

DISTRIBUTION, I PRESUME:

A ROLE FOR PRESUMPTIONS IN ESTABLISHING THE “MAKING AVAILABLE” RIGHT[♦]

INTRODUCTION.....	737
I. WHY A PRESUMPTION?.....	741
A. <i>Substantive Policy</i>	742
B. <i>Disparate Access to Proof</i>	744
C. <i>Probability</i>	747
D. <i>Consistency</i>	748
II. THE MECHANICS OF PRESUMPTIONS.....	750
III. EVIDENCE REQUIRED TO ESTABLISH AND REBUT A PRESUMPTION OF DISTRIBUTION.....	755
A. <i>Creating the Presumption: The Basic Facts</i>	755
B. <i>Rebutting the Presumption: Counterproof of the Presumed Fact</i>	757
CONCLUSION: JAMMIE THOMAS REVISITED.....	759

INTRODUCTION

In September 2008, U.S. District Court Judge Michael Davis concluded that he had committed a “manifest error of the law,”¹ and declared a mistrial in a suit pitting the American recording industry against Jammie Thomas, a single mother from Minnesota.² Capitol Records, as well as several other record companies, had sued Ms. Thomas for copyright infringement of sound recordings she kept on her computer’s hard drive.³ They alleged that Ms. Thomas had violated the plaintiffs’ exclusive

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¹ Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008).

² *Id.* at 1226-27; see David Kravets, *Judge Declares Mistrial in RIAA-Jammie Thomas Trial*, WIRED Blogs, Sept. 24, 2008, <http://blog.wired.com/27bstroke6/2008/09/not-for-publica.html>.

³ See Complaint at 2-3, Virgin Records Am., Inc. v. Thomas, 579 F. Supp. 2d (D. Minn. 2006) (No. 06-1497), 2006 U.S. Dist. Ct. Pleadings LEXIS 17379 (decided *sub nom.* Capitol Records, Inc. v. Thomas).

distribution rights in the works by “making available” the copyrighted works, i.e., by placing them on a hard drive connected to a peer-to-peer (“P2P”) file sharing network.⁴

The suit against Ms. Thomas was the first brought against an individual user by the Recording Industry Association of America (“RIAA”), the lobbying and litigation arm of the U.S. recording industry, to go to a jury. Judge Davis’ “manifest error” was in the jury instructions he issued. The problematic instruction stated, “[t]he 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.*”⁵ Based on this instruction, the jury found that Ms. Thomas had infringed the copyrights of twenty-four sound recordings and awarded the record companies \$220,000 in damages.⁶ When Judge Davis subsequently granted Ms. Thomas a new trial, he wrote that the jury instruction at issue was “erroneous, and that error substantially prejudiced Thomas’ rights.”⁷

The targeting of Ms. Thomas resulted from a change in RIAA strategy for combating illicit P2P file sharing.⁸ Where initially the RIAA went after the companies that produced and distributed the

⁴ 17 U.S.C. § 106 (2006) states:

Subject to [17 U.S.C.] sections 107 through 122 . . . , the owner of 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

⁵ Jury Instruction at 9-10, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d (D. Minn. 2006) (No. 06-1497), 2007 Jury Instr. LEXIS 1638. Following the retrial, a jury again found Ms. Thomas liable for copyright infringement and awarded damages of \$1.92 million; see David Kravets, *Jury in RIAA Trial Slaps \$2 Million Fine on Jammie Thomas*, WIRED Blogs, June 18, 2009, <http://www.wired.com/threatlevel/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas/> (emphasis added).

⁶ See Erik Larson & Tom Wilkowske, *Music Industry Urges Judge Not to Reverse First Piracy Trial*, Bloomberg.com, Aug. 4, 2008, <http://www.bloomberg.com/apps/news?pid=conewsstory&refer=conews&tkr=EMI%3ALN&sid=aEkOwhPJbxpk>.

⁷ *Capitol Records, Inc.*, 579 F. Supp. 2d at 1226-27.

