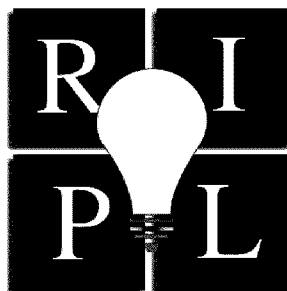


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## MONEY FOR NOTHING AND MUSIC FOR FREE? WHY THE RIAA SHOULD CONTINUE TO SUE ILLEGAL FILE-SHARERS

WILLIAM HENSLEE

### ABSTRACT

The Recording Industry Association of America (“RIAA”) has sued over 35,000 people for illegal file-sharing music, or uploading and downloading music. The RIAA has sued anyone under its “making available” theory, or anyone who offers to distribute copyrighted music without the owner’s consent. However, the United States Circuit Courts of Appeals are split on whether copyright infringement occurs when a file is “made available” or when there is actual dissemination of a file. Due to this split, the RIAA has negotiated deals with internet service providers to penalize individuals who illegally share files. This article analyzes a recent decision, *Capitol Records v. Thomas*, and argues why the RIAA could not enforce its rights under a deal with ISPs. Furthermore, this article argues that the RIAA should continue to sue for direct infringement and contributory infringement. Finally, this article proposes a modification to section 101 of the Copyright Act.

Copyright © 2009 The John Marshall Law School



*Cite as William Henslee, Money for Nothing and Music for Free? Why the RIAA Should Continue to Sue Illegal File-Sharers*, 9 J. MARSHALL REV. INTELL. PROP. L. 1 (2009).



# MONEY FOR NOTHING AND MUSIC FOR FREE? WHY THE RIAA SHOULD CONTINUE TO SUE ILLEGAL FILE-SHARERS

WILLIAM HENSLEE\*

## INTRODUCTION

The Recording Industry Association of America (“RIAA”)<sup>1</sup> has sued over 35,000 people in the past five years attempting to prevent the illegal file-sharing (uploading and downloading) of music.<sup>2</sup> The RIAA’s theory of liability relied on the concept that the unauthorized act of uploading a digital music file is copyright infringement.<sup>3</sup> Simply posting a digital file without the permission of the copyright owner on a shared folder was enough for a lawsuit from the RIAA.<sup>4</sup> These suits alleged a violation of the copyright owner’s exclusive right “to distribute copies or phonorecords

---

\* Associate Professor of Law, and founding faculty member, Florida A & M University College of Law. B.A. University of Hawaii, J.D. Pepperdine University School of Law, M.F.A. University of California, Los Angeles Graduate School of Theater, Film, & Television. Special thanks to Elizabeth Kirk, J.D., for her excellent work on this project. Thank you to my program assistant, Sharon Jenrette, for all her help.

<sup>1</sup> 1 ROBERT LIND ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 1.142 (2008) (stating that the RIAA represents the interests of the recording industry); Frank Ahrens, *Music Industry Sues Online Song Swappers; Trade Group Says First Batch of Lawsuits Targets 261 Major Offenders*, WASH. POST, Sept. 9, 2003, at A01 (noting that the RIAA represents the music industry’s five largest music companies of Universal Music, Sony Music Entertainment, Warner Music Group, BMG Entertainment and EMI); RIAA - Who We Are, <http://www.riaa.com/aboutus.php> (last visited Sept. 1, 2009) (stating the RIAA’s mission, purpose, and typical activities).

<sup>2</sup> *RIAA to Stop Mass Lawsuits*, ROLLING STONE, Feb. 5, 2009, at 18; see Antony Bruno, *A New Battle Plan: Fresh Approach Needed in RIAA’s Fight Against Piracy*, BILLBOARD, Oct. 18, 2008, at 16 (“From the very minute it issued the first 261 lawsuits on Sept. 8, 2003, the RIAA’s strategy to target P2P users rather than just the P2P networks themselves was a contentious one. . . . The sole point of the lawsuit effort is to reinforce the message that P2P file sharing is illegal.”).

After suing 35,000 people since September 2003 for illegally sharing music files online, the Recording Industry Association of America announced in December that it has halted its controversial lawsuit campaign. ‘It isn’t working for them,’ says a major-label source. ‘Massive piracy hasn’t decreased.’ The RIAA will immediately change its strategy: It plans to team up with Internet service providers to identify copyright infringers, send warning letters and, in extreme cases, shut off service.

*RIAA to Stop Mass Lawsuits, supra.*

<sup>3</sup> See, e.g., Complaint at 3–4, *Virgin Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (Civ. No. 06-1497) (*sub nom.* Capitol Records, Inc. v. Thomas); see also Steve Knopper, *RIAA Will Keep On Suing: The Music Industry has Targeted 11,456 Illegal Downloaders — Has it Done Any Good?*, ROLLING STONE, June 9, 2005, [http://www.rollingstone.com/news/story/7380412/riaa\\_will\\_keep\\_on\\_suing](http://www.rollingstone.com/news/story/7380412/riaa_will_keep_on_suing) (discussing how the RIAA is suing people for illegally downloading and sharing copyrighted music).

<sup>4</sup> See Press Release, Recording Indus. Ass’n of Am., Statement of Mitch Bainwol (Sept. 30, 2003) (on file with The John Marshall Review of Intellectual Property Law), available at <http://www.riaa.com/newsitem.php?id=6BB95D3D-27FC-BD92-B338-D80172A90DD1>.

of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>5</sup>

To establish a *prima facie* case for infringement, the plaintiff must prove, first, ownership of a valid copyright, and second, that the defendant violated one or more of the plaintiff’s exclusive rights under 17 U.S.C. § 106.<sup>6</sup> The difficulty with the RIAA’s position was that it required the Copyright Act to be read to include an offer to distribute as an act of distribution and publication.<sup>7</sup> While the RIAA’s position is logical and defensible, at least one court has disagreed with their premise and required proof of actual transfer.<sup>8</sup> Since the emergence of the RIAA’s theory there has been a split in the circuits. There is one school of thought that believes it is sufficient for the RIAA to prove infringement by the act of uploading to a shared folder.<sup>9</sup> The act of uploading was proof of infringement and sufficient evidence of the detriment, because the shared folder allowed anyone who accessed the folder to download the copyrighted file.<sup>10</sup> Stated simply, “proof of transfer” was unnecessary, the only requirement was proof of uploading.<sup>11</sup> The other perspective requires a

---

<sup>5</sup> 17 U.S.C. § 106(3) (2006); *see, e.g.*, *Interscope Records v. Does 1–7*, 494 F. Supp. 2d 388, 389 (E.D. Va. 2007).

<sup>6</sup> 17 U.S.C. § 501; *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (indicating that plaintiffs must demonstrate ownership of a valid copyright and copying of the original work).

*Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.*

17 U.S.C. § 501(a) (emphasis added).

<sup>7</sup> *See Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1215 (D. Minn. 2008).

Plaintiffs further argue that even if the law required a defendant’s active involvement in making distributions, Thomas is liable because she took the active steps of willfully reproducing copyrighted works without authorization and affirmatively choosing to place them in a shared folder making them available to anyone who wanted them on a computer network dedicated to the illegal distribution of copyrighted works.

*Id.*

<sup>8</sup> *See Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l*, 991 F.2d 426, 430 (8th Cir. 1993).

<sup>9</sup> *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (“[P]eople who *post* or download music files are primary infringers.”) (emphasis added); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library adds a work to its collection, lists the work in the index . . . and makes the work *available* to the . . . public,” violation of the exclusive right of distribution has occurred) (emphasis added); *Artista Records L.L.C. v. Greubel*, 453 F. Supp. 2d 961, 971–72 (N.D. Tex. 2006); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993); *Atl. Recording Corp. v. Anderson*, Civ. No. H-06-3578, 2008 WL 2316551, at \*7 (S.D. Tex. Mar. 12, 2008).

<sup>10</sup> *BMG Music*, 430 F.3d at 889; *see In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); *Hotaling*, 118 F.3d at 203.

