



BY MARC E. MAYER

DISTRIBUTIVE PRINCIPLES

THE DETERMINATION OF COPYRIGHT INFRINGEMENT MAY HINGE ON WHETHER “ACTUAL DISTRIBUTION” OR MERE “MAKING AVAILABLE” HAS OCCURRED

ON OCTOBER 4, 2007, a jury in Minnesota found 30-year-old Jammie Thomas liable for having willfully infringed copyrights in 24 sound recordings by making digital files of those recordings—including works by Aerosmith, Green Day, and Guns N’ Roses—available on the KaZaA peer-to-peer file-sharing network. According to the jury, Thomas’s testimony that she had not shared music files was not credible. Indeed, as one juror later commented, “She’s a liar.” The jury awarded the record company plaintiffs statutory damages in the amount of \$9,250 per work infringed, for a total of \$222,000 for the 24 works.

The verdict in *Capitol Records, Inc. v. Thomas* was groundbreaking insofar as it was the first of the thousands of cases filed by

member companies of the Recording Industry Association of America (RIAA) to be tried by a jury. Nevertheless, while it sent a clear and unambiguous message to those engaged in the copying and dissemination of works through online peer-to-peer networks, the victory for record companies was short-lived. On May 15, 2008, Judge Michael Davis, *sua sponte*, issued an order stating that the court was contemplating ordering a mistrial because it had committed manifest error in giving Jury Instruction No. 15: “The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners’ exclusive right of distribution, regardless of whether actual distribution has been shown.”

On September 24, 2008, after additional briefing, the court vacated the verdict and judgment and granted the plaintiff a new

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trial. In its decision, the court concluded that Jury Instruction No. 15 was erroneous because “[l]iability for violation of the exclusive distribution right found in [Section] 106(3) requires actual dissemination.”¹ In other words, to find infringement of the distribution right, it was not sufficient that Thomas had made the copyrighted works “available” to other KaZaA users; the plaintiffs were required to prove that the works had in fact been disseminated to—that is, actually downloaded by—the other users.

Thomas was not the only case in 2008 to reach this conclusion. Indeed, it was not even the only case in which a judgment against a user of a file-sharing network was reversed based on the court’s reexamination of the scope of the distribution right.² In 2008 alone, at least five district courts examined this very issue, and each came to a different conclusion based on a different rationale. The *Thomas* case did, however, bring to the forefront the ongoing legal and philosophical battle concerning the scope of the distribution right as applied to those engaged in sharing files on a peer-to-peer network. Amazingly, this single issue—whether an “actual dissemination” is required, or whether it is sufficient to make a work “available” to the public—seems to have spawned more judicial analysis of the distribution right in one year (2008) than in any other year since the inception of the distribution right in 1976 as a separately enumerated right reserved to the copyright owner.

Although the current battle is being fought almost exclusively in the context of individuals making works available over peer-to-peer networks, it has much broader implications. Among these are questions concerning the burden of proof, the weight of evidence required by copyright owners to prove infringement, and the role of investigators in policing copyright infringement.

The “Making Available” Right

Historical context is necessary to understand the current debate over the scope of the distribution right. Section 106(3) of the Copyright Act reserves to the copyright owner the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” The Copyright Act does not contain a definition of the term “to distribute.” However, it does contain a definition of the term “publication.” Significantly, the definition of “publication” tracks, almost verbatim, the language of the distribution right (“Publication is the distribution of copies or phonorecords of works to the public...”), but contains one additional, critical sentence: “The offering to distribute copies or phonorecords to a group of persons for purposes of further dis-

tribution, public performance, or public display, constitutes publication.”³

The similarity in the 1976 act between the two terms (“distribution” and “publication”) is not coincidental, as borne out by the legislative history. As the U.S. Supreme Court noted, the purpose of the distribution right as written into the 1976 act was to “recognize[] for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works.”⁴ Thus, since 1976, several courts, based on the statutory language and legislative history, came to the conclusion that “distribution” was synonymous with “publication”—arguably including the “making available” portion of the definition of “publication.” This included the Second and Third Circuits, which held that the two terms were “for all practical purposes synonymous” or “essentially synonymous.”⁵

Nevertheless, until fairly recently, cases squarely and substantively addressing the scope of the distribution right, including the question of whether “making available” a copyrighted work was an act of distribution, were few and far between. One of the only pre-Internet decisions to substantively discuss the “making available” issue was *Hotaling v. Church of Jesus Christ of Latter-Day Saints*.⁶ Though *Hotaling* had nothing to do with the Internet, the case in many respects served as the backbone for the argument that distribution included “making available” a copyrighted work.