⁸ The architecture of P2P technology allows users to remain “anonymous or pseudonymous” while transactions between users “are not easily observable by a third party.” These factors pose significant obstacles to content owners attempting to enforce their copyright against individual users because “[p]eer-to-peer software primarily exists to create decentralized networks of individual computer users . . . [and] allows the users to communicate directly with one another, rather than routing their transmissions through a central server—thus the term ‘peer-to-peer’ architecture, as opposed to ‘client server.’” *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 159 (D. Mass. 2008) (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-20 (2005)). For a more detailed explanation of the technology, see Niels Schaumann, *Intellectual Property in an Information Economy: Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1019-23 (2002).

P2P technology,⁹ the RIAA, in September 2003, also began to target with legal action individual users who were alleged to have used some form of the P2P technology to illegally copy and/or distribute copyrighted works.¹⁰ Since then, more than 35,000 lawsuits have been filed against individual users of P2P technology, including Ms. Thomas.¹¹

While the success of the RIAA’s litigation strategy in stemming the tide of illegally downloaded music is questionable,¹² it has at least demonstrated that the existence of a “making available” right in U.S. copyright law is an uncertain proposition. Although the RIAA has recently decided to abandon its legal assault against individual P2P file sharers,¹³ the question of whether the distribution right under § 106(3) of the U.S. Copyright Act encompasses the right to make works available for distribution will not simply disappear. First, the RIAA’s new strategy, relying on cooperation of Internet service providers (“ISPs”), does not preclude further tests of the “making available” right.¹⁴ Second and more significantly, when Congress passed the Digital Millennium Copyright Act (“DMCA”) and President Bill Clinton signed it into law in 1998, both the President and Congress believed that U.S. copyright law did provide for the “making available” right.¹⁵ Thus, if U.S. copyright law does not in

⁹ Beginning with a suit against Napster in 1999, the RIAA went on to sue Scour, Aimster, AudioGalaxy, Morpheus, Grokster, Kazaa, iMesh, and Limewire. *See, e.g.*, *Metro Goldwyn Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007); *see also* ELECTRONIC FRONTIER FOUNDATION, *RIAA v. THE PEOPLE: FIVE YEARS LATER 2*, <http://www.eff.org/files/eff-riaa-whitepaper.pdf>; Justin Hughes, *On the Logic of Suing One’s Customers and the Dilemma of Infringement-Based Business Models*, 22 *CARDOZO ARTS & ENT. L.J.* 725 (2005).

¹⁰ John Borland, *RIAA Sues 261 File Swappers*, *CNET NEWS*, Sept. 8, 2003, http://news.cnet.com/2100-1023_3-5072564.html.

¹¹ Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, *WALL ST. J.*, Dec. 19, 2008, at B1.

¹² *Compare* ELECTRONIC FRONTIER FOUNDATION, *supra* note 9, at 13, (“While it is hard to precisely measure the use of P2P and the amount of illegal file sharing in the U.S., one thing is clear: after more than 30,000 RIAA lawsuits, tens of millions of U.S. music fans continue to use P2P networks and other new technologies to share music.”), *with* RIAA.com, *For Students Doing Reports*, <http://www.riaa.com/faq.php> (last visited Nov. 9, 2009) (“Prior to the [RIAA litigation] campaign, illegal p2p music trading was growing exponentially. Since 2004, the percentage of Internet-connected households that have downloaded music from p2p is essentially flat.”).

¹³ McBride & Smith, *supra* note 11.

¹⁴ *Id.* (noting that “the industry group is reserving the right to sue people who are particularly heavy file sharers, or who ignore repeated warnings . . .”)

¹⁵ For instance, the Senate concluded that, in order to adhere to the WIPO Treaties, legislation was necessary, not to create a “make available” right, but only to address the areas of “anticircumvention of technological protection measures and protection of the integrity of rights management information.” S. REP. NO. 105-190, at 8 (1998) (Conf. Rep.); *see also* H. REP. NO. 105-551, pt. 1, at 12 (1998) (“The treaties do not require any change in the substance of copyright rights or exception in U.S. law.”).

some way recognize the exclusive right of copyright owners to make works available for distribution, the U.S. would be in violation of nine binding international agreements,¹⁶ including the World Intellectual Property Organization (“WIPO”) Copyright Treaty (“WCT”)¹⁷ and the WIPO Performances and Phonograms Treaty (“WPPT”),¹⁸ as well as seven Free Trade Agreements.¹⁹ These treaties serve as the basis for the international norms for copyright protection in the digital age, treaties that the United States had a large role in crafting and had purportedly implemented in its domestic law.²⁰