<sup>11</sup> *See BMG Music*, 430 F.3d at 889. One commentator stated:

proof of transfer, meaning one has to download the file from the shared folder for infringement to occur.<sup>12</sup>

The RIAA's legal strategy has changed since Jammie Thomas convinced a Minnesota District Court Judge to reverse himself in Ms. Thomas' trial for copyright infringement.<sup>13</sup> Ms. Thomas was originally assessed a fine of \$222,000 for sharing songs on Kazaa.<sup>14</sup> After considering the case, Chief Judge Michael J. Davis, reversed himself on September 24, 2008.<sup>15</sup> Following that setback, the RIAA announced on December 19, 2008, a "new plan" to replace the litigation strategy based on the old theory, that an offer to distribute satisfies 17 U.S.C. § 106(3), and abandon the pursuit of infringers through the legal process that has cost so much time, effort, and negative public relations.<sup>16</sup> The strategy replacing the RIAA's "no proof of transfer required" theory is one that involves a deal with several internet service providers to restrict, and even remove, internet access for users who continue to illegally upload music for unauthorized distribution.<sup>17</sup>

While the new strategy remains untested, unproven, and criticized by every foreign government in which it has been used, *Capitol Records, Inc. v. Thomas*,<sup>18</sup> continues to serve as an example of how well litigation works to spread the word that downloading is illegal.<sup>19</sup> On June 18, 2009, after a four day trial, a new jury came

Is the existence of an open share folder, screen shots of music listed and downloads taken, and IP addresses enough "proof"? Or does the RIAA need to show that a particular copyrighted song was sent from one computer to another?

The answer will help determine the validity of the RIAA's controversial claim that merely "making available" copyright music is a sufficient basis for committing infringement. That claim has been the underpinning behind many of the 20,000 lawsuits the industry association has pursued against individual pirates.

If the judge reverses his prior position and orders a new trial in the Thomas case, the music industry may see accused pirates put up more vigorous defenses.

Eriq Gardner, *Legal Roundup: Proof of Transfer*, BILLBOARD, Sept. 6, 2008, at 10.

<sup>12</sup> *Nat'l Car Rental*, 991 F.2d at 434 ("[I]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords." (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A] (1998))); *Atl. Recording*, 554 F. Supp. 2d at 985 ("It is untenable that the definition of a different word in a different section of the statute was meant to expand the meaning of 'distribution' and liability under § 106(3) to include offers to distribute."); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008).

<sup>13</sup> *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1226–27 (D. Minn. 2008) (reversing the jury verdict because Jury Instruction No. 15 was erroneous and prejudicial to Thomas' rights, vacating the judgment, and granting Thomas a new trial); see also Bruno, *supra* note 2 ("Jammie Thomas, a Minnesota single mom who took the RIAA to court and initially lost a \$222,000 verdict, recently won a retrial based on an appeal that making available music in a shared folder is not the same as infringement . . .").

<sup>14</sup> *Thomas*, 579 F. Supp. 2d at 1227.

<sup>15</sup> *Id.* at 1220, 1226–27 ("The Court concludes that simply because all distributions within the meaning of § 106(3) are publications does not mean that all publications within the meaning of § 101 are distributions.").

<sup>16</sup> See *RIAA to Stop Mass Lawsuits*, *supra* note 2.

<sup>17</sup> *Id.*

<sup>18</sup> 579 F. Supp. 2d 1210 (D. Minn. 2008).

<sup>19</sup> See, e.g., Marc E. Mayer, *Distributive Principles: The Determination of Copyright Infringement May Hinge on Whether "Actual Distribution" or Mere "Making Available" Has Occurred*, 32 L.A. LAWYER 35, 40 (2009).

back with a verdict of \$1.92 million against Ms. Thomas-Rasset.<sup>20</sup> This verdict will most likely be appealed.<sup>21</sup> The size of the RIAA win could cause public backlash.<sup>22</sup>

This article will discuss why the RIAA should continue to sue alleged illegal file-sharers, and evaluate the RIAA's "new" theory. In addition, this article will conclude with a proposed amendment to the Copyright Act to include an offer to distribute in the definition of distribution and to allow for publication and dissemination to be synonymous in a peer-to-peer file-sharing context.<sup>23</sup>

## I. THE WHEELS ON THE BUS GO 'ROUND AND 'ROUND

On April 19, 2006, Capitol Records filed a complaint against Jammie Thomas alleging that she infringed their 17 U.S.C. § 106 exclusive rights in twenty-four sound recordings.<sup>24</sup> The trial began on October 2, 2007, and at closing, the jury was given instructions including one that stated: "The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown."<sup>25</sup> On the basis of this instruction, on October 4, 2007, the jury returned a verdict with a finding that Thomas had willfully infringed by uploading copyrighted songs on the Internet, and awarded Capitol Records \$9,250 for each willful infringement.<sup>26</sup> On

---

<sup>20</sup> Special Verdict Form at 17–20, *Capitol Records, Inc. v. Thomas*, No. 06-CV-1497 (MJD/RLE) (D. Minn. June 18, 2009), 2009 WL 2030495 [hereinafter 2009 Special Verdict Form]. Instead of damages of \$9,250 per song awarded by the first jury, the second jury awarded damages of \$80,000 per song. *Compare* Special Verdict Form at 2, 4–8, No. 06-CV-1497 (MJD/RLE) (D. Minn. Oct. 4, 2007), 2007 WL 2957532 [hereinafter 2007 Special Verdict Form] (awarding \$9,250 in statutory damages for each copyrighted work infringed), *with* 2009 Special Verdict form, *supra* (awarding \$80,000 in statutory damages for each copyrighted work infringed). The damage award increased from \$222,000 in the first trial to \$1,920,000 in the second trial. *Compare* 2007 Special Verdict Form, *supra* (awarding \$220,000 in damages), *with* 2009 Special Verdict form, *supra* (awarding \$1,920,000 in damages).

<sup>21</sup> Alex Ebert & Curt Brown, *Two Losses and \$1.9M in the Hole, Still Defiant: Slammed by a Jury, Jammie Thomas-Rasset Maintains Her Innocence, But She Admits the Evidence is Stacked Against Her*, STAR TRIBUNE, June 20, 2009, at B1, available at <http://www.startribune.com/local/48641077.html?elr=KArksUUoDEy3LGDiO7aiU>.

<sup>22</sup> Ben Sheffner, *The Law Won: Majors Welcome P2P Win, But \$1.92M Award Could Make For Bad PR*, BILLBOARD, June 27, 2009, at 10 ("While the recording industry maintains strong support in Congress, with powerful champions including House Judiciary Committee Chairman John Conyers, D-Mich., and his Senate counterpart Patrick Leahy, D-Vt., the Minneapolis verdict could well lead to a legislative move to reduce the damages awards available against individual infringers like Thomas-Rasset.").

<sup>23</sup> *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1158–60 (9th Cir. 2004) (noting that peer-to-peer networks do not store information on a central server, but on the computers of individual users). Because of how this network is arranged, a user must have a software program like Grokster to access the network. *See id.* at 1158–60. The index of files on the network is limited to just the material hosted on the computer of the users who are online and logged into the network through the software program. *See id.* at 1158.

<sup>24</sup> Complaint, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-CV-1497 (MJD/RLE)).

<sup>25</sup> *Thomas*, 579 F. Supp. 2d at 1213.

<sup>26</sup> *Id.*

October 15, 2007, Defendant filed a Motion for a New Trial.<sup>27</sup> “On May 15, 2008, the Court issued an Order stating that it was contemplating granting a new trial” on the basis of the disputed jury instruction.<sup>28</sup>

Ms. Thomas argued that the jury instruction did not require proof of actual distribution in order to prove a violation of 17 U.S.C. § 106(3) and that a proof of transfer would be necessary.<sup>29</sup> Capitol Records argued that proof of transfer did not matter because Thomas violated the section 106(1) reproduction right.<sup>30</sup> The parties agreed that the only *evidence* of actual dissemination was the downloading of the songs by MediaSentry, Capitol Records agent.<sup>31</sup> Capitol Records argued that the active steps of willfully reproducing copyrighted works without authorization, and uploading the works in a shared folder, making them available to anyone who wanted them, was enough for a finding of liability.<sup>32</sup> Ms. Thomas retorted that MediaSentry completed the actual downloading of the copies of the work; she did not participate in any distribution.<sup>33</sup>

The court looked to the statutory framework, specifically 17 U.S.C. § 106(3), which states, “[T]he owner of a copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>34</sup> The court also noted that “[c]ourts have split regarding whether making copyrighted materials available for distribution constitutes distribution under section 106(3).”<sup>35</sup> The court addressed this issue in four main parts: “1) whether the plain meaning of the term . . . requires . . . dissemination of the copyrighted work [for distribution]; 2) whether the term ‘distribution’ is synonymous with . . . ‘publication’ . . . ; 3) whether a defendant [is] primarily liable for authorizing dissemination; and 4) whether U.S. treaty obligations . . . and legislative . . . interpretation[] of . . . those obligations require a particular interpretation of . . . ‘distribution.’”<sup>36</sup>

#### *A. The First Wheel That Fell Off the Thomas Bus*

In looking at the first question, the court found a plain reading of the statute supported a finding that distribution only occurs when a defendant actually transfers ownership or actual copies or phonorecords of a work.<sup>37</sup> The plain language of

---

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1214.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1215.