In *Hotaling*, the defendant church purchased a single microfiche of the plaintiff’s materials, which included various genealogical research materials. The church made copies of the microfiche and then sent it to several of its branch libraries. However, the copying had taken place outside the limitations period, and there was no evidence of any specific instances within the limitations period in which the libraries had loaned the infringing copies to members of the public. Thus, the plaintiff argued that the defendant’s libraries had nevertheless distributed the work by “making it available” to the public. The Court agreed:

When 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. At that point, members of the public can visit the library and use the work. Were this not to be considered distribution within the meaning of [Section] 106(3), a copyright holder would be prejudiced by a library that does not keep records of public use,

and the library would unjustly profit by its own omission.⁷

Though far from comprehensive in its discussion, the *Hotaling* court squarely rejected the defendant’s argument that proof of actual distribution or dissemination was required and thus implicitly adopted the concept of a “making available” right. That was further confirmed by the dissenting opinion of Judge K. K. Hall, who argued that because “the Church did not sell or give an infringing copy to anyone...current law does not deem this sort of use an infringing distribution.”⁸

Following *Hotaling*, a few courts subsequently agreed, either expressly or implicitly, that the distribution right was violated when a defendant made copyrighted works available to the public, including over the Internet. Most notable of these was the Ninth Circuit’s 2001 decision in *A&M Recordings, Inc. v. Napster, Inc.*,⁹ in which the court noted, without further explanation, that “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”

This conclusion was further extended over the last few years to the act of making works available on a peer-to-peer network. In 2006, two Texas courts—in *Arista Records LLC v. Greubel*¹⁰ and *Warner Bros. Records, Inc. v. Payne*¹¹—concluded that this type of conduct constituted a distribution. Similarly, the district court in Maine, in *Universal City Studios LLLP v. Bigwood*,¹² cited *Napster* and *Hotaling* and concluded that “by using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet, Defendant violated Plaintiffs’ exclusive right to distribute the motion pictures.” In early 2007, a district court in Pennsylvania held that “[w]hile neither the United States Supreme Court nor the Third Circuit Court of Appeals has confirmed a copyright holder’s exclusive right to make the work available, the Court is convinced that 17 U.S.C. [Section] 106 encompasses such a right...”¹³ It was against this backdrop that Judge Davis in Minnesota gave Jury Instruction No. 15, which fairly articulated the law as set forth in *Bigwood*.

The “Actual Distribution” Requirement

While several courts embraced and extended *Hotaling*’s language to find that the distribution right was violated by making a work available, a competing line of authority was developing simultaneously. This line of cases adopted a much narrower view of the distribution right, holding that violation of the right required an “actual dissemination” of the work, and thus, by extension, merely making a work available was not sufficient for infringement.

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20. True False

1. The right to distribute copies or phonorecords of a copyrighted work by sale or other transfer of ownership, or by rental, lease or lending, is one of the exclusive rights reserved to a copyright owner under U.S. copyright law.

- True.
False.

2. The distribution right was first enumerated as a separate exclusive right reserved to the copyright owner in the Copyright Act of 1976.

- True.
False.

3. *Capitol Records, Inc. v. Thomas* involved claims that the defendant had infringed the plaintiffs' copyrights by making available and transmitting digital music files over a peer-to-peer computer network.

- True.
False.

4. In the *Thomas* trial, a jury found that the defendant had infringed the plaintiffs' copyrights.

- True.
False.

5. *Hotaling v. Church of Jesus Christ of Latter-Day Saints* involved an allegation that the defendant had distributed copyrighted works by sharing digital copies of e-books on the Internet.

- True.
False.

6. The distribution right as set forth in the Copyright Act tracks the act's definition of "publication" word for word, without any additions or omissions.

