579 F. Supp. 2d at 1217.
[37] *Id.*
[38] *Id.* at 1218–19.

abuses of children.[39] Specifically, 18 U.S.C. Ch. 110 states that one of the criminal behaviors subject to punishment is when a person "knowingly receives, or *distributes*, any visual depiction . . . by any means including *by computer*" when the depiction involved a visual depiction of a "minor engaging in sexually explicit conduct."[40]

Similar to copyright law, file sharing networks have forced courts to determine the proper interpretation of distribution under the child obscenity law.[41] Since the statute does not provide a definition for "distribute," these courts have based their interpretations primarily on the plain meaning of "distribute" within the statute.[42] When analyzing the interpretation of distribution on peer-to-peer networks, the Eastern District of New York stated, "[s]tatutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there."[43] In beginning this analysis, the courts need to consider the "ordinary or natural meaning of the words chosen by Congress" and their "placement and purpose of those words in the statutory scheme."[44] Much like in copyright law, the criminal statute does not contain any definition of "distribute," so the court must consider the "ordinary, common meaning" of the word.[45] *Black's Law Dictionary* defines "distribute" as "[t]o apportion; to divide among several," "[t]o deliver," and "[t]o spread out; to disperse."[46] Using this definition, courts have found that placing files into a shared folder on a peer-to-peer network constitutes distribution because the shared folder is accessible to other peer-to-peer users.[47] Transfer of the files to a specific person is not required, nor does the defendant need to have "knowledge or active participation" in the recipient's downloading of the file, because "the defendant deliberately distribute[s] to all users of the [peer-to-peer] program…and forfeited control over who could download them."[48] The First Circuit has held similarly that "when an individual consciously makes files available for others to take and those files are…taken, distribution has occurred.[49] The fact that the defendant

[39] 18 U.S.C. § 2252(a)(2) (2012).

[40] 18 U.S.C. §2252(a)(2) (2012). (emphasis added).

[41] *See generally* United States v. Caparotta, 890 F. Supp. 2d 200, 203–07 (E.D.N.Y. 2012).

[42] *Id.* at 203–05.

[43] *Id.* at 203 (quoting Cruz–Miguel v. Holder, 650 F. 3d 189, 195 (2d Cir.2011)); *See also* K Mart Corp. v. Cartier, 486 U.S. 281, 291–92 (1988).

[44] *Id.* (quoting Cruz–Miguel v. Holder, 650 F. 3d 189, 195 (2d Cir.2011)).

[45] *Id.* 890 F. Supp. 2d at 204.

[46] *Distribute,* BLACK'S LAW DICTIONARY (9th ed. 2009).

[47] *Caparotta*, 890 F. Supp. 2d at 204.

[48] *Id.*

[49] United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012).

did not actively elect to transmit those files is irrelevant."[50]

The Eastern District of New York cites to the public policy regarding peer-to-peer networks for its interpretation of distribution.[51] The court notes that "the use of a shared folder on a [peer-to-peer] program is more effective at 'distributing' child pornography files than more traditional electronic methods such as email, chat rooms, or a direct private transfer."[52] This is due to the other methods requiring "the distributor to actively initiate and monitor the transfer of files" where in contrast "the same files can be distributed to multiple individuals using the [peer-to-peer] program by the click of a button and without the distributor's participation."[53] Due to the efficiency of the distribution without the need for active participation, the court equates the time of distribution to when the user adds the file to their shared folder.[54]

The Eleventh Circuit has gone further to hold that the government does not even need to show that another user on the network has actually downloaded the file.[55] In *United States v. Spriggs*, the Court held that "to establish distribution, the government does not need to prove that another user actually downloaded a file from [the defendant's] computer."[56] No direct evidence is needed to show other users actually downloaded the files from the defendant's computer, and it is usually sufficient for the government to show that the default setting on the peer-to-peer network "automatically provide[s] for reciprocal sharing and require[s] additional steps if a user [does] not want to share files with others using the program" to prove that distribution occurred.[57] This is mainly due to the nature of peer-to-peer networks and the frequency of the files being shared across users once they become available in a shared folder. In this conclusion, the Court equated "[a]llowing files to be accessed on the Internet by placing them in a file sharing folder" to "posting material on a website for public viewing."[58] Once the file has knowingly been made available to the public, distribution is complete.[59] Based on this decision, the Eleventh Circuit

[50] *Id.*
[51] *Id.*
[52] *Caparotta*, 890 F. Supp. 2d at 204.
[53] *Id.*
[54] *See also* United States v. Farney, 513 Fed. Appx. 114, 116 (2d Cir. 2013) (affirming both conviction and sentence enhancement because "knowingly placing child pornography files in a shared folder on a peer-to-peer file-sharing network constitutes distribution under U.S.S.G §2G2.2, even if no one actually obtains an image form the folder.").
[55] United States v. Spriggs, 666 F. 3d 1284, 1287 (11th Cir. 2012).
[56] *Id.*
[57] *Id.* at 1286–87.
[58] *Id.* at 1287.
[59] *Id.*

once again reaffirmed its interpretation of distribution within peer-to-peer networks in *United States v. Carroll*, holding that "knowingly placing or leaving files in a shared folder connected to a peer-to-peer network undoubtedly constitutes distribution under 18 U.S.C. §2252 (a)(2)."[60]

The Tenth Circuit predominately relied on *Black's Law Dictionary's* definition of distribution to determine that storing files in a shared folder and simply making the files available for downloading was sufficient to establish distribution since it involves a conscious effort.[61] The *Shaffer* court held:

> We have little difficulty in concluding that [the defendant] distributed child pornography in the sense of having "delivered," "transferred," "dispersed," or "dispensed" it to others. He may not have actively pushed pornography on Kazaa users, but he freely allowed them access to his computerized stash of images and videos and openly invited them to take, or download, those items. It is something akin to the owner of a self-serve gas station. The owner may not be present at the station, and there may be no attendant present at all.... But the owner has a roadside sign letting all passersby know that, if they choose, they can stop and fill their cars for themselves.... So, too, a reasonable jury could find that [the defendant] welcomed people to his computer and was quite happy to let them take child pornography from it.[62]

This comparison to a self-serve gas station highlights the ridiculous nature of the claim that peer-to-peer file sharing network users do not distribute just because it looks differently than other copyright distribution. Present and active participation is not required, and like the self-serve gas station, file sharing users take all the reasonable steps to make a file ready and available for another user to download without

[60] 886 F.3d 1347, 1353 (11th Cir. 2018).
[61] United States v. Shaffer, 472 F.3d 1219, 1223 (10th Cir. 2007).
[62] *Id.* at 1223–24.

the original user's active input.[63] The same way one cannot make the claim that a self-service gas station is not distributing gasoline just because the owner is not the one pumping the gas, the Tenth Circuit has found no merit in the argument that users who make their files available to the public are not distributing.[64] In another Tenth Circuit case, *United States v. Dayton*, the court upheld a jury instruction stating "if a person knowingly makes images available on a peer-to-peer file sharing network…this is considered 'distribution' of the images…[the] Government may meet its burden of proof…by showing that Defendant knowingly allowed others access to his shared folder."[65]