<sup>33</sup> *Id.* at 1214–15 (“It is well-established that the lawful owner of a copyright cannot infringe its own copyright.” (quoting *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) (citation omitted))).

<sup>34</sup> *Id.* at 1216 (quoting 17 U.S.C. § 106(3) (2006)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1216–17.

section 106(3) describes distribution as the “sale, transfer of ownership, rental, lease, or lending” and therefore an “offer” to do any of these things is not distribution.<sup>38</sup>

If the court is correct in its interpretation of section 106(3), the United States Supreme Court’s decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*,<sup>39</sup> was wrongly decided.<sup>40</sup> Despite the Minnesota District Court’s sympathy for a single mother getting caught illegally uploading music on Kazaa, the *Grokster* decision, discussed in more detail below, was correct in its determination that the act of uploading, without proof of further dissemination, violates section 106.<sup>41</sup>

In her second trial, “The RIAA anti-piracy contractor, MediaSentry, presented evidence that Thomas-Rasset actually distributed [eleven] copyrighted songs through Kazaa (to MediaSentry’s investigators), and cited metadata from tracks in her shared folder strongly suggesting that the files had themselves been downloaded, not purchased or ripped from her CD collection.”<sup>42</sup> While the RIAA’s case was primarily built on circumstantial evidence, it was enough to convince the jury to penalize her for attempting to cover-up her unauthorized activities.<sup>43</sup>

### B. *The Second Wheel That Fell Off the Thomas Bus*

For the second question, the Thomas court looked to the section 101 definition of publication, finding that distribution and publication were not synonymous.<sup>44</sup> Section 101 defines publication as:

[T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.<sup>45</sup>

The court found that while the first sentences of the section 101 definition and section 106(3) were “substantially identical,” there was clarifying language in section 101.<sup>46</sup> In addition, the court found that nowhere in the legislative history of section 106 did Congress state that distribution should be given the same broad

---

<sup>38</sup> *Id.* at 1217.

<sup>39</sup> 545 U.S. 913 (2005).

<sup>40</sup> *See id.* at 936–37 (indicating that uploading files to a file-sharing network is copyright infringement).

<sup>41</sup> *See id.*

<sup>42</sup> Jon Healey, *RIAA: 2, Jammie Thomas-Rasset: 0*, L.A. TIMES, June 18, 2009, <http://latimesblogs.latimes.com/technology/2009/06/riaa-jammie-thomas-rasset-piracy-verdict-kazaa.html> (“RIAA witnesses also linked the Kazaa uploads to a unique identifier on Thomas-Rasset’s modem and computer and showed that the unusual username on the Kazaa account matched one that Thomas-Rasset acknowledged using on several other websites.”).

<sup>43</sup> *Thomas*, 579 F. Supp. 2d at 1213, 1215–16.

<sup>44</sup> *Id.* at 1220.

<sup>45</sup> 17 U.S.C. § 101 (2006).

<sup>46</sup> *Thomas*, 579 F. Supp. 2d at 1219.



meaning as publication.<sup>47</sup> The court found that publication and distribution were distinct concepts.<sup>48</sup> “The statutory definition of publication [was] broader than the term distribution as used in § 106(3).”<sup>49</sup> The court found that “[a] publication can occur by means of the ‘distribution of copies or phonorecords of a work to the public,’ but ‘a publication may also [be an] ‘offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.’”<sup>50</sup> With this fine line, the court found a publication occurs when one distributes copies or phonorecords, but an offer to distribute copies or phonorecords is a mere offer of distribution, not an actual distribution.<sup>51</sup> The court decided that when Congress’ chose to use both terms within the Copyright Act, that choice showed intent for the terms to have different meanings.<sup>52</sup>

While the court was correct in determining that publication and distribution have different meanings, it was incorrect in determining that an offer to distribute cannot satisfy the definition of distribution under section 106(3).<sup>53</sup> Failing to recognize that uploading media to a file sharing network, without actual proof of downloading (i.e., distribution), creates an impossible burden for plaintiffs in file sharing cases. The court ignored Capitol Records argument that the act of uploading copyrighted material without permission from the copyright owner violates 17 U.S.C. § 106(1), the right of reproduction.<sup>54</sup> Had the court recognized the violation of the right of reproduction, it would not have had to reach the issue of distribution.<sup>55</sup>

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1220.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting 17 U.S.C. § 101).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See Thomas*, 579 F. Supp. 2d at 1219.

<sup>54</sup> *Id.* at 1215.

Plaintiffs further argue that even if the law required a defendant’s active involvement in making distributions, Thomas is liable because she took the active steps of willfully reproducing copyrighted works without authorization and affirmatively choosing to place them in a shared folder making them available to anyone who wanted them on a computer network dedicated to the illegal distribution of copyrighted works.

*Id.*

<sup>55</sup> *See id.* at 1220.

The Court concludes that simply because all distributions within the meaning of § 106(3) are publications does not mean that all publications within the meaning of § 101 are distributions. The statutory definition of publication is broader than the term distribution as used in § 106(3). A publication can occur by means of the “distribution of copies or phonorecords of a work to the public by sale of other transfer of ownership, or by rental, lease or lending.” § 101. This portion of the definition of publication defines a distribution as set forth in § 106(3). However, a publication may *also* occur by “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.” § 101. While a publication effected by distributing copies or phonorecords of the work is a distribution, a publication effected by merely offering to distribute copies or phonorecords to the public is merely an offer of distribution, not an actual distribution.

*Id.*

Unfortunately for the court, yet fortunately for this article, the court focused its infringement analysis on section 106(3).<sup>56</sup>

While the Copyright Act does not directly define distribution, the United States Supreme Court has equated it with “publication.”<sup>57</sup> Further, Congress described distribution when revising the Copyright Act in 1976:

Public distribution.—Clause (3) of section 106 establishes the exclusive right of publication: 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.’ Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, *any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement.*<sup>58</sup>

Additionally, “[u]nder the definition in section 101, a work is ‘published’ if one or more copies or phonorecords . . . are distributed to the public . . . without regard to the manner in which the copies or phonorecords changed hands.”<sup>59</sup> With this in mind, publication only requires an infringer to offer to distribute a copyrighted work for the purpose of further distribution, meaning to provide additional copies to third parties.<sup>60</sup> If publication is “[t]he offering to distribute copies or phonorecords to a group of persons for the purposes of further distribution, public performance, or public display,”<sup>61</sup> then actual dissemination of the work is not necessary for a violation of the copyright owners’ exclusive right of publication. It follows that actual dissemination should not be required to prove a violation of the distribution right.<sup>62</sup> Without any proof of third party downloading or review of any kind, the United States Supreme Court has held that uploading a newspaper article for electronic transmission without the permission of the copyright owner is copyright infringement.<sup>63</sup>

---

<sup>56</sup> *Id.*

<sup>57</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985).

<sup>58</sup> H.R. REP. NO. 94-1476, at 62 (1976) (emphasis added).

<sup>59</sup> *Id.* at 138.

<sup>60</sup> 17 U.S.C. § 101 (2006) (“The offering to distribute copies or phonorecords to a group of persons for the purposes of further distribution . . . constitutes publication.”).

<sup>61</sup> *See id.* §§ 101, 106(3); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

<sup>62</sup> *See* 17 U.S.C. §§ 101, 106(3); *Hotaling*, 118 F.3d at 203.