- True.
False.

7. Some courts have found that the distribution right is equivalent to publication under the Copyright Act.

- True.
False.

8. Some courts have applied *Hotaling* to find that making digital copies of copyrighted works available for others to download on a peer-to-peer network constitutes a distribution.

- True.
False.

9. *National Car Rental System v. Computer Associates International, Inc.*, was decided by the Eighth Circuit.

- True.
False.

10. *National Car Rental System* involved an allegation that the defendant distributed copyrighted material by allowing another to use copyrighted software outside the scope of a license.

- True.
False.

11. According to the court in *Elektra Entertainment Group Inc. v. Barker*, for a plaintiff to plead that the defendant violated the distribution right by offering to distribute copyrighted works, the plaintiff must allege that the offer to distribute was for the purpose of further distribution, public performance, or public display.

- True.
False.

12. In *London-Sire Records, Inc. v. Doe*, the court held that, without evidence of an actual dissemination, a defendant did not infringe the distribution right solely by making copyrighted works available to others on the Internet.

- True.
False.

13. In *Atlantic Recording Corporation v. Howell*, the court initially granted summary judgment for the record company plaintiffs but then reconsidered its ruling and vacated the judgment.

- True.
False.

14. In 2008, courts in Massachusetts, Minnesota, Arizona, and New York considered the distribution right as it applied to making works available on a peer-to-peer network.

- True.
False.

15. In *Thomas*, the court concluded that the distribution right was equivalent to the definition of "publication" in the Copyright Act.

- True.
False.

16. *Arista Records LLC v. Does 1-27* was decided by a court in what state?

- A. Maine.
B. California.
C. Massachusetts.
D. Texas.

17. The issue of whether the act of making works available on a peer-to-peer network alone constitutes a distribution has been definitively resolved by the Ninth Circuit.

- True.
False.

18. According to some courts, a defendant's actual distribution of copyrighted works can be proven by circumstantial or indirect evidence.

- True.
False.

19. Some courts have held that the downloading of a work made available on a peer-to-peer network by an investigator may be evidence that the work was actually disseminated to others.

- True.
False.

20. According to a commentator, evidence that a defendant tampered with or corrupted his or her hard drive, made vast numbers of highly popular works available online for long periods of time, and intended and encouraged others to download the works he or she made available supports an inference that the works were distributed by the defendant.

- True.
False.

These cases relied primarily on a 1993 Eighth Circuit decision, *National Car Rental System v. Computer Associates International, Inc.*¹⁴—another non-Internet case, decided four years prior to *Hotaling*. At issue in *National Car Rental* was a dispute over a software license agreement between National and Computer Associates, the licensor of computer software developed to process National's data. Among the claims asserted by Computer Associates was that National had breached the parties' license agreement by permitting third parties to use the software. The district court concluded that this claim was preempted by the Copyright Act, as the

sions to apply *National Car Rental* to the issue of making works available online was U.S. District Judge Patel's 2005 decision in the case brought by two record companies against certain entities and investors involved with the Napster file-sharing network.¹⁷ This decision appeared four years after the Ninth Circuit's 2001 *Napster* ruling, which affirmed Judge Patel's original preliminary injunction order against Napster. The Ninth Circuit seemed to hold that distribution rights were violated when works were uploaded to the Napster system. However, in her 2005 decision, Judge Patel concluded—or perhaps clarified her view—that making works available

simultaneously to examine and evaluate the “making available” right as it applied to individuals making works available for download on peer-to-peer networks. This flurry of case law began on March 31, 2008, when two district courts—one in Massachusetts and one in New York—reached completely different conclusions after examining similar facts and allegations.