The Fifth Circuit agreed with the *Shaffer* (Tenth Circuit) and *Chiaradio* (First Circuit) courts and held that "downloading images and videos containing child pornography from a peer-to-peer computer network and storing them in a shared folder accessible to other users on the network amounts to distribution under § 2252A(a)(2)(B)."[66] The Eighth Circuit also followed the Tenth Circuit's reasoning in *Shaffer*.[67] In *United States v. Dodd*, the court held that "[a]bsent concrete *evidence* of ignorance…a fact-finder may reasonably infer that the defendant knowingly employed a file sharing program for its intended purpose."[68] Since the intended use of the peer-to-peer network is to distribute files among the peer users, the court found it sufficient that the distribution had occurred when the defendant placed the file in their shared folder.[69] The court also found it persuasive to its interpretation of distribution that the language in the equivalent criminal sentencing guideline includes in its definition of distribute "possession with intent to distribute."[70]

When addressing the issue, circuit courts have found that placing files onto a peer-to-peer network where they are accessible to other users constitutes distribution. More specifically, in the circuit courts that have faced the interpretation of distribution in the context of peer-

[63] *Id.* at 1221–22.

[64] *Id.* at 1223–24.

[65] No. 09–5022, 2012 WL 2369328 (10th Cir. June 25, 2012) (citing United States v. Shaffer, 472 F.3d 1219, 1223 (10th Cir. 2007)). *See also* United States v. Dunn, 777 F.3d 1171(10th Cir. 2015) (holding that defendant's knowing placement of child pornography files into shared folder accessible to other users of peer-to-peer file-sharing program was sufficient for trier of fact to conclude that defendant had "distributed" files).

[66] United States v. Richardson, 713 F.3d 232, 236 (5th Cir. 2013). *See also* United States v. Romero-Medrano, 899 F.3d 356, 360 (5th Cir. 2018); United States v. Baker, 742 F.3d 618, 620 (5th Cir. 2014).

[67] *See* United States v. Dodd, 598 F.3d 449, 543 (8th Cir. 2010).

[68] *Id.*

[69] *Id.* at 452–53.

[70] *Id.* at 452.

to-peer file sharing networks, the First, Second, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted similar rulings on the interpretation of distribution under the criminal statute."[71] A vast amount of times distribution is proved simply due to the nature of the peer-to-peer network, with most of the debate in criminal law instead surrounding the defendant's knowledge requirement, mainly if the "very design of the peer-to-peer program may foreclose any possibility that the user unwittingly shared files."[72]

III. ANALYSIS

A. Comparison of Courts' Statutory Interpretation of 17 U.S.C. §109(b)(4) and 18 U.S.C. § 2252(a)(2)

Neither 17 U.S.C. § 109(b)(4) nor 18 U.S.C. § 2252(a)(2) contains a definition of distribution, so courts turn to the plain meaning of "distribution" within the statute.[73] Where the two interpretations diverge has mainly centered on how plaintiffs have argued the cases: plaintiffs in copyright cases have argued that "making available" should be considered an alternative to distribution, but the government in criminal cases has argued that using the shared folders on peer-to-peer networks *was* distribution itself.[74] Courts in the criminal context did not consider the "make available" theory, but instead looked to all the facts and circumstances of each case to find if distribution occurred.[75]

This fact intensive inquiry makes the "make available" argument obsolete since it looks more to the likely certainty that the defendant's actions resulted in the distribution of the file through factors such as

[71] United States v. Carroll, 886 F.3d 1347, 1353 (11th Cir. 2015); United States v. Farney, 513 F. App'x 114, 116 (2d Cir. 2013); United States v. Richardson, 713 F.3d 232, 236 (5th Cir. 2013); United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012); *Dodd*, 598 F.3d at 452; United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007).

[72] *Carroll*, 886 F.3d at 1354. *See also* United States v. McElmurry, 776 F.3d 1061, 1065 (9th Cir. 2015) (finding knowledge when the network requires the user to authorize file sharing for each particular peer that requests a file); U.S. v. Spriggs, 666 F.3d 1284, 1286–87 (11th Cir. 2012) (finding knowledge when a peer-to-peer program prompts the user during installation to choose whether or not he wants to share downloaded files); *Shaffer*, 472 F.3d at 1221 (finding knowledge when the network forces the user to acknowledge and accede to a licensing agreement explaining the peer-to-peer process and then involves the user in setting up a shared folder).

[73] *See Caparotta*, 890 F. Supp. 2d at 204 (noting the absence of a definition of "distribute" within 18 U.S.C. § 2252(a)(2)); Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1218 (D. Minn. 2008) (noting the absence of a definition of "distribute" within 17 U.S.C. § 106(3)).

[74] *See Spriggs*, 666 F.3d at 1287.

[75] *See id.*

how readily available the file was and the frequency of downloads over the network.[76] This fact intensive inquiry in criminal law would also fit within copyright law, as the First Circuit recently noted:

> The Court can draw from the Complaint and the current record a reasonable inference in the plaintiffs' favor—that where the defendant has completed all the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution *actually took place*.[77]

This approach is consistent with 17 U.S.C. §109 because it merely asks what inferences a reasonable fact-finder can make about whether distribution actually occurred.[78] Through this approach the court can find distribution from the combination of making a file available and circumstantial evidence that once the file is made available there is a high likelihood that the file would be downloaded and distributed.[79] Many of the courts that rejected the "make available" theory later began to consider this alternative theory of "making available" plus circumstantial evidence.[80] This combination of making available a file and surrounding circumstantial evidence allows statistical inferences to be made that can ease the hardships of copyright holders since it allows the possibility of proving where reasonable people agree distribution has occurred without the high costs of finding the exact individual who downloaded the file from the user within the file sharing network.[81] From the opposite standpoint, it allows defendants to "present evidence that no such reproduction [of their files] ever took place, thus avoiding liability."[82] It would also expose less computer users and possible defendants to high statutory liabilities for merely inadvertently making files available on a computer level, since there is less of an incentive for copyright holders to go after users who have shared very few files.[83] The incentive instead would be to only bring action against users who

[76] *See id.*

[77] London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (emphasis in original).

[78] *See* 17 U.S.C. § 109 (2013).

[79] *See London-Sire Records*, 542 F. Supp. 2d at 169.

[80] *Id.* at 169, 176–77. *See also* Atlantic Recording Corp. v. Howell, 544 F. Supp. 2d 976, 983–84 (D. Ariz. 2008).

[81] *See London-Sire Records*, 542 F. Supp. 2d at 169.

[82] John Horsfield-Bradbury, "*Making Available" as Distribution: File-Sharing and the Copyright Act*, 22 HARV. J.L. & TECH 273, 298 (2008).