<sup>63</sup> *See New York Times Co. v. Tasini*, 533 U.S. 483, 498 (2001) (holding that LEXIS/NEXIS exercised the exclusive right of distribution, 17 U.S.C. § 106(3), by selling copies of copyrighted articles through its NEXIS database); *see also Agee v. Paramount Commc’ns, Inc.*, 59 F.3d 317, 325–26 (2d Cir. 1995) (citing *Playboy Enters., Inc., v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)) (stating that an offer to distribute files can be an “unauthorized uploading of copyrighted images onto [a] computer bulletin board with knowledge that images would be downloaded by other bulletin board subscribers.”).

*C. The Third Wheel That Fell Off the Thomas Bus*

For the third question, the Thomas court found that the authorization clause in section 106(3), which states “[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . (3) to distribute,” merely provided a “statutory foundation for secondary liability, [and was] not a means of expanding the scope of direct infringement liability.”<sup>64</sup> The court found the “authorization” clause was intended to avoid any question of liability for contributory infringers, not to be an assessment of direct liability.<sup>65</sup> The court stated, “Equating making available with distribution would undermine settled case law holding that merely inducing or encouraging another to infringe does not, alone, constitute infringement unless the encouraged party actually infringes.”<sup>66</sup>

The court’s argument is flawed. In the case of file sharing, the uploader is encouraging others to download songs from the shared files, however, the uploader likely does not know who the others in the file sharing network are and whether the files uploaded are of actual interest to any potential downloaders.<sup>67</sup> The fact that the uploader does not personally encourage specific individuals to download should not shield the uploader from liability.<sup>68</sup> Making a file available on a file sharing network, without the permission of the copyright owner, should be sufficient to violate the language of section 106.<sup>69</sup>

Liability for copyright infringement does not require a proof of taking, but it does require (1) adding a work to a collection; (2) listing a work in an index; and (3) making the work available to the public.<sup>70</sup> Posting a song on a P2P server is adding a work to a collection, listing the work in an index, and making the work available to the public; it satisfies all of the elements discussed in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*.<sup>71</sup> Further, the United States Supreme Court has held that a copyright owners’ distribution right is violated when a copy is made without the owners’ consent.<sup>72</sup>

The issue with proving electronic transfer of materials on a P2P network is that the system is designed to “willfully blind” the distributor of the software, and thus no one maintains a record of transfer.<sup>73</sup> However, copyright infringement is a strict

<sup>64</sup> *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1220–21 (D. Minn. 2008).

<sup>65</sup> *Id.* at 1221 (citing H.R. REP. NO. 94-1476, at 61 (1976)).

<sup>66</sup> *Id.* (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005)).

<sup>67</sup> *See id.*

<sup>68</sup> *See Grokster*, 545 U.S. at 919.

<sup>69</sup> *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *Atl. Recording Corp. v. Anderson*, Civ. No. H-06-3578, 2008 WL 2316551, at \*8 (S.D. Tex. Mar. 12, 2008).

<sup>70</sup> *Hotaling*, 118 F.3d at 203 (concluding that a violation of the exclusive right of distribution has occurred); *see BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (“[P]eople who *post* or download music are primary infringers” (emphasis added)).

<sup>71</sup> *Hotaling*, 118 F.3d at 203 (finding that adding unauthorized copies of protected works in a library collection is an infringement of the distribution right).

<sup>72</sup> *See Grokster*, 545 U.S. at 928–30 (recognizing primary liability of posting users who created unauthorized copies of music files in a case for contributory liability); *see also A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (holding that a copyright holder’s distribution rights are violated by Napster users who upload files).

<sup>73</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).

liability offense, and intent is only relevant when determining damages.<sup>74</sup> According to several district courts, making copyrighted works available to others may constitute infringement by distribution in certain circumstances.<sup>75</sup>

In effect, the motivation for downloading this type of software is to infringe, and receive “free” music, movies, or files.<sup>76</sup> While it is reasonable to assume a certain portion of these files belong to the public domain or are non-infringing, it is also reasonable to assume that the majority of files that are actually downloaded are infringing.<sup>77</sup> Uploading a copyrighted file to a file sharing site without permission of the copyright owner should be enough for copyright infringement regardless of intent or knowledge of potential downloaders.<sup>78</sup>

#### *D. The Fourth Wheel That Fell Off the Thomas Bus*

The fourth question involved the application of international law.<sup>79</sup> The United States has adopted and ratified two treaties, the World Intellectual Property Organization Copyright Treaty (“WCT”) and the World Intellectual Property Organization Performances and Phonograms Treaty (“WPPT”).<sup>80</sup> The Thomas court stated, “It is undisputed that the WCT and the WPPT recognize a making-available right that is not dependent on proof that copies were actually transferred to

---

Willful blindness is knowledge, in copyright law . . . as it is the law generally. (citation omitted) One who, knowingly or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent, (citation omitted), because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.

*Id.*

<sup>74</sup> See *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000).

<sup>75</sup> See *Artista Records, L.L.C. v. Greubel*, 453 F. Supp. 2d 961, 971–72 (N.D. Tex. 2006); *Atl. Recording Corp. v. Anderson*, Civ. No. H-06-3578, 2008 WL 2316551, at \*8 (S.D. Tex. Mar. 12, 2008); *Warner Bros. Records, Inc. v. Payne*, Civ. No. W-06-CA-051, 2006 WL 2844415, at \*4 (W.D. Tex. July 17, 2006).

<sup>76</sup> See *Grokster*, 545 U.S. at 937–38.

The only apparent question about treating MGM’s evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM’s part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. . . . Grokster distributed an electronic newsletter containing links to articles promoting its software’s ability to access popular copyrighted music.

*Id.*

<sup>77</sup> See *id.* at 952 (Breyer, J., concurring) (stating that MGM’s expert “declared that 75% of current files available on Grokster are infringing and 15% are ‘likely infringing.’”).

<sup>78</sup> See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *Atl. Recording Corp.*, 2008 WL 2316551, at \*8.

<sup>79</sup> *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008).

<sup>80</sup> WIPO Copyright Treaty, Contracting Parties (1996), available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wct.pdf>; WIPO Performances and Phonograms Treaty, Contracting Parties (2008), available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wppt.pdf>.

particular individuals.”<sup>81</sup> The court also noted, by ratifying and adopting these treaties, the Executive and Legislative branches of government indicated that U.S. law complied with the treaties and the making-available clause.<sup>82</sup> The court, however, relied on the fact that the treaties are not self-executing and “lack any binding legal authority separate from their implementation through the Copyright Act.”<sup>83</sup> As a result, the court found the treaties non-persuasive.<sup>84</sup>

However, the fact that both the Executive and Legislative branches reviewed the language of the Copyright Act and determined that the statutory language was adequate to grant copyright holders the right to sue for infringement when an unauthorized third party makes a protected work available should have been sufficient for the court to recognize that an offer to distribute violates section 106(3).<sup>85</sup>

When the first three questions are read in conjunction with the WIPO treaties, it shows that the United States would not be in compliance with international agreements if read to construe publication as more than an offer in an electronic file-sharing context. On December 20, 1996 the United States entered into the World Intellectual Property Organization (“WIPO”) Copyright Treaty.<sup>86</sup> Article 6 of the Treaty states, “Authors of literary and artistic works shall enjoy the exclusive right of authorizing the *making available* to the public of the original and copies of their works through sale or other transfer of ownership.”<sup>87</sup> In implementing the treaty, Congress heard from Marybeth Peters, the Register of Copyrights, who stated, “After an extensive analysis the Copyright Office concluded that existing protections are adequate to fulfill all but two of the substantive treaty obligations.”<sup>88</sup> This is underscored by another statement by Marybeth Peters, “Making [a work] available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as the reproduction right . . . .”<sup>89</sup> As a result of ratification of the treaty by the executive and legislative branches, combined with the finding of the Register of Copyrights, section 106(3) should be read to create a making available right with no proof of transfer.

Because of the Thomas case, and others that follow its reasoning, the RIAA has changed its legal strategy and is now relying on agreements with internet service

<sup>81</sup> *Thomas*, 579 F. Supp. 2d at 1225.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1226.

<sup>84</sup> *Id.*

<sup>85</sup> See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (1976)) (general revision to title 17 of the United States Code).

<sup>86</sup> WIPO Copyright Treaty, Contracting Parties, *supra* note 80.