Content owners and technology companies anxiously awaited the ruling in *Elektra Entertainment Group, Inc. v. Barker*¹⁹ for almost two years. The Southern District of New York was considering a Rule 12(b)(6) motion to dismiss filed by the defendant,

Judge Karas, in a lengthy decision, denied the motion to dismiss. However, after finding that the plaintiffs' allegations were sufficient, the court stopped shy of adopting the plaintiffs' argument that the distribution right was infringed by “making copyrighted works available” over the Internet.

conduct alleged was, for purposes of Section 301 of the Copyright Act, “equivalent” to a violation of the distribution right. The Eighth Circuit disagreed, holding that “the copyright holder's distribution right is the right to distribute copies,” and thus “we cannot conclude that an allegation that National ‘permitted the use’ necessarily amounts to an allegation of the actual distribution of a copy of the program.”¹⁵

At first glance, there would seem to be a clear difference between making a copy of a work available to the public (including via a library or online service, as in *Hotaling*) and permitting certain third parties to use a software program (as in *National Car Rental*). The court in *National Car Rental* also did not consider the outside boundaries of the distribution right or whether making copies available to the public might constitute a distribution. Rather, its discussion was only in the context of copyright preemption and involved a particular, rather unusual factual circumstance. Nevertheless, the “actual distribution” language of *National Car Rental* was seized on by some courts and commentators as broadly requiring an actual dissemination of tangible “copies or phonorecords” to take place for distribution to occur.¹⁶

Interestingly, one of the first major deci-

via the Napster index of filenames was not sufficient to constitute a distribution. Taking note of *Hotaling*, Judge Patel expressly refused to apply her holding to conclude that making copyrighted works available to the public is enough for distribution:

[M]erely 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. [T]o the extent that *Hotaling* suggests that the mere offer to distribute a copyrighted work gives rise to liability under section 106(3), that view is contrary to the weight of...authorities. It also is inconsistent with the text and legislative history of the Copyright Act of 1976....¹⁸

Reconsidering the Distribution Right in 2008

By the beginning of 2008, there was an apparent split of authority on the “making available” issue as it applied to peer-to-peer computer networks. Moreover, the cases addressing the issue relied on one of two appellate decisions—*Hotaling* and *National Car Rental*—that were not directly applicable to the Internet. Confronted with competing authority, five district courts in 2008 chose almost

Denise Barker, on the ground that allegations that Barker “made the Copyrighted Recordings available for distribution to others” were insufficient to state an infringement claim. Amicus briefs on both sides were submitted by the Motion Picture Association of America, the U.S. attorney, the Electronic Frontier Foundation, and the Computer and Communications Industry Association. Judge Karas, in a lengthy decision, denied the motion to dismiss. However, after finding that the plaintiffs' allegations were sufficient, the court stopped shy of adopting the plaintiffs' argument that the distribution right was infringed by “making copyrighted works available” over the Internet:

Although the Court finds, using Congress's words, that the distribution right of 106(3) may be infringed by “[t]he offer[] to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display” 17 U.S.C. [Section] 101, the Court hesitates in equating this avenue of liability with the contourless “make available” right proposed by Plaintiff.²⁰

Instead, the court focused its analysis on the statutory language and, specifically, on the relationship between the distribution right and the definition of “publication.” In doing

so, the court concluded that “the House and Senate of the Ninety-Fourth Congress considered the terms ‘distribute’ and ‘publication’ to be synonymous.”²¹ The court concluded, “Having accepted that the definition of ‘distribute’ is synonymous with the definition of ‘publication,’ however, liability under Section 106(3) requires that Plaintiffs—to be faithful to the statute—affirmatively plead that Defendant made an offer to distribute, and that the offer to distribute was for the purpose of further distribution, public performance, or public display.”²² In other words, it is not enough simply to plead (and prove) the “making available” allegation; it is also necessary to plead (and prove) that the purpose of an “offer to distribute” fulfilled the additional language of the statute.

On the same day that *Elektra* was decided, a Massachusetts district court came to the opposite conclusion in *London-Sire Records, Inc. v. Doe*²³—although *Elektra* received more attention. Perhaps this was because at issue in *London-Sire* was the narrow question of whether the plaintiffs were entitled, at the outset of the case, to issue subpoenas to various Internet service providers to discover the identity of those engaged in file-sharing over the Internet. Even so, the court engaged in a detailed and far-reaching discussion of a number of related issues, including the applic-

ability of the First Amendment to file-sharing, whether the distribution right applied to intangible goods such as computer files and, most notably, whether the distribution right encompassed the “making available” of works online.