The question of whether U.S. copyright law provides a “making available” right thus requires an answer, that absent an amendment to the Copyright Act, must be provided by the courts. This Note proposes that courts answer the question by establishing a presumption of distribution that takes effect when certain basic facts tending to show distribution are established. This approach will help bring U.S. copyright law into compliance with its international treaty obligations, resolve confusion, establish a consistent judicial framework for deciding the issue, avoid a strained interpretation of the Copyright Act, and provide copyright holders with effective and reasonable protections against online distribution. Part I of this Note will explore the difficulties surrounding the “making available” issue and how they might be addressed through the creation of a distribution

¹⁶ This is the argument advanced by Thomas D. Snyder of the Progress & Freedom Foundation, as amicus, in the *Thomas* case. See Amicus Curiae Brief of Thomas D. Snyder of the Progress & Freedom Foundation Opposing the Motion for a New Trial at 2, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d (D. Minn. 2006) (No. 06-1497) [hereinafter Snyder Brief].

¹⁷ See World Intellectual Property Organization (WIPO) Copyright Treaty art. 6, Dec. 20, 1996, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html. Art. 6, § 1 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.” *Id.*

¹⁸ See World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty, art. 8, Dec. 20, 1996, available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P101_10992. Art. 8, § 1 states: “Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.” *Id.*

¹⁹ See U.S.-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, § 101(a)(2), 120 Stat. 1191 (2006); U.S.-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, § 101(a)(2), 119 Stat. 3581 (2006); Dominican Republic-Central America-U.S. Free Trade Agreement Implementation Act, Pub. L. No. 109-53, § 101(a)(2), 119 Stat. 462 (2005); U.S.-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, § 101(a)(2), 118 Stat. 1103 (2004); U.S.-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 101(a)(2), 118 Stat. 919 (2004); U.S.-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 101(a)(2), 117 Stat. 909 (2003); U.S.-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 101(a)(2), 117 Stat. 948 (2003).

²⁰ See Snyder Brief, *supra* note 16.

presumption. Importantly, this section will provide a foundation for the creation of the presumption, by demonstrating how the considerations supporting a presumption in “making available” cases align closely with the general considerations that have historically governed the creation of presumptions. Part II will focus on the role of presumptions in the judicial process, as well as the practical mechanics of their operation in “making available” cases. Part III explores the types of evidence that would create the presumption in “making available” cases, as well as the types that could effectively rebut the presumption. This Note will not wade, however, into the interpretative morass of declaring whether the distribution right under U.S. copyright law includes the right to “make available,” instead leaving that task to other scholars, students, and concerned amici.

I. WHY A PRESUMPTION?

A presumption is a device that requires the trier of fact to draw a particular conclusion (the “presumed fact”) on the basis of other facts (the “basic facts”) and absent evidence tending to disprove the presumed fact.²¹ Most presumptions “have been created for a combination of reasons,”²² and the creation of a distribution presumption would align with those reasons. Beyond a broad need for judicial consistency, a presumption would provide courts with a workable solution to the “making available” issue without resorting to strained interpretations of or amendments to the Copyright Act. Most importantly, a presumption would effectively provide copyright holders with the means to enforce the right to make their works available for distribution, bringing U.S. law into compliance with its international intellectual property agreements. A presumption would also recognize the special problems of copyright enforcement in the digital age, particularly, the scarcity of evidence of infringement, where wide scale copying and distribution occurs without the infringing parties leaving the privacy of their own homes. Further, the probability that distribution has occurred, based in part on the massive scale of infringing distribution on P2P networks, is sufficiently high to warrant a presumption of distribution if certain basic facts are established.

Throughout our legal history, presumptions have been used

²¹ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE: DOCTRINE AND PRACTICE* 184-85 (1995).

²² KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* 574 (6th ed. 2006) [hereinafter *MCCORMICK ON EVIDENCE*].

to

(a) implement substantive policies by making claims or defenses easier or harder to maintain, (b) insure that parties with relatively better access to proof will produce it (penalizing them for not doing so), providing relief to parties less able to obtain similar evidence, (c) establish what is likely to be true anyway, and (d) resolve cases where definitive proof is simply unavailable.²³

Presumptions have also been created to simply avoid an impasse.²⁴ As discussed *infra*, these commonly cited reasons for the creation of presumptions closely align with the particular considerations surrounding the “making available” issue, providing a historical foundation for the implementation of a presumption of distribution.