[83] *Id.*

have shared a multitude of files, since it becomes easier to prove via circumstantial evidence that actual distribution has occurred the higher the number of files made available.[84]

The "make available" plus circumstantial argument is a middle-ground between the current circuit split in copyright law, which is a reason why it has been accepted or hinted at by circuit courts that have rejected the strict "make available" right.[85] In addition to how many works a user shares, other circumstantial evidence courts use are: the nature of the work shared (if it is a work that is in high demand and likely to be downloaded or if it is an obscure work not many people know about); the nature of the system (how many users are on it, does it distribute full or partial files, how much traffic is on the network, etc.); how long the file has been available (assuming the longer it is up, the higher the likelihood another user downloaded it); the fact that "the defendant has tried to corrupt or throw out his or her computer[;] terms of service that might permit the service to further distribute works that are made available by users;" and if investigators have been able to download it.[86] This creates a rule of law that is very fact intensive and could vary on a case by case basis.[87] This argument, however, seems to be easier for courts to accept as distribution, rather than accepting "making available" the equivalent or distribution or a separate "make available" right [88]

Many copyright holders would be frustrated with a "make available" plus circumstantial evidence rule for distribution, since it "makes it more difficult for the copyright holder when the copyright holder is pressing the lawsuit to win on summary judgement" due to the increase in factual issues and potential disputes.[89] This forces the copyright holder to develop its case further, prior to the summary judgement stage, or risk the increase costs of lengthier litigation.[90] This is why copyright holders have not advocated for this type of "make available" plus circumstantial evidence theory, that the government has advocated for in many criminal cases, but instead would prefer there to simply be a "make available" right in copyright law.[91]

While courts have been presented with the "make available" theory by copyright holders looking to equate "make available" with

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[84] *See id.*

[85] *See* Symposium, *Make It Available at Your Own Risk: A Look into Copyright Infringement by Digital Distribution*, 30 LOY. L.A. ENT. L. REV. 1, 28 (2009).

[86] *Id.* at 28–29.

[87] *See id.* at 29.

[88] *See* Horsfield-Bradbury, *supra* note 84.

[89] Symposium, *supra* note 87 at 29.

[90] *Id.*

[91] *See id.* at 27–28.

"distribution," the courts have been inconsistent in their interpretations of both the statute and Supreme Court precedence.[92] For example, courts have deviated in their interpretation of 17 U.S.C. § 109 with their interpretations of the Supreme Court's holding in *Harper & Row Publishers, Inc. v. Nation Enterprises* regarding the right to "publish."[93] Courts that reject the "make available" theory state that the right to "publish" is distinct from the right to "distribute," since the Supreme Court has specified such a publication right.[94] On the other hand, courts that accept the "make available" theory have read the *Harper* decision to even further cement the equating of the right to "distribute" with the right to "publish."[95] The Supreme Court in *Harper* does equate "distribute" and "publish" more than it creates a separate "publication" right; specifically it discusses the "right of first distribution"[96] and "right to control the first public distribution."[97] Even within the opinion, the Supreme Court speaks of the two rights conjointly, which supports the continued idea that the right to "distribute" encompasses the right to "publish," which includes a "make available" right.[98]

The other point of contention is how the definition of "publication" affects how the court should interpret "distribution."[99] 17 U.S.C. §101 defines "publication" to include "the offering to distribute copies or phonorecords."[100] Critics of the "make available" theory use this definition as an example of if Congress wants to create a "make available" right, they are capable of doing it.[101] On the other hand, courts that accept the "make available" right highlight that "publication" should be read as a subset of the right of "distribution."[102] In the criminal context, courts have found it persuasive that "distribution" is defined to include "make available" in another part of the statutory scheme, specifically in the sentencing guidelines that correspond to 18 U.S.C. § 2252(a)(2).[103] Where distribution is not defined in the statute and the other sections have further pertinent

[92] *See* Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1220 (D. Minn. 2008); Warner Bros. Records, Inc. v. Payne, No. W-060-CA-051, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006).

[93] *See* 471 U.S. 539, 568–69 (1985).

[94] *Thomas*, 579 F. Supp. 2d at 1220.

[95] *Warner Bros. Records, Inc*, WL 2844415 at *3.

[96] *Harper*, 471 U.S. at 543, 547.

[97] *Id.* at 552.

[98] *Id.* at 547.

[99] *See generally* Am. Visuals Corp. v. Holland, 239 F.2d 740, 744 (2d Cir. 1956).

[100] 17 U.S.C.A. § 101.

[101] *See* Elektra Entm't Grp, Inc. v. Barker, 551 F. Supp. 2d 234, 245 (S.D.N.Y. 2008).

[102] *See id.* at 243.

[103] *Dodd*, 598 F.3d at 452.

definitions, it would be improper to assume facially that Congress intended a negative without a more in-depth analysis into legislative history.

B. Legislative History's Impact

Courts often look to legislative history in order to help interpret Congressional intent of statutory language that may appear to be ambiguous.[104] Many of the courts that rejected the "make available" theory within copyright law cited legislative history and intent, as well as legal scholars' interpretation of the legislative history and intent as a reason for rejecting the "make available" theory.[105] However, many legal scholars have reexamined the legislative history of the Copyright Act of 1976 following court decisions regarding the "make available" theory and have come to different conclusions.[106] Prior to 2011, the most cited treatise in copyright law, *Nimmer on Copyright*, took the position that in order to infringe on the distribution right, there is a requirement for actual dissemination of copies of a work to the public.[107] After further analysis of the legislative history, however, Nimmer amended his latest treatise in 2011 stating that "the distribution right was formulated precisely so that it would extend to making copyrighted works available, rather than mandating proof of actual activities of distribution."[108]

Many legal scholars have changed their attitudes on whether Congress intended there to be a "make available" right due to the work of Professor Peter S. Menell, who went further back into the legislative history of the 1976 Copyright Act to explain the existence of the "make available" right.[109] Menell recognized that the 1976 Copyright Act was

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[104] *See generally* Chen v. Major League Baseball Props., Inc., 798 F.3d 72, 76 (2d Cir. 2015) ("[W]here a statute is ambiguous, [courts] may look to legislative history to discern the legislature's intent."); Escuela de Medicina San Juan v. Liaison Comm., 820 F. Supp. 2d 317, 319 (D.P.R. 2011) ("Only when a statute is ambiguous should the court look to congressional intent in order to interpret a statute.").

[105] *See* Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1219 (D. Minn. 2008); National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F. 2d 426, 434 (8th Cir. 1993); Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 983–84 (D. Ariz. 2008); London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153, 168 (D. Mass. 2008).

[106] *Compare Atlantic Recording Corp.*, 554 F. Supp. 2d at 984, *with* Elektra Entm't Grp., Inc. v. Barker, 551 F. Supp. 2d 234, 241 (S.D.N.Y. 2008).

[107] Melville B. Nimmer, 2 Nimmer on Copyright § 8.11[C][1][a] (2012) ("Infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.").

[108] Nimmer, *supra* note 109, § 8.11[D][4][c].