<sup>87</sup> WIPO Copyright Treaty art. 6, *adopted* Dec. 20, 1996, 36 I.L.M. 69 (emphasis added).

<sup>88</sup> *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 43 (1997) (statement of Marybeth Peters, Reg. of Copyrights).

<sup>89</sup> Letter from Marybeth Peters, Reg. of Copyrights, to Rep. Howard L. Berman, Rep. 28th Dist. of Cal. (Sept. 25, 2002), *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 114–15 (2002).

providers.<sup>90</sup> The details of these “secret” deals are not yet known.<sup>91</sup> While the “no proof of transfer” doctrine was controversial, it was a logical interpretation of the spirit of the law and necessary to stop illegal downloading.<sup>92</sup> A modification to the section 101 definitions is all that is required to codify the theory.<sup>93</sup> In addition, the United States Supreme Court has already adopted the proposition that offering a music composition and sound recording for potential downloading by uploading it on a file sharing network is infringement in the *Grokster* case, discussed below.<sup>94</sup> The theory on which the RIAA now relies has serious Constitutional and public policy ramifications independent of the Copyright Act.

## II. DROP IT LIKE IT'S HOT: BACK-ROOM DEALS MAKE GOOD MOVIES, NOT GOOD LEGAL THEORIES

The RIAA recently announced a new method for ending illegal downloading of music, one that relies on the cooperation of internet-service providers (“ISP”).<sup>95</sup> While the details of the plan have not been released, the first step of the plan requires the RIAA to notify the ISP’s of suspected illegal downloading.<sup>96</sup> After notification from the RIAA, the ISP will then notify the user of the alleged violation and ask them to stop.<sup>97</sup> If the user continues to upload music for file-sharing, one or two more additional notices will be delivered.<sup>98</sup> If the user fails to remove the music from the file-sharing domain, the ISP will cut-off the user’s internet access all together.<sup>99</sup>

There are a couple of problems with this “solution.” First, the design of the P2P systems make it impossible to track or define individual users, only the username of the network; second, there is no check or outside system to monitor the RIAA, the terms of their contracts with the ISPs, or how the new “solution” is applied.

---

<sup>90</sup> Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

<sup>91</sup> *Id.*

<sup>92</sup> *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (“[P]eople who *post* or download music are primary infringers”) (emphasis added); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library adds a work to its collection, lists the work in the index . . . and makes the work *available* to the . . . public,” violation of the exclusive right of distribution has occurred) (emphasis added); *Artista Records L.L.C. v. Greubel*, 453 F. Supp. 2d 961, 971–72 (N.D. Tex. 2006); *Atl. Recording Corp. v. Anderson*, Civ. No. H-06-3578, 2008 WL 2316551, at \*7–8 (S.D. Tex. Mar. 12, 2008); see *Agee v. Paramount Commc’ns, Inc.*, 59 F.3d 317, 325–26 (2d Cir. 1995); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993).

<sup>93</sup> See 17 U.S.C. § 101 (2006).

<sup>94</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928–30 (2005).

<sup>95</sup> Antony Bruno, *A New Game Plan: The Biz Faces Challenges As It Enlists ISPs To Help Fight Piracy*, BILLBOARD, Jan. 10, 2009, at 8 (“Enlisting the ISPs as allies, however, hasn’t been an easy task. Indeed, while the RIAA claims it has secured the cooperation of leading ISPs in its graduated-response efforts, Marks [RIAA general counsel] won’t disclose which are onboard.”); McBride & Smith, *supra* note 90.

<sup>96</sup> McBride & Smith, *supra* note 90.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

*A. See Me, Feel Me, Touch Me: The Design of the Peer-to-Peer System*

A peer-to-peer (P2P) system works by allowing users to share electronic files directly with each other rather than through a central server.<sup>100</sup> These networks have achieved great popularity in recent years because there is no need for a central computer to mediate the exchange of information once the file-sharing software has been downloaded.<sup>101</sup> This feature was designed to promote efficiency and to help the software creators escape liability for third party infringements by software users.<sup>102</sup> Additionally, an uploaded file can be available for multiple users at any given time making file requests and retrievals much faster for someone seeking to download a file.<sup>103</sup> Because these requests do not occur through a central server, communications can take place between any two computers that remain connected to the network.<sup>104</sup> The United States Supreme Court has already found that creators of this type of software may be contributorily liable for copyright infringement, stating, “One infringes contributorily by intentionally inducing or encouraging direct infringement.”<sup>105</sup> There is no debate that when one has uploaded copyrighted material without permission of the copyright owner on a P2P file-sharing network, and a third party has downloaded that material, there is copyright infringement because there was actual dissemination of the copyrighted material.<sup>106</sup>

However, the P2P system is designed to mask the identity of the participants in the transaction and does not indicate when a particular file is being downloaded or who specifically is downloading the file.<sup>107</sup> For concrete proof, one would have to photograph the screen during the process of downloading.<sup>108</sup> Even the ISP would not have direct knowledge of the individual who downloaded the material from a business or household account.<sup>109</sup> This could create problems for family households who could potentially lose their Internet service because one member of the household or family friend illegally downloads.

*B. Do You Hear What I Hear? No Court System Means No Discovery Process*

Under the previous system where the RIAA sued the file-sharers in court, the defendants had discovery rights to view the evidence against them and they could

---

<sup>100</sup> Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919–20 (2005).

<sup>101</sup> *Id.* at 920.

<sup>102</sup> *See id.* at 920, 934.

<sup>103</sup> *Id.* at 920.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 930 (citing Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

<sup>106</sup> *See generally id.* (holding that the Court could not find contributory infringement without a finding of direct infringement).

<sup>107</sup> *Id.* at 922–23.

<sup>108</sup> *See* Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008). This is the precise process that was debated during the Thomas case when MediaSentry used printouts of the screen to show actual transfer. *Id.* This is also debated evidence because MediaSentry was the agent of Capital Records, the owner of the copyright. *Id.* at 1214.

<sup>109</sup> *See Grokster*, 545 U.S. at 922–23.

challenge the propriety of the evidence collection.<sup>110</sup> Under the RIAA's proposed system, there does not appear to be any way for the accused file-sharer to view the evidence and challenge the collection methods before they are forced to take down their file-shared music or risk losing Internet service.<sup>111</sup> The courts afford those accused of copyright infringement greater protection from zealous investigators.<sup>112</sup>

In Massachusetts,<sup>113</sup> Arizona,<sup>114</sup> North Carolina,<sup>115</sup> and Maine,<sup>116</sup> the RIAA and its investigative arm, MediaSentry, have come under scrutiny for unlicensed investigations.<sup>117</sup> States' private investigator licensing systems are in place to

<sup>110</sup> See *Arista Records L.L.C. v. Does* 1–27, 584 F. Supp. 2d 240, 256 (D. Me. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 176 n.30 (D. Mass. 2008); *Capitol Records, Inc. v. Weed*, No. 2:06-CV-01124-PHX-JAT, 2008 WL 1820667, at \*5 (D. Ariz. Apr. 22, 2008); *Elektra Entm't Group, Inc. v. Doe*, No. 5:08-CV-115-FL, 2008 WL 5111885, at \*6 (E.D.N.C. Sept. 26, 2008).

<sup>111</sup> See Bruno, *supra* note 95 (describing the RIAA's new tactics outside the court system and therefore outside the normal evidentiary and procedural safeguards of the courts).

<sup>112</sup> See *Arista Records*, 584 F. Supp. 2d at 256; *London-Sire*, 542 F. Supp. 2d at 175–76; *Weed*, 2008 WL 1820667, at \*5.

<sup>113</sup> See *London-Sire*, 542 F. Supp. 2d at 176 n.30.

The same movant further contends that the Linares affidavit, which forms the basis of some of the plaintiffs' prima facie case, should be stricken. The movant claims that MediaSentry, the private investigator who downloaded the files from the Does and recorded their IP addresses (citation omitted) does not have the license to undertake private investigations required by Massachusetts General Laws ch. 147, §§ 23–25.

*Id.*

<sup>114</sup> *Weed*, 2008 WL 1820667, at \*5.

Defendant argues that Plaintiffs and MediaSentry agreed to violate Arizona private investigator licensing requirements. (citation omitted) . . . [A]n individual or agency is required to be licensed before acting as a private investigator in the state of Arizona. Defendant argues that since MediaSentry is not licensed in the state of Arizona, Plaintiffs and MediaSentry's agreement to undergo an investigation of Defendant's files is unlawful conduct.