A. *Substantive Policy*

A presumption would provide courts with a clear and effective mechanism to adjudicate the “making available” disputes, allowing for a reasonable interpretation of the existing Copyright Act that aligns with U.S. treaty obligations. The Supreme Court has long held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²⁵ While plaintiffs (and amici) have referenced this rule of statutory interpretation, known as the *Charming Betsy* rule, to argue that U.S. international treaty obligations and the legislative history surrounding the enactment

²³ MUELLER & KIRKPATRICK, *supra* note 21, at 189; *see also* MCCORMICK ON EVIDENCE, *supra* note 22, at 577; GLEN WEISSENBERGER, WEISSENBERGER’S FEDERAL EVIDENCE, § 301.3 (5th ed. 2006). The Supreme Court has used similar reasoning in endorsing the establishment of presumptions in certain situations. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (endorsing rebuttable presumption of reliance on material misstatements in securities fraud actions). There, the Court stated, “[p]resumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are . . . useful devices for allocating the burdens of proof between parties.” *Basic Inc.*, 485 U.S. at 245 (citations omitted).

²⁴ MCCORMICK ON EVIDENCE, *supra* note 22, at 574 (“A presumption may also be created to avoid an impasse, and reach some result . . .”).

²⁵ *Murray v. Charming Betsy*, 6 U.S. 64, 81 (1804); *see, e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) (“[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.”); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (utilizing the “long heeded-admonition of Mr. Chief Justice Marshall” in *Charming Betsy* to interpret a statute); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States.”).

of such treaties should control the interpretation of the distribution right,²⁶ courts have either sidestepped the issue²⁷ or rejected the line of reasoning.²⁸ Courts have not been swayed by the international treaty obligations of the U.S. to interpret the Copyright Act as containing a “making available” right when they have viewed such an interpretation to be unreasonable.²⁹ A presumption provides a path to the “making available” right without foisting upon the courts what many judges and commentators believe is an unreasonable interpretation of the distribution right.

Failure by the courts to recognize a right to make copyrighted works available for distribution would bring the U.S. expressly out of compliance with the WCT, the WPPT, as well as numerous free trade agreements. The legislative history of the WIPO treaties clearly demonstrates that past Presidents and sessions of Congress believed that the Copyright Act provided for a “making available” right. In 1996, at the urging of the U.S. and the European Union (“E.U.”), WIPO promulgated the WCT and the WPPT, treaties that served to update and clarify how the international norms prescribed in the Berne Convention for the Protection of Literary and Artistic Works applied to the Internet.³⁰ Article Eight of the WCT states, “[a]uthors 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.”³¹ The WPPT provides a similar right to performers.³² To implement these digital-age treaties, Congress

²⁶ See Snyder Brief, *supra* note 16.

²⁷ See, e.g., *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 969 n.10 (N.D. Tex. 2006). The court was able to make a ruling “without addressing the issue of compliance with the treaty or the legislative history surrounding congressional implementation of the treaty’s provisions.” *Id.* at 969.

²⁸ See, e.g., *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 243 n.7 (S.D.N.Y. 2008) (“First, the Court notes that because the WIPO treaties are not self-executing, they create no private right of action on their own. . . . Second, the Court is hesitant to substitute the claimed legislative intent of the 105th Congress [which enacted the WIPO treaties] for that of the 94th Congress [which enacted the Copyright Act of 1976].”); *Capitol Records Inc., v. Thomas*, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008) (acknowledging international treaty obligations but rejecting the interpretation of the distribution right as containing the “make available” right as not reasonable).

²⁹ *Thomas*, 579 F. Supp. 2d at 1226 (“[C]oncern for U.S. compliance with the WIPO treaties and the FTAs cannot override the clear congressional intent in § 106(3).”).

³⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

³¹ See World Intellectual Property Organization (WIPO) Copyright Treaty art. 6, § 1, Dec. 20, 1996, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (emphasis added).