[109] *See, e.g.*, BMG Rights Mgmt LLC v. Cox Commc'ns, Inc., 149 F. Supp. 3d 634, 668 (E.D. Va. 2015), *aff'd in part, rev'd in part*, 881 F.3d 293 (4th Cir. 2018)

developed over twenty-one years starting in 1955, and the relevant pieces of legislative history discussing the right to "distribute" are not found in the 1976 notes, but between 1961 and 1965 (eleven to fifteen years earlier than what many litigators and courts were analyzing).[110] The issue about the distribution right was settled during those early years, not during the 1976 Congress.[111] Within the 1964 hearings and the 1965 Supplemental Report prepared by the Register of Copyrights, it is clearly established the reasons why Congress sought to replace the 1909 Act's right to "publish" and "vend" with the right to "distribute," and the issue was settled with no further discussion for the next eleven years leading to the passing of the 1976 Act.[112] Menell argues that since there is nothing to contradict the 1964 hearing transcript and 1965 Supplemental Report in the eleven intervening years before the passing of the bill, these two documents give the best insight into Congress's intent for the right of distribution.[113]

The question that many courts have difficulty understanding is why the 1976 Act replaces "publish" and "vend" with a new term "distribution," especially since the Register of Copyright wanted to retain the right to publish.[114] The answer is found in the February 1963 hearing, where the Register of Copyrights Abe Goldman stated:

> "Subsection (b), I believe, would cover everything that's covered in section 1(a) of the present law by reference to the terms "publish" and "vend"-- broadened, I would say, to avoid any questions as to whether "publish" or "vend" is used in such a narrow sense that there might be forms of distribution not covered. I think

("There is a split in the academic debate, with Menell and Nimmer advocating for a 'making available' right and Patry and Goldstein advocating for actual distribution."); Katherine E. Beyer, *Taking the "Hype" Out of Hyper-Linking: Linking Online Content Not Grounds for U.S. Copyright Infringement*, 55 IDEA 1, 9 (2014) ("Menell's legislative history argument—combined with Nimmer's adoption of the 'making available' right and the U.S.'s international obligations—largely fueled supporters' reasoning when advocating for the adoption of the 'making available' right."); Rick Sanders, *Will Professor Nimmer's Change of Heart on File Sharing Matter?*, 15 Vand. J. Ent. & Tech. L. 857, 858, 866 (2013) (Explaining that Menell's 2011 article persuaded the revision of *Nimmer on Copyright*—". . . the most important and influential treatise on copyright law.").

[110] Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 COPYRIGHT SOC'Y U.S.A. 1, 31–32 (2011).

[111] *Id.* at 32.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 41.

> the draft covers virtually all forms of distribution."[115]

Goldman clearly explains that the distribution right should be interpreted as broader than the right to "vend" or "publish."[116] The reason for the change to "distribution" was not to redefine what was covered by "publish" or "vend," but instead to make sure that other forms of distribution were covered that may not have been if "publish" or "vend" were construed narrowly.[117] By interpreting the right to distribute narrowly to exclude the "make available" right that was covered under the old "right to publish," the courts that rejected the "make available" theory ignore this important part of legislative history.[118]

For the courts that still wonder why the 1976 Act did not specify or define the right to distribute to include the right to "make available" like previous acts, the answer can be found by looking at Chapter 2 of the 1965 Supplemental Report:

> Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach . . . . [A] particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances. For these reasons, we believe that the author's rights should be stated in the statute in broad terms.[119]

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[115] *Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions and Comments on the Draft*, 3 COPYRIGHT LAW REVISION 108, 110 (1964).

[116] Menell, *supra* note 112, at 42.

[117] *Id.* at 57.

[118] *Id.* at 16, 25.

[119] STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW

Congress did not want to give extensive definitions to the rights in 17 U.S.C. § 106 in fear that future technologies would make those definitions obsolete.[120] The absence of an explicit definition of "distribution" or inclusion of "make available" right should not be interpreted as Congress's intent to limit or eliminate the "make available" right, especially since the other hearings confirmed the intent of Congress to keep and expand upon the rights of "publication" and "vending."[121] Instead, it is clear that Congress knew there would be technological developments it would not be able to foresee, and it denied restricting the language of the copyright owner's exclusive rights that could result in limiting the copyright owner's interest if new technologies develop.

Congress even used the terms "distribution" and "publication" interchangeably in their reports: "*Public distribution*.—Clause (3) of section 106 establishes the exclusive right of publications: The 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.'"[122] "The unmistakable implication is that Congress intended . . . the right to distribute to fully encompass the right to publish [and for distribution] to be understood [in] reference to established understanding of publish and publication."[123] There were "several instances where the Congress that passed the 1976 Act" did not "refer to the distribution right when they [were] defining distribution; they referred to [it] as a publishing right."[124] This act, in addition to previously discussed Congressional intent to have distribution be interpreted broader than publication, would make it absurd to exclude any rights (like the right to "make available") that were present under "publication" for the new "distribution" right.

REVISION, PART 6, SUPPLEMENTARY REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, at 13–14 (Comm. Print 1965).

[120] *See* ROBERT KASTENMEIER, COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted* in 1978 U.S.C.C.A.N. 5659, 5664 ("Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion . . . .").

[121] *Id.* at 130 ("With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given 'publication' a number of diverse interpretations . . . .").

[122] *Id.* at 62.

[123] Menell, *supra* note 112, at 245–46.

[124] Jay Dougherty et. al., *supra* note 87, at 25.

Along with legislative history, parallel copyright law decisions by Congress helped shape the language of the 1976 Act. The Sound Recording Amendment Act of 1971 and the ratification of the Geneva Phonogram Convention frame distribution to encompass the offering of duplicates to the public. These documents illustrate that the definition of publication in §101 of the 1976 Act, which included the "offer to distribute," should be construed within the definition of "distribute".[125]

The intent to broaden the right to "publish" and "vend" was not the only reason the right to "distribute" took their place. The definition of "vend" within the 1909 Act was specific to the right to "dispose of by sale," but the definition of "publish" was more subtly ambiguous.[126] It not only referred to an exclusive right to publish, but also was a requirement for federal copyright protection.[127] To gain copyright protection, an author or artist would have to publish with notice, and this requirement tied the term "publication" to two distinct meanings within the statute.[128] Courts never tried to reconcile the two meanings of "publish," so Congress agreed there was no place for "publication" in the new 1976 Act.[129] The use of "publication" in the 1909 Act's "main reason for existence was no longer valid [in the new Act,] because it would be inconsistent with international treaties the drafters expected the United States to join eventually."[130] Mainly, the 1976 Copyright Act excluded the notice requirement that was paired with publication's second meaning.[131] "Distribution" was used not only to expand upon "publication" and "vending," but it was also used to clarify and avoid this confusion about using an ambiguous term like "publication" in the new legislation.[132]

The full legislative history of the 1976 Act makes it clear that "the scope of 'distribute' encompasses the prior right to 'publish,' but in 'broadened' form."[133] There is no need to consider the terms "publication" and "distribution" as mutually exclusive terms, and "if anything, Congress intended [distribution] to be [construed] broader."[134] Congress chose the term "distribute" to encompass and broaden the rights to "publish" and "vend" while avoiding the confusion and "roundly criticized set of doctrines" distinguishing between different

[125] *See* Menell, *supra* note 112, at 220.