*Id.*

<sup>115</sup> See *Elektra Entm't Group*, 2008 WL 5111885, at \*6 ("Plaintiffs move to strike the Linares declaration, pursuant to Rule 12(f), on the grounds that Linares lacked the requisite personal knowledge to make it and the unclean hands doctrine bars it because MediaSentry unlawfully investigated defendant without a license.").

<sup>116</sup> See *Arista Records*, 584 F. Supp. 2d at 256.

Defendants claim that the Court never should have authorized the subpoena because the facts Plaintiffs provided in support of their discovery motion were gathered by allegedly criminal acts of MediaSentry, Plaintiffs' investigator. Maine law prohibits persons from acting as private investigators without first obtaining a license; acting as a private investigator without a license is a class D crime.

*Id.*

<sup>117</sup> Compare *id.* at 256–58 (rejecting allegations that MediaSentry's conduct was unlawful), with Andy Greene, *Battle Over Online Piracy Gets a Sheriff: London Company Web Sheriff Helps Top Artists—But Does it Go Too Far?*, ROLLING STONE, Apr. 30, 2009, at 27 (discussing internet trolling as a means to prevent online piracy).

Web Sheriff, which has a staff of 20 (mostly copyright attorneys and Internet experts), performs a wide range of anti-piracy services for acts . . . Monthly fees begin at \$1,000 and extend up to \$25,000, depending on the package of services.

. . . .  
 . . . Over the past several years, pre-release online piracy has become such a problem that it was made a felony in the United States. When albums leak,



protect the state citizens from unlicensed investigators who might use questionable tactics.<sup>118</sup> Without the state courts' involvement, there is a danger that the evidence will be accepted without being subject to cross-examination, which is unsettling considering the previous 35,000 lawsuits the RIAA has filed since 2003.<sup>119</sup> Thousands of people may be denied Internet access without the evidence against them being scrutinized by a trier of fact.

In the past, the RIAA subpoenaed the ISP's for information identifying the users of file-sharing software.<sup>120</sup> While this cooperative short-cut helped the RIAA by quickly identifying infringers who had masked their identities with usernames designed to hide their actual identities, the alleged infringers had the court system to allow them to challenge the evidence against them.<sup>121</sup> Under the new system, unlicensed investigators working for the RIAA will be evaluating the evidence against the alleged infringers and the RIAA will act on that information without any scrutiny of the evidence.

While the details of the agreements between the RIAA and the ISPs have not been released, it is possible that every ISP will have slightly different terms in their individual agreements. There is no difference in the legal theory under which the RIAA will be operating. The act of posting a digital file on a shared folder will satisfy the act of infringement. The RIAA's new method of punishing copyright infringers relies on the same legal theory that some courts have rejected, placing the alleged infringers at a distinct disadvantage.<sup>122</sup>

---

artists lose everything from sales revenue to creative control over how much their music is heard—early leaks aren't always mastered or sequenced the way the final album will be.

...  
 ... Most of the sites that host links to pre-release music—Bit-Torrent aggregators, YouTube, peer-to-peer clients, MP3 blogs and download sites like RapidShare and Megaupload—will remove the links if asked.

Andy Green, *supra*.

<sup>118</sup> See *Arista Records*, 584 F. Supp. 2d at 256; *London-Sire*, 542 F. Supp. 2d at 176 n.30; *Weed*, 2008 WL 1820667, at \*5.

<sup>119</sup> See *RIAA to Stop Mass Lawsuits*, *supra* note 2.

<sup>120</sup> *McBride & Smith*, *supra* note 90.

The new approach [of the RIAA] dispenses with one of the most contentious parts of the lawsuit strategy, which involved filing lawsuits requiring ISPs to disclose the identities of file sharers. Under the new strategy, the RIAA would forward its emails to the ISPs without demanding to know the customers' identity.

*Id.*

<sup>121</sup> See *Interscope Records v. Does 1–7*, 494 F. Supp. 2d 388, 389–90 (E.D. Va. 2007); *In re Subpoena to Univ. of N.C. at Chapel Hill*, 367 F. Supp. 2d at 945, 946 (M.D.N.C. 2005); *Capitol Records, Inc. v. Doe*, Civ. No. 07-cv-1570-JM (POR), 2007 WL 2429830, at \*2 (S.D. Cal. Aug. 24, 2007); *Capitol Records, Inc. v. Does 1–16*, Civ. No. 07-485 WJ/LFG, 2007 WL 1893603, at \*2 (D.N.M. May 24, 2007); *LaFace Records, L.L.C. v. Does 1–5*, No. 2:07-cv-187, 2007 WL 2867351, at \*3 (W.D. Mich. Sept. 27, 2007); see also *Bruno*, *supra* note 2 (“[S]everal vindicated defendants began countersuing the RIAA for wrongful prosecution, and respected educational institutions like the state universities of Kansas, Maine and Wisconsin began refusing to cooperate.”). Without the aid of the legal system, there is no repercussion for wrongful prosecution, and state universities will not have to cooperate, because they have their own ISP. See *Bruno*, *supra*.

<sup>122</sup> See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1223 (D. Minn. 2008) (discussing the rejection of the possibility of a legal claim for the “making available” of copyrighted works).

Similar plans have been rejected in France, Germany, and New Zealand; and the United Kingdom is predicted to reject the proposal as well.<sup>123</sup> In France, the “three-strikes” law was rejected on April 9, 2009, after eighteen months of discussion.<sup>124</sup> Patrick Bloche, a deputy in the National Assembly, stated that the law is “politically dead.”<sup>125</sup> On July 20, 2009, Nicolas Sarkozy, French President, “reintroduce[d] an antipiracy law to the country’s National Assembly.”<sup>126</sup> The new proposal allows for “accelerated court convictions and \$2,100 fines.”<sup>127</sup>

New Zealand withdrew its law when ISPs could not agree with the music business on the guidelines for defining abuse.<sup>128</sup> The United Kingdom is looking at how other countries in the European Union react before they make a decision on the “three strikes” law.<sup>129</sup> “On June 16, the British government published a Digital Britain paper that suggests giving regulator Ofcom legal powers to impose an array of technical restrictions on ISPs that are unable to reduce illegal filesharing.”<sup>130</sup>

Germany rejected the law because it was incompatible with German data and telecommunications privacy legislation.<sup>131</sup> Germany, however, does not shy away from legal action.<sup>132</sup> While criminal prosecutions were the norm since 2004, the German Public Prosecution Office (“PPO”) now only advocates criminal proceedings in cases where there have been over three thousand illegal downloads.<sup>133</sup> However, there have been civil cases where infringers were fined for as few as two illegal

---

<sup>123</sup> Aymeric Pichevin & Andre Paine, *Of All The Gaul: French National Assembly Rejects Three Strikes’ Legislation*, BILLBOARD, Apr. 18, 2009, at 7.

The French rejection of the three-strikes legislation is the latest blow to efforts by the recording industry to pass laws that would require Internet service providers to cut off service to chronic copyright infringers.

In March, the New Zealand government withdrew its three-strikes law when ISPs and the music business couldn’t agree on a code of conduct. The government has opened another round of talks on the proposed law.

The U.K. trade organization BPI has pushed for tougher regulation in its submission to the British government’s “Digital Britain” report, due in early summer. Just a day before the French rejected the law, chief executive Geoff Taylor predicted that the French three-strikes system would be “up and running by autumn” and warned it was vital that “the U.K. is not to be left behind.”

But British ministers have only hinted at imposing French-style measures as a last resort.

And now, there’s likely to be even less desire for emulating the French proposal.

*Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> John Hopewell, *EU Guns For Pirates: Countries Launch Array of Legal Measures*, VARIETY, June 29–July 12, 2009, at 14.

<sup>127</sup> *Id.* (The new proposal is to replace the three strikes rule with a “speeding ticket-style fines system.”) (quoting Luc Besson).

<sup>128</sup> Pichevin & Paine, *supra* note 123.

<sup>129</sup> *Id.*

<sup>130</sup> Hopewell, *supra* note 126.