³² See World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty art. 8, § 1, Dec. 20, 1996, *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P101_10992 (“Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale

passed the Digital Millennium Copyright Act in October 1998.³³ In developing the DMCA, both Houses of Congress held extensive hearings and produced several committee reports, ultimately arriving at the conclusion that no changes to U.S. copyright law were required in order to provide a “making available” right to copyright owners.³⁴ With both Houses of Congress as well as the President in agreement, the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 was enacted as part of the DMCA.³⁵ Under the belief that the DMCA had fully implemented the WIPO Treaties, the President ratified the WCT and the WPPT in 1999.³⁶

Thus, through the ratification and adoption of these treaties, the legislative and executive branches impliedly indicated that U.S. law complied with the treaties by providing a “making available” right.³⁷ But, as the court in *Thomas* stated in accordance with the *Charming Betsy* rule, “the contents of the WIPO treaties are only relevant insofar as § 106(3) is ambiguous and there is a reasonable interpretation of § 106(3) that aligns with the United States’ treaty obligations.”³⁸ The ambiguity in the distribution right, particularly its connection to the § 101 definition of “publication,” is demonstrated by the myriad interpretations adopted by courts adjudicating “making available” claims. A presumption of distribution would allow courts to adopt well-settled and reasonable interpretations of § 106(3) while incorporating into the statute the right to make copyrighted works available for distribution.

B. *Disparate Access to Proof*

“[J]ust as burdens of proof are sometimes allocated for reasons of fairness,”³⁹ presumptions can help “to correct an imbalance resulting from one party’s superior access to the proof.”⁴⁰ Within the world of P2P file sharing, due in large part to

or other transfer of ownership.”).

³³ See The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

³⁴ See S. REP. NO. 105-190, at 8 (1998) (Conf. Rep.); H. REP. NO. 105-551, pt. 1, at 12 (1998).

³⁵ The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

³⁶ See WPPT Notification No. 8, WIPO Performances and Phonograms Treaty, Ratification by the United States of America, September 14, 1999, available at http://www.wipo.int/edocs/notdocs/en/wppt/treaty_wppt_8.html and WCT Notification No. 10, WIPO Copyright Treaty, Ratification by the United States of America, available at http://www.wipo.int/treaties/en/html.jsp?file=/redocs/notdocs/en/wct/treaty_wct_10.html.

³⁷ See *supra* note 15.

³⁸ *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008).

³⁹ MCCORMICK ON EVIDENCE, *supra* note 22, at 574.

⁴⁰ *Id.*

the “virtual (nonphysical) nature”⁴¹ of the digital environment, evidence of copyright infringement is relatively difficult for plaintiffs to obtain (and relatively easy for defendants to hide, alter, or destroy).⁴² A presumption would help correct this imbalance.

Direct evidence of copyright infringement would normally consist of either an admission by the defendant of infringing activity or witness testimony of infringing activity. However, “[i]t is generally not possible to establish copying as a factual matter by direct evidence, as it is rare that the plaintiff has available a witness to the physical act of copying”⁴³ or that the defendant would admit to copying. Unlike the other exclusive rights provided by the Copyright Act, the infringement of which are commonly proven through circumstantial evidence,⁴⁴ violations of the distribution right have traditionally been proven through such direct evidence. This is due to the public nature of the right, for which a violation requires a “public” distribution.⁴⁵ Such distribution often “occur[s] on a large scale and there might be many recipients who could directly substantiate how they received a copy and from whom.”⁴⁶ An example is the mass production of bootleg DVDs (reproduction) and their subsequent sale on the street corner (distribution).

Availability of this sort of proof is scarce in the digital context, particularly within the realm of P2P file sharing.⁴⁷ The fundamental difference is that the infringing activities now occur in the privacy of homes, not on street corners or in warehouses. Further, an individual who downloads a song from another’s hard drive has little or no means to identify the individual offering that

⁴¹ LESLIE DAVID SIMON, NETPOLICY.COM: PUBLIC AGENDA FOR A DIGITAL WORLD 44 (2000). Simon goes on to state that nonphysical “nature of the digital age poses special problems for policy makers by virtue of its very complexity and abstractness.” *Id.*

⁴² See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 159 (D. Mass. 2008) (“[U]sers in a peer-to-peer network can remain relatively anonymous or pseudonymous. Because communications between two computers on a peer-to-peer network can take place directly, without passing through a central network server, such transactions are not easily observable by a third party. By the nature of the network and software, then, peer-to-peer users can control what information they display to the world.”).