[126] Rick Sanders, *Will Professor Nimmer's Change of Heart on File Sharing Matter?*, 15 VAND. J. ENT. & TECH. L. 857, 866 (2013).

[127] *Id.* at 867.

[128] *Id.*

[129] *Id.* at 869–71.

[130] *Id.* at 870; *see also* H.R. REP. NO. 94-1476, at 144–45 (1976).

[131] Sanders, *supra* note 128, at 870.

[132] *Id.* at 870–71.

[133] Menell, *supra* note 112, at 257.

[134] *Id.* at 259.

types of publication that developed under the 1909 Act's need for formalities.[135]

C. Public Policy for Enforcing Infringements on Peer-to-Peer Networks

1. Prevalence of Piracy on Peer-to-Peet Networks

As a policy concern, copyright infringement is still prevalent on peer-to-peer file sharing networks.[136] In 2017, "nearly all of the top 50 most-searched phrases" on the most popular file sharing network, BitTorrent, "were the names of copyrighted movies or television shows."[137] BitTorrent alone makes up more than a quarter of all Internet traffic.[138] This is in addition to the fact that "nearly a quarter of internet traffic is estimated to be infringing copyright" and peer-to-peer file sharing networks add another layer of anonymity that makes it harder to enforce copyright infringement.[139] In 2015, roughly 7.7 million Americans paid for a music subscription service compared to the 20 million Americans who got their music through peer-to-peer file sharing networks.[140] This high prevalence of infringing activity on file sharing networks, which by nature have a layer of anonymity and difficulty for third parties to track the files, creates a glaring need for embracing better copyright protection and enforcement.[141] Previously, courts did not reject the "make available" theory because it conflicted with public policy, but because the courts held it was contrary to statutory interpretation.[142]

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[135] *Id.* at 267.

[136] Francis Dinha, *The Danger of P2P File-Sharing Sites*, FORBES (Dec. 21, 2018 7:45 AM), https://www.forbes.com/sites/forbestechcouncil/2018/12/21/the-dangers-of-p2p-file-sharing-sites/#71830d4f787c.

[137] *Id.*

[138] Jia You, *A Peak Inside the Internet's Favorite File-Sharing Network*, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE (Oct. 6, 2014 3:00 PM), https://www.sciencemag.org/news/2014/10/peek-inside-internets-favorite-file-sharing-network.

[139] Dinha, *supra* note 138; *see also* Ryan Faughnder, *Music Piracy is Down but Still Very Much in Play*, LOS ANGELES TIMES (June 28, 2015 7:17 PM), https://www.latimes.com/business/la-et-ct-state-of-stealing-music-20150620-story.html ("About a fifth of Internet users around the world continue to regularly access sites offering copyright infringing music").

[140] Faughnder, *supra* note 141.

[141] *See* Dinha, *supra* note 139.

[142] *See* Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008) (acknowledging that foreign copyright treaties and the Register of Copyrights both advocate and describe a more expansive reading of "distribute.").

2. "Make Available" Right Would Be Consistent with U.S. Treaty Obligations

A "make available" theory would be consistent with the United States' international treaty obligations.[143] The United States is a party to the World Intellectual Property Organization Copyright Treaty, which recognizes a "make available" right for copyright owners.[144] Also, the World Intellectual Property Organization Performances and Phonograms Treaty, to which the United States is also a party, recognizes a similar "make available" right.[145] Neither one of these are dependent on proof that copies were actually transferred to particular individuals.[146] The United States has also entered into several Free Trade Agreements that provide a "make available" right.[147] By ratifying these treaties, "the legislative and executive branches indicated that U.S. law complied with the treaties by protecting that making-available right."[148]

3. "Make Available" Right Would Be Consistent with U.S. Federal Statutes

Interpreting a "make available" right in copyright law would not be contrary to any other current federal court interpretations of "distribute" in other federal statutes.[149] Besides 18 U.S.C. § 2252(a)(2), other provisions of federal copyright law have explicitly defined "distribute" even more broadly to include offers to distribute as well.[150] 17 U.S.C. § 901(a)(4) addresses copyright protection of semiconductor chip products, and states that "to 'distribute' means to sell, or to lease, bail, or otherwise transfer, or to offer to sell, lease, bail, or otherwise transfer."[151] 17 U.S.C. § 506(a)(1)(C) (2012) imposes criminal penalties for "the distribution of a work being prepared for commercial

[143] World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 67 [hereinafter WCT].

[144] WCT, *supra* note 145, at art. 6(1), art. 8.

[145] World Intellectual Property Organization Performances and Phonographs Treaty art. 12(1), art. 14, Dec. 20, 1996, 36 I.L.M. 78, 84–5 [hereinafter WPPT].

[146] *See* WCT, *supra* note 145, at art. 6(1), art. 8; WPPT, *supra* note 147, at art. 12(1), art. 14.

[147] *See, e.g.*, U.S.-Australia Free Trade Agreement, Austl.-U.S., art. 17.5, May 18, 2004.

[148] Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008).

[149] United States v. Shaffer, 472 F.3d 1219, 1224–25 (10th Cir. 2007).

[150] Motown Record Co., LP, et al. v. DePietro, 2007 WL 576284 (E.D. Pa. 2007).

[151] 17 U.S.C. § 901(a)(4) (2012).

distribution, by making it available on a computer network accessible to members of the public."[152] 17 U.S.C. § 1101(a)(3) deals with unauthorized fixation and trafficking in sound recordings and music videos, the "bootleg statute," which among its prohibited acts includes someone who "distributes or offers to distribute, sells or offers to sell."[153] Even the Register of Copyrights, who has historically been prominent in setting or influencing U.S. copyright policies, "opined to Congress that making a copyrighted work available violates the distribution right."[154]

Critics of the "make available" theory would point to these statutes as evidence that Congress, when it wants to, can specify a "make available" right. However, given that the legislative history of the 1976 Copyright Act indicates that the right to "distribute" encompasses and expands upon the right to "publish" (which includes the right to "make available"), it is less of a concern that Congress did not explicitly restate the right to "make available."[155] Legal scholars have also found no logical distinction between the right to distribute within the 1976 Copyright Act and the acts of distributing in any of these other federal statutes.[156] There is no legislative history or statutory language that would suggest that "distribute" within the 1976 Copyright Act should be interpreted any differently than these other statutes.[157]

4. Troublesome Windfalls of Rejecting the "Make Available" Right

Another public policy rationale for enforcing a "make available" theory is that there are potential windfalls for defendants if the "distribution" right is construed as narrowly as courts like the *Thomas* court have interpreted it.[158] The same windfall the *Hotaling* court discussed, how defendants would be able to get away with infringement through improper record keeping absent a "make available" theory, could also be said about infringement on file sharing networks absent a "make available" right.[159] It would be impossible to find evidence of

[152] 17 U.S.C. § 506(a)(1)(C) (2012).

[153] 17 U.S.C. § 1101(a)(3) (2012).

[154] *Thomas*, 579 F. Supp. 2d at 1217–18.