<sup>131</sup> Wolfgang Spahr, *Germany Rejects Three Strikes’ Piracy Plan*, BILLBOARD, Feb. 21, 2009, at 15.

<sup>132</sup> See Wolfgang Spahr, *The Prosecution Rests: German Biz Switches To Civil Piracy Cases*, BILLBOARD, Apr. 25, 2009, at 14 (describing Germany’s actions and guidelines in suing illegal file sharers).

<sup>133</sup> *Id.*

downloads.<sup>134</sup> Based on opposition to P2P activity, Spain has recently jailed a P2P operator and fined him the dollar equivalent of \$6,496.<sup>135</sup> In Sweden, the creators of a BitTorrent tracker, Pirate Bay, were sentenced to a year in jail and to pay approximately \$3.6 million to the film and music industries.<sup>136</sup>

Instead of abandoning the court system and the case for direct infringement, the RIAA should pursue a change to the statutory language and continue to sue for direct and contributory infringement.

### III. SLIPPIN' INTO DARKNESS: THE CASE FOR CONTRIBUTORY INFRINGEMENT

One is liable for contributory infringement when one "knowingly contributes to the infringing conduct of another."<sup>137</sup> Contributory infringement requires: (1) direct infringement by a third party; (2) actual or constructive knowledge that a third party was directly infringing; and (3) a material contribution to the infringing activities.<sup>138</sup>

For the courts to adopt a theory of contributory infringement for file-sharers, they must first adopt the rationale behind the *Hotaling* case.<sup>139</sup> In *Hotaling*, the court held that a library distributed a published work pursuant to the Copyright Act when it placed an unauthorized copy in its catalog/index system and made the copy available to the public.<sup>140</sup> While the church in question had acquired a legitimate copy of the microfiche in question, it also made microfiche copies of the works without permission and sent the copies to several of its branch libraries.<sup>141</sup> The owner of the copyright contacted the church and demanded the church cease the distribution.<sup>142</sup> The *Hotalings* filed suit and the trial court granted a summary judgment motion in favor of the church.<sup>143</sup> On appeal, the United States Court of Appeals for the Fourth Circuit held that "[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."<sup>144</sup>

---

<sup>134</sup> *See id.*

<sup>135</sup> Howell Llewellyn, *Spanish Court Jails P2P Operator*, BILLBOARD, Apr. 25, 2009, at 15 ("A Spanish Court has sentenced a man to six months in jail of operating an illegal file-sharing Web site. No previous peer-to-peer lawsuits in Spain had resulted in convictions, due to the failure of prosecutors to prove a profit motive.").

<sup>136</sup> *See* Louise Nordstrom, *INTERNET Hollywood Scores Win Over Pirate Bay Hub Swedish Court Convicts Four in File-sharing Case*, HOUS. CHRON., Apr. 18, 2009, at 4 ("The entertainment industry won . . . in a legal battle against file-sharing Pirate Bay, with guilty verdicts and one-year prison sentences handed down to four men . . . All four . . . were ordered to pay damages of 30 million kronor (\$3.6 million) . . .").

<sup>137</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

<sup>138</sup> *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 801 (N.D. Cal. 2005) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2, 1019–22 (9th Cir. 2001)).

<sup>139</sup> *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

<sup>140</sup> *Id.* at 201.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 202.

<sup>144</sup> *Id.* at 203.

As indicated earlier, a copyright infringement is a violation of “any of the exclusive rights of the copyright owner.”<sup>145</sup> “One of [these] exclusive rights is the right ‘to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.’”<sup>146</sup> The first-sale doctrine applies when an “owner of a lawful copy of the work . . . sell[s], rent[s], lend[s], or otherwise dispos[es] of the lawful copy” without retaining a copy of the work.<sup>147</sup> In this instance, because the legal copy is physically transferred, the copyright owner’s right to distribution is not infringed.<sup>148</sup> Distributing unauthorized copies, however, violates the copyright owner’s distribution right and does create infringement.<sup>149</sup> To create a case for “distribution” one must show the copy was “disseminated to the public.”<sup>150</sup>

In *Hotaling*, “[t]he librar[y] did not record public use of the microfiche” copies.<sup>151</sup> The church argued that because records of public use were not available, the court could only find that the work in the library collection was merely an “offer to distribute” and not a “distribution.”<sup>152</sup> The court found that under the church’s definition, “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 omission.”<sup>153</sup> The court also stated:

Moreover, even if we were to accept the Church’s argument, it would not change the outcome. If, as the Church says, actual use by the public must be shown to establish distribution, no one can expect a copyright holder to prove particular instances of use by the public when the proof is impossible to produce because the infringing library has not kept records of public use. To reiterate, a copyright holder should not be prejudiced in this manner, nor should an infringer benefit from its failure to keep records. In this case, the Church’s library did not record instances of public use of the Hotaling microfiche.<sup>154</sup>

This line of reasoning applies to P2P servers because every individual user is responsible for creating his or her own personal music library. Unlike the library system where records of dissemination are normally collected, the P2P systems are designed so that there are no records of downloads of stored files.<sup>155</sup> It would severely prejudice the copyright holders to require them to prove that actual copies were disseminated.<sup>156</sup> In *Hotaling*, the library retained a copy of the copyrighted

---

<sup>145</sup> 17 U.S.C. § 501(a) (2006).

<sup>146</sup> *Hotaling*, 118 F.3d at 203 (quoting 17 U.S.C. § 106(3)).

<sup>147</sup> *Id.* (citing 17 U.S.C. § 109(a)).

<sup>148</sup> *See id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (citing 17 U.S.C. § 106(3)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 204.

<sup>155</sup> *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–13 (9th Cir. 2001) (discussing the general framework of P2P networks and that the network itself keeps no records).

<sup>156</sup> *See Hotaling*, 118 F.3d at 204.

work in its “collection.”<sup>157</sup> On a P2P server, the collector who uploads the music to create a collection must maintain a copy of the work in his or her collection or the work will cease to be available from that user.<sup>158</sup>

A court has already adopted this logic.<sup>159</sup> In the United States District Court of the Northern District of California, Napster escaped direct infringement liability because:

[P]laintiffs seize upon the cataloging or indexing system in *Hotaling* and argue that Napster’s “indexing” system is akin to that in *Hotaling*. There is, however, more to *Hotaling* than that. In that case the library had a copy of the copyrighted work in its “collection”. Napster did not have works in its “collection”; it did not have a “collection” of recordings. The infringing works never resided on the Napster system. Instead, plaintiffs here seek to establish copyright infringement based on the mere fact that the names of their copyrighted musical compositions and sound recordings appeared in Napster’s index of available files. This might constitute evidence that the listed works were available to Napster users, but it is certainly not conclusive proof that the songs identified in the index were actually uploaded onto the network in a manner that would be equivalent to the way in which the genealogical materials at issue in *Hotaling* were copies and distributed to the church’s branch libraries.<sup>160</sup>

Additionally, contributory infringement is found when a contributory infringer: (1) has direct or constructive knowledge of a third party’s infringing activity; and (2) induces, causes, or materially contributes to the infringing conduct.<sup>161</sup> For the Internet, the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit have recognized the concept of “inducement.”<sup>162</sup>

If the logic from *Hotaling* is adopted, the question becomes one of showing if the individual who posted the copyrighted file either, induced,<sup>163</sup> enabled,<sup>164</sup> or contributed<sup>165</sup> to the infringing conduct.

---

<sup>157</sup> *Id.* at 202.

<sup>158</sup> *See Napster*, 239 F.3d at 1011–13 (describing generally how a P2P server works).

<sup>159</sup> *See In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 805 (N.D. Cal. 2005).

<sup>160</sup> *Id.* at 803.

<sup>161</sup> *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citation omitted)); *see also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (discussing the elements of contributory infringement).

<sup>162</sup> *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“One infringes contributorily by intentionally inducing or encouraging direct infringement”); *Perfect 10*, 487 F.3d at 727 (“[A]n actor may be contributorily liable [under *Grokster*] for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement”); *Napster*, 239 F.3d at 1019 (stating that the defendant incurs contributory liability when they “engage[] in personal conduct that encourages or assists the infringement” (quoting *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)).

<sup>163</sup> *See Grokster*, 545 U.S. at 930.

<sup>164</sup> *See Fonovisa*, 76 F.3d at 263.