The *London-Sire* court expressly rejected the argument that “publication” and “distribution” were synonymous, concluding that while “all ‘distributions...to the public’ are publications...not all publications are distributions to the public.” Departing from, and either expressly rejecting or distinguishing *Hotaling*, the first *Napster* decision, and others, the court ultimately concluded that there could be no liability for violating the distribution right without an actual distribution. The court, however, ultimately permitted the discovery to go forward, finding that “at least at this stage of the proceedings” the complaint, combined with some initial evidence, was sufficient to establish a prima facie case.²⁴

The *Elektra* and *London-Sire* cases were just a precursor of what was to come. Less than one month later, a district court in Arizona took up the issue, in unusual procedural circumstances. In *Atlantic Recording Corporation v. Howell*,²⁵ the court had granted summary judgment in favor of the record company plaintiffs but subsequently

decided to reconsider its ruling based on the defendant’s assertion that additional deposition testimony (not previously submitted) raised issues as to whether the defendant had specifically authorized and intended his music files to be shared through the KaZaA system. After subsequent briefing, the court turned away from its earlier decision and this time denied the plaintiffs’ motion for summary judgment, holding that the plaintiffs had not established an actual distribution and that merely making works available online or “offering” to distribute them was insufficient. In large part, the court echoed the reasoning of *London-Sire*, declined to equate “distribution” with “publication,” and, after lengthy consideration of the relevant case law, held that the distribution right “is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public.”²⁶

It was unclear exactly what prompted the court’s about-face. Indeed, it did not appear that any the relevant material facts regarding actual distribution had changed since the original ruling. However, the court’s conclusion was clear: “*Hotaling* is inconsistent with the Copyright Act”²⁷ and moreover:

The court agrees with the great weight of authority that [Section] 106(3) is not violated unless the defendant has actu-



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ally distributed a work to a member of the public....Unless a copy of the work changes hands in one of the designated ways, a “distribution” under [Section] 106(3) has not taken place. Merely making a copyrighted work available to the public does not violate a copyright holder’s exclusive right of distribution.²⁸

Almost certainly as a result of these decisions, as well as the growing controversy over the distribution right, Judge Davis in Minnesota was prompted to reconsider the verdict—and, specifically, Jury Instruction No. 15—in *Thomas*. On May 15, 2008, approximately two weeks after the *Howell* decision, Judge Davis issued his order stating that he was contemplating granting a new trial and ordering further briefing. Following that ruling, extensive additional briefing was done, including five amicus briefs on both sides of the issue (the Electronic Frontier Foundation and Motion Picture Association of America were among the amici). In his decision to vacate the verdict and judgment and grant the plaintiffs a new trial, Judge Davis presented one of the most detailed discussions to date of the issues surrounding the distribution right. The judge considered the plain and dictionary meanings of the word “distribution,” the legislative history, the opinion of the Register of Copyrights, the use of the term “distribution” in other provisions of the U.S. Code, the implications of (and to) international copyright law (including clear WIPO treaty obligations to provide a “making available” right), the relationship between the definitions of “distribution” and “publication,” and, of course, the *National Car Rental* and *Hotaling* decisions.

Based on all these considerations, the court ultimately concluded that the plain language of the statute did not support the “making available” theory, that “the statutory definition of publication is broader than the term ‘distribution,’” and that “[t]he *National Car Rental* decision is the binding law of the Eighth Circuit on the meaning of [Section] 106(3) and has been relied on by numerous district courts in the peer-to-peer network downloading context....*National Car Rental*, not *Hotaling*, is binding upon this Court.”²⁹ Especially interesting, however, was the court’s call for legislative action and its overt hostility to the original verdict (and in some sense to the overall RIAA enforcement program):

The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court....The defendant is an individual, a consumer. She is not a business. She sought no

profit from her acts....Unfortunately, by using KaZaA, Thomas acted like countless other Internet users. Her alleged acts were illegal, but common. Her status as a consumer who was not seeking to harm her competitors or make a profit does not excuse her behavior. But it does make the award of hundreds of thousands of dollars in damages unprecedented and oppressive.³⁰