[155] *See generally* Devin Hartline, *Nimmer Changes His Tune: "Making Available" is Distribution*, COPYHYPE (Oct. 02, 2012), http://www.copyhype.com/2012/10/nimmer-changes-his-tune-making-available-is-distribution/.

[156] Jay Dougherty et al., *supra* note 87 at 27.

[157] *Id.* at 27–28.

[158] *See generally* Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1218–1224 (D. Minn. 2008).

[159] Anna Sallstrom, *Diversey and the Not-Yet-Existent Right to Make Copyrighted*

actual distribution if the peer-to-peer networks kept poor records of the transactions between users or developed the technology for their network to make it impossible to track the transfers of files between each of the users.[160] The file sharing networks and their users would benefit from creating a technology that forecloses any opportunity to prove actual dissemination.[161] Accepting the "make available" theory, or even a "make available" plus circumstantial evidence rule, would finally make it possible for copyright holders to find proper remedies for infringing works being distributed over file sharing networks.[162] A "make available" right would still be preferable to copyright holders, because much of the circumstantial evidence, like the nature of the system or length of time the file had been available, relies upon the file sharing network's technology being readily understandable and trackable.[163] The fact that "piracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder"[164] creates questionable results if copyright law is construed to make it even harder for copyright holders to regulate their rights that are infringed by those who are using means to purposefully hide their actions.

The second windfall of rejecting the "make available" theory would be that the statute will be read to be more restrictive when it comes to newer technologies.[165] For courts addressing the child obscenity criminal statute, interpreting "distribution" to include "making available," "keeps pace with recent technology that has enormously increased the ways that child pornography can be created, accessed, and distributed."[166] Since peer-to-peer networks are more efficient than standard distribution methods (face-to-face, mail, email, etc.), especially with higher volume of files, stricter methods of enforcement are needed for infringement on these networks.[167] Unlike pirating

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Works Available to the Public, PUBLIC KNOWLEDGE (Jan. 9, 2014), https://www.publicknowledge.org/news-blog/blogs/diversey-and-not-yet-existent-right-make-copy.

[160] *Managed File Transfer*, BLUE TURTLE TECH., https://blueturtle.co.za/portfolio-item/managed-file-transfer/ (last visited Aug. 31, 2019).

[161] *Id.*

[162] Thomas D. Sydnor II, *The U.S. Making-Available Right: Preserving the Rights "To Publish" and "To Perform Publicly"*, Feb. 2014, at 59.

[163] Jay Dougherty et al., *supra* note 87 at 28 (while some circumstantial evidence like the nature of the file, guilt inferring act of defendant, or if investigators can download are independent of the file sharing system's control).

[164] *Warner Bros. Records, Inc*, No. W-06-CA-051, 2006 WL 2844415 at *3.

[165] United States v. Caparotta, 890 F. Supp. 2d 200, 208–09 (E.D.N.Y. 2012) (explaining that the court's broad interpretation of the statute is consistent with plain meaning and takes changing technology into account).

[166] *Id.* at 209.

[167] *See generally* S. Rep. No. 105-190, at 2 (1998) (legislative history for Digital

businesses, these users on file sharing networks distribute materials anonymously and privately, and more importantly, "if you waited until a single copy was 'shared'—in other words, waited for actual distribution" then it becomes near impossible to enforce.[168] These files cannot be traced easily or recalled.[169] If a copyright holder cannot stop the distribution until after the file was actually distributed, then the copyright owner "no longer [has] the exclusive right to make its work available because other people were making it available" but also "no longer [has] the exclusive right to distribute because the work [has] already been distributed."[170] This would limit the right to "distribute" to merely a right to attempt to recover damages; and in the context of file sharing networks, these damages are difficult to recover since proving the specific actual distribution is problematic.[171]

5. "Make Available" Right Creates Ease of Enforcement

Finally, the "make available" right would make enforcement easier, since tracking files across peer-to-peer networks, to find evidence of where the file originated and which users downloaded it, can be very costly.[172] Modern networks, like BitTorrent, make the tracking of files even more difficult since the network takes small fragments of files from many different users to create one downloaded file.[173] This means that any one user downloading a single file is actually downloading parts of the file from several different users.[174] On the other side of the network, any one user sharing their files are not sharing a complete file with another single user, but they are sharing different pieces of their file with several other different users.[175] This makes finding evidence of a user "distributing" a complete file to a single user practically impossible.[176]

The contents a user has in their shared folder that they have made available to the public is easier to monitor and produce as evidence. Applying common logic to how these peer-to-peer file sharing networks work, once a file is placed in a shared folder and left there, it is

Millennium Copyright Act of 1998).

[168] Jay Dougherty et al., *supra* note 87 at 16.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 17–18.

[172] *Id.* at 16–17.

[173] *See* Jia You, *supra* note 140.

[174] Chris Hoffman, *How Does BitTorrent Work?,* HOW-TO-GEEK (Apr. 13, 2018, 9:45 PM), https://www.howtogeek.com/141257/htg-explains-how-does-bittorrent-work/.

[175] *Id.*

[176] *See* Jia You, *supra* note 140.

reasonable to infer that distribution has occurred with some other users within the peer-to-peer network given the goal and nature of these networks is to facilitate distribution of files among peer users.[177] This is especially true with a file of a new song that would have a high demand among the network's users.[178]

The internet also has a culture of anonymity, and even if a copyright owner has an agent go into the peer-to-peer network and is able to identify and download a file from another user's shared folder, the law is not clear about whether or not an agent downloading a file would be proof of infringement since you cannot infringe upon your own copyright.[179] This creates the need for there to be liability for the user making the file available, so the copyright owner would only have to find the infringing file in a shared folder and not worry about the legal questions about an agent downloading the file to complete the "distribution."[180] Rejecting the right to "make available" or refusing to infer distribution through all the facts and circumstances in effect creates a license for copyright infringers to distribute without repercussions due to the high costs and complexities for copyright holders to prove exactly which users downloaded specific files from other specific users.[181] It is important to understand that cases rejecting the "make available theory," like *Capitol Records v. Thomas*,[182] did not reject the theory because it was against any public policy rationales, but only because they found no merit in substituting "distribute" with "make available."