<sup>165</sup> *See Napster*, 239 F.3d at 1020.

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

In *Grokster*, the United States Supreme Court applied a patent law theory of “inducement” to the claim of contributory infringement.<sup>166</sup> Specifically, the Court stated, “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”<sup>167</sup> The Court indicated the standard for inducement liability is providing or creating a service with the object of “promoting its use to infringe copyright.”<sup>168</sup> “The inducement rule, . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”<sup>169</sup> Additionally, in *Grokster*, the software was developed as a P2P software, and was engineered, disseminated, and promoted explicitly for facilitating piracy.<sup>170</sup>

While *Grokster* was found liable for contributory infringement for marketing the software that was designed for piracy and illegal downloading, it only worked as a massive infrastructure for individual infringers to infringe.<sup>171</sup> If *Grokster* is expanded to state that anyone who uses the P2P software *created* to market infringement to infringe by creating a shared folder that allows for anyone on the infrastructure to illegally download and pirate music, the inducement rule may stand for the individual. If the creation of the shared file is seen as the act of inducement, *Grokster* may be expanded to extend contributory infringement for anyone who allows others to download their “shared music” and would comply with initial standard of contributory liability: “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.”<sup>172</sup>

B. *Enabling*: Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996)

In *Fonovisa, Inc. v. Cherry Auction, Inc.*,<sup>173</sup> individual operators of a flea market named Cherry Auction were found liable for contributory copyright infringement when they provided the space for infringing vendors to sell their goods.<sup>174</sup> The court found that primary infringers, the vendors who sold illegal copies of copyrighted goods, and the flea-market were engaged in a mutual enterprise of infringement and stated “[I]t would be difficult for the infringing activity to take place in the massive

---

<sup>166</sup> *Grokster*, 545 U.S. at 936–37.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 914.

<sup>169</sup> *Id.* at 937.

<sup>170</sup> *Id.* at 923–24 (“[F]rom the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.”).

<sup>171</sup> *Id.* at 919–20.

<sup>172</sup> *Id.* at 930 (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

<sup>173</sup> 76 F.3d 259 (9th Cir. 1996).

<sup>174</sup> *Id.* at 264.

quantities alleged without the support services provided.”<sup>175</sup> These support services included the renting of space, specifically because the owners “retain[ed] the right to exclude any vendor for any reason, at any time, and thus [could] exclude vendors.”<sup>176</sup> Additionally the County Sherriff had raided the flea-market two years before the complaint was filed and seized 38,000 counterfeit recordings.<sup>177</sup> This completed the prerequisite knowledge and the act of enabling that allowed for a finding of contributory infringement.<sup>178</sup>

While the flea-market in *Fonovisa* was a geographical location where vendors met to swap infringing materials and goods, a shared folder is a digital space where individuals create a library of potentially infringing material and goods.<sup>179</sup> Because of the way the P2P server operates, those who create these types of shared folders are aware of the ability of others to make copies and further distribute the work.<sup>180</sup> Just like the flea-market owners created the space for the vendors to engage in direct infringement, those who create a shared folder on a P2P network create a space for other individuals to engage in direct infringement.<sup>181</sup> Under the logic of *Fonovisa* this digital space with the prerequisite constructive knowledge should be enough for the finding of contributory infringement.<sup>182</sup>

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

In *A&M Records, Inc. v. Napster, Inc.*,<sup>183</sup> the United States Court of Appeals for the Ninth Circuit found that the designer and distributor of a software program was liable for contributory infringement.<sup>184</sup> Napster was a file-sharing program which was expressly engineered to enable the easy exchange of pirated music.<sup>185</sup> Citing *Fonovisa*, the court found that “Napster materially contributes to the infringing activity . . . , ‘without the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.’”<sup>186</sup>

Drawing on the similarities between *Fonovisa* and *Napster*, individuals materially contribute to the infringement by offering services that allow unauthorized copies to be made of copyrighted music by offering the space and services that allow it to happen on a larger scale than would be possible if they had

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 261.

<sup>177</sup> *Id.*

<sup>178</sup> *See id.* at 262–64.

<sup>179</sup> *See id.* at 261.

<sup>180</sup> *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919–20 (2005).

<sup>181</sup> *See Fonovisa*, 76 F.3d at 262–64 (holding that a party with knowledge, and who benefits from the infringing activity, can be held contributorily liable).

<sup>182</sup> *See id.* at 264.

<sup>183</sup> 239 F.3d 1004 (9th Cir. 2001).

<sup>184</sup> *Id.* at 1020.

<sup>185</sup> *Id.* at 1020 n.5 (“[A] document authored by Napster co-founder Sean Parker mentioned ‘the need to remain ignorant of users’ real names and IP addresses since they are exchanging pirated music’” (quoting *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000), *aff’d in part and rev’d in part*, 239 F.3d 1004 (9th Cir. 2001)).

<sup>186</sup> *Id.* at 1022 (quoting *Napster*, 114 F. Supp. 2d at 920) (citation omitted).

not created the digital space (i.e. the shared folder).<sup>187</sup> Both the owners of the flea-market in *Fonovisa* and the creator of the software in *Napster* increased the frequency of infringement by making it easy, just as one who creates a digital library and allows others access to those library files increased the frequency of infringement by making it easy and available.<sup>188</sup>

#### IV. THE ANSWER TO THE QUESTION: MODIFICATION TO SECTION 101

Congress should add a definition to section 101 for “distribution” for clarity.<sup>189</sup> Immediately following the definition for “display,” the following language should be added to the Copyright Act: “Distribution’ includes any act of dissemination, including any offer for dissemination, of a work to the public by means of sale, rental, lease or lending, uploading to a file-share network, or transmitting the work in any media or by any method, whether now known or later discovered or developed. The act of dissemination and/or the offer to disseminate a work or copies of the work to any persons or file-sharing network for purposes of further distribution, performance, or display, constitutes distribution. Distribution does not require actual receipt or downloading of the work by any third party.”

#### CONCLUSION

In addition to Congress amending the Act, the courts need to act like United States Supreme Court decisions mean something and follow the precedent created by the Court in *Grokster*.<sup>190</sup> The RIAA should continue to pursue illegal uploaders and downloaders in court to ensure that no one is falsely accused of copyright infringement. While the RIAA suits have not dramatically curtailed illegal downloading, more stories about the large damages assessed Jammie Thomas will begin to deter illegal downloading. According to Mitch Bainwol, the chairman/CEO of the RIAA, “Our 2008 [song] shipment numbers show that revenue from an ever-expanding array of digital formats grew 44% in the last two years, from \$1.9 billion to \$2.7 billion, and now makes up more than 30% of music sales.”<sup>191</sup> Bainwol further stated, “During the last 10 years, a series of court decisions in the United States and abroad have confirmed that basic property rights in the physical world apply in the online world too. The most recent example is the conviction of the Pirate Bay operators in Sweden.”<sup>192</sup> In addition, the availability of legal downloads will also

---

<sup>187</sup> See *Napster*, 239 F.3d at 1022; *Fonovisa*, 76 F.3d at 264.

<sup>188</sup> See *Napster*, 239 F.3d at 1022; *Fonovisa*, 76 F.3d at 264.

<sup>189</sup> See 17 U.S.C. § 101 (2006).

<sup>190</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (holding those who induce, promote, or contribute to copyright infringement as liable, particularly in an online context such as P2P networks).

<sup>191</sup> Mitch Bainwol, *Courting Success: Ten Years After Napster, The Pirate Bay Case Proves That Legal Remedies Work*, BILLBOARD, June 6, 2009 at 10.

<sup>192</sup> *Id.*



help to prevent illegal downloading.<sup>193</sup> In the words of Marty Lafferty, CEO of the Distributed Computing Industry Association, which represents P2P companies, “Experience has demonstrated that efforts at enforcement against copyright infringement alone, which do not also provide attractive commercial alternatives, will be outpaced by technological advancement and are therefore doomed to failure.”<sup>194</sup>

---

<sup>193</sup> *See id.* (“More Internet-connected households today download music legally than illegally—23% compared with 18% in 2008, according to new data from NPD.”).

<sup>194</sup> Andre Paine, *Avast Ye Hackers: The Pirate Bay Trial Marks A Key Battle In Anti-P2P Campaign*, BILLBOARD, Feb. 28, 2009, at 9.