Just when it seemed that the tide of authority had firmly shifted away from a “making available” right, on October 29, 2008—one month after the decision in *Thomas*—a district court in Maine denied the defendants’ motion to dismiss in *Arista Records LLC v. Does 1-27*.³¹ The court did not expressly decide whether making copyrighted files available infringed the distribution right but, significantly, the plaintiffs’ allegations that the defendants made works available online were, according to the court, sufficient to state a claim. Strangely, the *Arista* court, while taking note of the key decisions, chose for the most part to sidestep them, noting simply that authority exists on both sides of the “making available” issue. Instead, the *Arista* court relied almost entirely on a single 2007 First Circuit decision, *Latin American Music Company v. Archdiocese of San Juan*.³² This case suggested, in passing, that making songs available on a Web site “might be” infringing.

The *Arista* court, referencing *Latin American Music*, noted that “the Court need not resolve at this early stage” whether making works available online is “likely” infringing or “highly unlikely” to infringe.³³ As a result, the plaintiffs’ allegations that the defendants were members of file-sharing networks and made copyrighted songs available were sufficient to survive the defendants’ motion to dismiss.³⁴

Proving Actual Distribution on Computer Networks

One thing is certain: The “making available” issue remains unresolved, and is likely to continue to remain unresolved for some time. Of the five district court decisions in 2008, three concluded that the act of “making available” a copyrighted work is not sufficient to violate the distribution right (*Howell*, *London-Sire*, and *Thomas*); one determined that it was sufficient but the “making available” conduct must be “for purposes of further distribution, public performance, or public display” (*Barker*); and one largely avoided the issue but suggested that “making available” conduct “might be” sufficient to state a claim (*Arista*). Thus, there appears to be a split of opinion, including between district courts in the same circuit (both the *London-*

Sire and *Arista* courts are in the First Circuit).

Moreover, the issue still has not been squarely addressed by any appellate court since *Hotaling*. The only two major appellate decisions, *Hotaling* and *National Car Rental*, involved very different sets of pre-Internet facts, came to opposite conclusions, and thus are unlikely to provide substantive guidance for the future. On December 23, 2008, Judge Davis refused to certify his ruling in *Thomas* for interlocutory appeal, thus delaying one opportunity for further guidance from a federal appellate court.

At present, copyright owners no longer can be assured that mere allegations or proof of “making available” a copyrighted work necessarily will suffice to establish copyright infringement. But all is not lost for copyright owners seeking to prove infringement by actual evidence or circumstantial and inferential evidence of the defendants’ activities on the Internet. At least two practical subsidiary principles emerge from the cases.

First, almost every court that has taken especially restrictive views of the “making available” right—including *Thomas*, *Howell*, and *London-Sire*—has confirmed that “direct proof of actual dissemination is not required by the Copyright Act.”³⁵ These courts, applying the “deemed” distribution language of *Hotaling*, have held that when evidence is unavailable or not ascertainable, and the works made available in fact were downloaded or disseminated, a plaintiff may rely on “circumstantial evidence to attempt to prove actual dissemination.”³⁶ This “circumstantial evidence” might include evidence about the nature of peer-to-peer systems such as KaZaA, the number of works that the defendant made available online, the defendant’s intent in making the works available, the length of time that the works were made available for others to download, the fact that the defendant’s files were downloaded by the plaintiff’s investigators or agents, and tampering or corruption by the defendant of his or her computer files or hard drive.³⁷

Second, several courts, including *Thomas* and *Howell*, have supported the theory embraced most prominently in the 1994 decision *Olan Mills, Inc. v. Linn Photo Company*.³⁸ Under this theory, any downloads by an investigator or agent of the plaintiff will suffice to constitute an actual distribution.³⁹ This conclusion may largely moot the “making available” issue, since the plaintiff often will have evidence of downloads by an investigator or agent as part of a pre-filing investigation. Not all courts have embraced this theory, but there seems to be general agreement that, at a minimum, evidence of an investigator’s download of the works at issue supports an inference of actual dissemination.