D. Impact on Peer-to-Peer File Sharing Networks

Since the Constitution states the purpose of Intellectual Property Law is to "promote the progress of science and the useful arts," [183] it is important to consider the impact a "make available" right may have not only on existing copyright holders, but also on new and growing technologies like peer-to-peer file sharing networks. Without any further considerations, this new theory of distribution, that makes it easier to find primary liability, may place file sharing networks at higher risk of being held secondarily liable more frequently than they are currently.[184] A showing of direct copyright infringement is required

[177] *Id.*
[178] *Id.*
[179] Dougherty, *supra* note 87 at 6.
[180] *See id.* at 16.
[181] *See id.* at 18.
[182] *Thomas*, 579 F. Supp. 2d at 1217–18.
[183] U.S. CONST. art. I, § 8, cl. 8.
[184] *See Thomas*, 579 F. Supp. 2d at 1210.

before there can be any finding on secondary liability.[185]

There are two main types of secondary liability: contributory liability and vicarious liability.[186] The two main elements of vicarious liability are control and profit.[187] Courts have found vicarious liability neither to be "unduly harsh nor unfair" in situations where defendants have "the power to cease the conduct" of another and "derive an obvious and direct financial benefit from the infringement."[188] The Second Circuit likened vicarious liability to employer-employee relationships since the elements of control and profit exist in both, with the only difference being the absence or existence of a formal employer-employee relationship.[189]

The issue with applying vicarious liability to peer-to-peer file sharing networks is that each network works in ways that are slightly different that can affect how much control or profit the network gain garner from their users.[190] Some peer-to-peer networks work with a royalty system, where users pay the firm a small fee for each file they download through the network, which the network uses as revenue and to pay royalties to content creators and referral fees to the users that share their files.[191] Other networks, like We7, use a system where a user can download files for free, but the file contains an advertisement at the beginning for the first four weeks.[192] The revenue generated by this system goes directly to the artists, labels, or other owners of the original content.[193] These networks that use this system make very little profit or no profit at all, and thus would not be held vicariously liable due to lack of profit on their content.[194] Profitability of peer-to-peer file

[185] *See* Gershwin Publ. Corp. v. Columbia Artists Mgmt., 443 F.2d 1159 (2d Cir. 1971) (analyzing secondary liability after a finding of copyright infringement).

[186] *See* Fonovisa v. Cherry Auction, 76 F.3d 259 (9th Cir. 1996).

[187] *Id.* at 262 (discussing Shapiro, Bernstein and Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963)).

[188] *Id.*

[189] Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); *See also* 3 Melville Nimmer & David Nimmer*, Nimmer on Copyright*, § 12.04(A)[2] (2012).

[190] Craig A. Grossman, *From Sony to Grokster, The Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 Buff. L. Rev. 141, 236 (2005).

[191] *File-Sharing Networks Return with Legitimate Ways to Share Music — and Make Money*, KNOWLEDGE@WHARTON (Aug. 6, 2008), https://knowledge.wharton.upenn.edu/article/file-sharing-networks-return-with-legitimate-ways-to-share-music-and-make-money/.

[192] *Id.*

[193] *Id.*

[194] M. Eric Johnson, Dan McGuire & Nicholas D. Wiley, *The Evolution of Peer-to-Peer File Sharing Industry and the Security Risks for Users*, IEEE Computer Society (2008).

sharing networks in general have often been questioned by business experts.[195]

The other issue is that peer-to-peer networks have different extents of control over the activity on their networks.[196] No one would liken a file sharing network's relationship to its users to be similar to an employer-employee relationship.[197] Users on the network act in their own interest, and the only control a network may have on the user is to slow down their download speeds or terminate the users from the network.[198]

The second type of secondary liability is contributory liability. The two main elements of contributory liability are material contribution and knowledge, or more simply to "knowingly contribute."[199] The contribution that peer-to-peer networks provide is the technology to access the network where the file sharing occurs, similar to how the defendants in *Fonovisa* provided the site and facilities of the flea market where the selling of infringing materials occured.[200] The knowledge, however, has to exist to a specific infringing action, not a general knowledge that infringing activity may be taking place on the network.[201] Often, this knowledge of specific infringing activity is established when a network is given notice of the infringing activity on their server.[202] If much of the question of secondary liability depends on the file sharing network's knowledge of *specific* instances of infringement, and the clear way to establish this knowledge is to give the network notice of the infringing activity, it follows that these file sharing networks should look towards other legal alternatives for a safe harbor from liability once they gain knowledge of an already ongoing infringing activity.

One of these legal alternatives is in 17 U.S.C. § 512, which outlines a potential safe harbor rule for online service providers (OSPs) that can be relevant to peer-to-peer file sharing networks.[203] Peer-to-peer file sharing networks constitute as an OSP according to the definition of 17

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[195] Knowledge@Wharton *supra* note 193.

[196] *See generally* Miguel Garcia et al., *Controlling P2P File-Sharing Networks' Traffic*, 3 Network Protocols and Algorithms 54, 61–75 (2011) (discussing architecture of eight public peer-to-peer file sharing networks).

[197] *P2P*, TECHTERMS, https://techterms.com/definition/p2p (last visited Sep. 10, 2019) (explaining the relationship between a file sharing network and its users).

[198] *How Torrents Penalize Leechers*, SHARECONNECTOR (May 13, 2013), http://shareconnector.net/how-torrents-penalize-leechers/.

[199] Fonovisa v. Cherry Auction, 76 F. 3d 259, 264 (9th Cir. 1996).

[200] *Id.*

[201] *Id.*

[202] *See generally Id.* (where knowledge was shown where flea market owner was warned previously of their venders selling infringing materials).

[203] 17 U.S.C. §512.

U.S.C. § 512(k)(1) that they are "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."[204] The conditions of eligibility for the service provider looking to take advantage of the safe harbor are that it "adopted and reasonably implemented, and informs subscribers…of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers" and also "accommodates and…does not interfere with standard technical measures" that copyright owners use to protect their works.[205]

The first condition of eligibility regarding the policy that provides for termination relates to the OSP's duty "upon notification of claimed infringement" to respond "expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[206] This statutory requirement is also referred to as the "notice and take down" requirement.[207] This process is not something that many or any peer-to-peer file sharing networks currently have in place, but it is reasonably possible that file sharing networks can implement it in the future to protect themselves if the modified or original "make available" theory is accepted.[208] Many file sharing networks currently have measures to slow down or prevent users from downloading files if they are not sharing files in return, also referred to colloquially as "leeching." [209]

Some networks track a user's ratio of downloading and uploading on the network, and if the ratio of downloading far outweighs the uploads, the networks can block the user's IP address.[210] Since these file sharing networks have shown that they have the ability to block users via their IP address, in addition to tracking these files and users by local identifications in addition to IP address, many of these

[204] 17 U.S.C. § 512 (k)(1).

[205] 17 U.S.C. § 512 (i)(1).

[206] 17 U.S.C. § 512 (c)(1)(C).

[207] David L. Clark, *Digital Millennium Copyright Act: Can It Take Down Internet Infringers?*, 6 COMPUTER L. REV. & TECH. J. 193, 208 (2002); *see also* Ian Rubenstrunk, Comment, *The Throw down over Takedowns: An Analysis of the Lenz Interpretation of 17 U.S.C. Sec. 512(F)*, 10 J. MARSHALL REV. INTELL. PROP. L. 793 (2011).

[208] *See* David L. Clark, *Digital Millennium Copyright Act: Can It Take Down Internet Infringers?*, 6 COMPUTER L. REV. & TECH. J. 193, 214 (2002).

[209] Evan Hoole, *Comment: An Uncomfortable Threesome: Permissive Party Joinder, Bittorrent, and Pornography*, 63 EMORY L.J. 1211, 1218 (2014).

[210] *How Torrents Penalize Leechers*, SHARECONNECTOR (May 13, 2013), http://shareconnector.net/how-torrents-penalize-leechers/.

networks would not have any problem technologically with implementing a "notice and take down" procedure within their system to qualify for this safe harbor.[211]

Modern file sharing networks not only have the ability to cut off users from the networks, they can also track users on the network via client ID numbers and files on the network using hash identifiers.[212] This is important due to the rise in use of "VPN"s, or virtual private networks, that people use to hide their real IP address.[213] Since users have found ways to mask their IP address, copyright owners may not be able to serve "notice and take down" orders to the internet providers anymore, and their only remedy would be to alert the file sharing network that have other ways of tracking its users besides their IP address.[214] If a copyright owner finds one of their works being illegally distributed and downloaded on the file sharing network, the copyright owner would not have to threaten legal suit or take the time and resources to search for the original "sharing" user.[215] Instead, the copyright owner can alert the network of the infringing file, and the network can give applicable warning of termination to users downloading and sharing that specific file, tracking the file by hash value and the user by their client ID.[216]

The major peer-to-peer file sharing networks would still have to implement other applicable practices to qualify for the §512 safe harbor, like designating an agent to receive notifications of infringement, file designation with the U.S. Copyright Office, and make designation publicly available,[217] as well as insuring that the network does not receive any financial benefit that is directly attributable to the infringing activity[218] or have actual knowledge that a specific infringing activity is occurring.[219] These are reasonable steps that these networks can take,

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[211] *See* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 514 (2018); Hoole, *supra* note 211.

[212] *See* Hoole, *supra* note 211, at 1217-18.

[213] Francis Dinha, *The Danger of P2P File-Sharing Sites*, FORBES TECH. COUNCIL (December 21, 2018 7:45 AM), https://www.forbes.com/sites/forbestechcouncil/2018/12/21/the-dangers-of-p2p-file-sharing-sites/#71830d4f787c.

[214] *See DMCA Notices: How Hollywood's Lawyers Find You*, (Apr. 26, 2017), https://www.turnonvpn.org/blog/avoid-dmca-notices/; Chris Hoffman, *The Many Ways Websites Track You Online*, (Sept. 28, 2016, 11:00 AM), https://www.howtogeek.com/115483/htg-explains-learn-how-websites-are-tracking-you-online/; Bauer et al., *The Arms Race in P2P*, 37th Research Conference on Communication, Information, and Internet Policy 11.

[215] *See* DMCA Notices, *supra* note 216; Bauer, *supra* note 216, at 8.

[216] Bauer, *supra* note 216, at 9.

[217] 17 U.S.C. §512(c)(2).

[218] 17 U.S.C. §512(c)(1)(B).

[219] Viacom v. YouTube, 676 F. 3d 19, 32 (2d Cir. 2012).

especially if it ensures that they are safe from any potential liability.[220]

Peer-to-peer file sharing networks should update some of their practices to qualify for the OPS safe harbor, because there are legitimate uses for the networks outside of copyright violation or criminal activity.[221] Some file sharing networks license music to be on their system to share with their users.[222] This is a way for artists to gain extra revenue and become exposed to a large number of listeners.[223] File sharing networks are also practicable for businesses since it is an easier way of transferring large files to many users that is more efficient than standard email or USB.[224] The high prevalence of piracy of music and other copyrighted materials on peer-to-peer file sharing networks calls for a change in how copyrights are policed on the networks.[225] The accepting of the "make available" or even "make available' plus circumstantial evidence by copyright courts will allow copyright owners to better police and protect their works on these networks, and the safe harbor created for OPS governed by §512 is a way for file sharing networks to help limit copyright piracy themselves, avoid secondary liability for the users on their network, and to help continue the technology for those using it for legitimate, non-infringing purposes.[226]

IV. CONCLUSION

With peer-to-peer file sharing networks continuing to be prominent in how electronic files are transferred and shared between internet users, combined with the continued prevalence of copyright piracy on file sharing networks, it is important for there to be a reasonably effective way for copyright holders to protect themselves from others copying and distributing their works without authorization.[227] The nature of peer-to-peer networks facilitates faster and easier downloads between peer users, and thus makes piracy easier as well.[228]

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[220] *Id.* at 31, 38, 43.

[221] *Id.* at 26.

[222] Knowledge@Warton supra note 112.

[223] *Id.*

[224] Dinha *supra* note 139.

[225] Morea, *supra* note 227, at 220–230 (detailing efforts to combat piracy on peer-to-peer networks).

[226] *Id.* at 197.

[227] *See* Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology,* 28 Campbell L. Rev. 195, 195 (2006).

[228] *See* Dines, *supra* note 7; *see supra* Subpart I (discussing the make available doctrine); 17 U.S.C. § 512 (a)–(e) (2010) (explaining limitations on liability); 17 U.S.C. § 512(h), (j) (2010) (detailing statutory efforts to combat piracy).

Federal circuit courts are split in the interpretation of "distribute" within the 1976 Copyright Act when it comes to activity on peer-to-peer file sharing networks, with the debate centering around if the right to "distribute" includes the right to "make available."[229] The circuit split in copyright law occurred over ten years ago, and neither the Supreme Court nor Congress has stepped in to resolve the issue.[230] The courts should now accept the "make available" theory or a modified "make available" plus circumstantial evidence rule similar to what the courts facing the issue of "distribution" on peer-to-peer file sharing networks within criminal law have held.[231] Reexamination of the 1976 Copyright Act's legislative history and comparison with how circuit courts have interpreted "distribution" within 18 U.S.C. § 2252(a)(2) illustrates that, although "distribute" is not defined within 17 U.S.C. §109, Congress intended for the right to "distribute" to include the right to "make available," especially within the context of peer-to-peer file sharing networks.[232]

The "make available" right is also consistent with other federal statutes and international agreements the United States has entered that have explicitly stated a right to "make available."[233] It will also prevent negative windfalls that the need for specific evidence of actual distribution would cause, as well as ease the policing and enforcement of copyright infringements on peer-to-peer networks.[234] The "make available" right would not inhibit progression in file sharing technologies either because they could take advantage of the §512 safe harbor for OSPs.[235] Courts in copyright law need to properly interpret and determine a "make available" right exists within the right of "distribution" in the 1976 Copyright Act.

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[229] *See e.g.*, Elektra Entm't Grp., Inc. v. Barker, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008).

[230] *See*, Samatha M. Basso, *When National Law Means Regional Law: A Look at the Non-Uniformity of Copyright Law and How the Federal Circuit Can Help*, 21 Fed. Cir. B.J. 355, 375 (2011-2012).

[231] United States v. Hernandez, 795 F.3d 1159, 1164 (9th Cir. 2015).

[232] *Compare*, Hotaling,118 F.3d 199, 203 (4th Cir. 1997), with 1976 House Report *supra* note 124 at 144-45.

[233] *See, e.g.*, 17 U.S.C. §901(a)(4); 17 U.S.C. §506(a)(1)(C); U.S.-Australia Free Trade Agreement, art. 17.5, May 18, 2004.

[234] Jay Dougherty, Moderator et al. *supra* note 87 at 16.

[235] 17 U.S.C. §512(b)(1).