On December 19, 2008, the RIAA

announced that it would shift the focus of its enforcement strategy away from infringement lawsuits against individual peer-to-peer uploaders. Instead, the new RIAA strategy involves negotiating cooperative arrangements with Internet service providers to curtail infringement.⁴⁰ However, RIAA enforcement cases already in the pipeline will continue to be pursued. Thus, while the volume of case law on the issue is likely to decrease, the last word on the issue has not been heard. Moreover, as digital distribution of media continues to overtake traditional distribution, the issue will remain an important one—for those enforcing copyright protection for online works as well as for those licensing or distributing copyrighted works. ■

¹ Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008).

² See Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976 (2008).

³ 17 U.S.C. §101.

⁴ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985).

⁵ Ford Motor Co. v. Summit Motor Prod., Inc., 930 F.2d 277 (3d Cir. 1991); Agee v. Paramount Communic'ns, Inc., 59 F. 3d 317, 325 (2d Cir. 1995).

⁶ Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F. 3d 199 (4th Cir. 1997).

⁷ *Id.* at 203.

⁸ *Id.* at 205.

⁹ A&M Recordings, Inc. v. Napster, Inc., 239 F. 3d

1004, 1014 (9th Cir. 2001).

¹⁰ Arista Records LLC v. Greubel, 453 F. Supp. 2d 961, 969-70 (N.D. Tex. 2006).

¹¹ Warner Bros. Records, Inc. v. Payne, 2006 WL 2844415, at *3-*4 (W.D. Tex. 2006).

¹² Universal City Studios LLLP v. Bigwood, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006).

¹³ Motown Records Co., LP v. DePietro, No. 04-CV-2246, 2007 WL 576284, at *3 n.38 (E.D. Pa. Feb. 16, 2007).

¹⁴ National Car Rental Sys. v. Computer Assocs. Int'l, Inc., 991 F. 2d 426 (8th Cir. 1993).

¹⁵ *Id.* at 430.

¹⁶ See, e.g., 2 M. & D. NIMMER, NIMMER ON COPYRIGHT §8.11[A], at 8-149 (2008 ed.) ("Infringement of [the distribution] right requires an actual dissemination of either copies or phonorecords."); Arista Records, Inc. v. MP3Board, Inc., No. 00 Civ. 4660 (SHS), 2002 WL 1997918, at *4 (S.D. N.Y. Aug. 29, 2002) ("[T]o show the unlawful 'distribution' of a copyrighted work pursuant to 17 U.S.C. [Section] 106(3) the record companies must show that an unlawful copy was disseminated 'to the public.'").

¹⁷ In re Napster, Inc., 377 F. Supp. 2d 796 (N.D. Cal. 2005).

¹⁸ *Id.* at 802-05.

¹⁹ Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234, 246 (S.D. N.Y. 2008).

²⁰ *Id.* at 243.

²¹ *Id.* at 241.

²² *Id.* at 244 (emphasis added).

²³ London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153 (D. Mass. 2008).

²⁴ *Id.* at 169.

²⁵ Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976 (D. Ariz. 2008).

²⁶ *Id.* at 983.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1223-35 (D. Minn. 2008).

³⁰ *Id.* at 1227-28.

³¹ Arista Records LLC v. Does 1-27, 584 F. Supp. 2d 240 (D. Me. 2008).

³² American Music Co. v. Archdiocese of San Juan, 499 F. 3d 32, 46 (1st Cir. 2007).

³³ Arista, 584 F. Supp. 2d at 250.

³⁴ *Id.* at 261.

³⁵ Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008).

³⁶ *Id.* See also Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976, 983-84 (D. Ariz. 2008) ("As Hotaling seems to suggest, evidence that a defendant made a copy of a work available to the public might, in conjunction with other circumstantial evidence, support an inference that the copy was likely transferred to a member of the public."); London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (Allegations supported a "reasonable inference" of distribution.).

³⁷ For an excellent discussion of this issue, see Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 101 (2008).

³⁸ Olan Mills, Inc. v. Linn Photo Co., 23 F. 3d 1345, 1348 (8th Cir. 1994).

³⁹ Thomas, 579 F. Supp. 2d at 1216 ("The Court holds that distribution to MediaSentry can form the basis of an infringement claim."); Howell, 554 F. Supp. 2d at 985 ("[T]he 12 copies obtained by MediaSentry are unauthorized.");

⁴⁰ See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, available at <http://online.wsj.com/article/SB122966038836021137.html>.

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