⁴³ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B] (2008).

⁴⁴ *Id.* “[C]opying is ordinarily established indirectly by the plaintiff’s proof of access and ‘substantial’ similarity.”

⁴⁵ 17 U.S.C. § 106(3) (2006).

⁴⁶ Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145, 1153 (2008).

⁴⁷ See, e.g., David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED Blogs, Sept. 4, 2008, <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (“The [RIAA] believes it is technically impossible to prove that files offered on a peer-to-peer user’s shared folders were actually downloaded by anyone besides its own investigators. ‘It’s all done behind a veil,’ RIAA attorney Donald Verrilli Jr. argued in the Thomas case.”) [hereinafter *File Sharing Lawsuits at a Crossroads*].

file. The copy itself is, in most cases, identical to the original, non-infringing copy. Although distribution may occur on a large scale through P2P networks, the infringing distributor need not reproduce the work but simply make the work available for others to reproduce, never parting with his own copy.

The centerpiece case in the RIAA's prosecution of their "making available" claims is *Hotaling v. Church of Jesus Christ of Latter-Day Saints*.⁴⁸ While many courts have declined to follow the decision,⁴⁹ the relevance of the underlying equitable concern that appears to have motivated the decision—that an infringing party could avoid liability for infringement through its own failure to record the illicit use—persists within the context of P2P file sharing and further supports a creation of a presumption of distribution.⁵⁰

In the *Hotaling* case, a library made several unlawful copies of the plaintiff's copyrighted works and distributed them to branches throughout the country.⁵¹ Because the copies were kept in microfiche form, the public was unable to check out the unlawful copies.⁵² The library did not keep records of microfiche use, so the plaintiff was unable to prove that anyone had actually used the unlawful copies.⁵³ The Fourth Circuit held that making copyrighted material available is sufficient to constitute distribution, stating:

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 § 106(3), a copyright holder would be prejudiced by a library that does not keep records of public use, and the

⁴⁸ 118 F.3d 199 (4th Cir. 1997); *see, e.g.*, *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 167 (D. Mass. 2008) ("To suggest that 'making available' may be enough, the plaintiffs rely primarily on the Fourth Circuit's decision in *Hotaling*"); *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) ("The initial judicial authority for [the "make available" theory of liability] comes from the Fourth Circuit's decision in *Hotaling* . . .").

⁴⁹ *See, e.g.*, *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (agreeing with "[t]he majority of district courts [that] have rejected the recording companies' 'making available' theory because *Hotaling* is inconsistent with the Copyright Act.")

⁵⁰ *See Warner Bros. Records, Inc. v. Payne*, 2006 U.S. Dist. LEXIS 65765, at *10 (W.D. Tex. 2006) ("[T]he same evidentiary concerns that were present in *Hotaling* are also present in a case involving peer-to-peer file sharing programs [P]iracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder.") (quotations and citations omitted).

⁵¹ *Hotaling*, 118 F.3d at 201.

⁵² *Id.* at 205.

⁵³ *Id.* at 203.

library would unjustly profit by its own omission.⁵⁴

The lack of recordkeeping by the alleged infringer that concerned the *Hotaling* court should also concern courts wrestling with “making available” claims. Forensic evidence, such as log files, may provide circumstantial proof of infringement, but that information is difficult, if not impossible, to obtain.⁵⁵ Often plaintiffs only have the Internet Protocol (“IP”) number or address of the alleged infringer and must subpoena the ISP to obtain more information.⁵⁶ Further, any information that may demonstrate infringing distribution can be destroyed or altered by the user. The inhibited access to proof of infringement in the digital environment is a substantial barrier to copyright owners’ effective enforcement of their rights. A presumption of distribution would help level the playing field and would stand as an appropriate response to a unique problem posed by advances in digital technology.

C. Probability

Regarding presumptions, “the most important consideration in [their] creation . . . is probability.”⁵⁷ Presumptions are often created when basic facts give rise to a natural inference of some additional fact.⁵⁸ A presumption, thus, may help “establish what is most likely to be true anyway”⁵⁹ Within the area of “make available” claims, proof of certain facts about the defendant—for instance, the presence of copyrighted works in the defendant’s shared folder that is connected to a P2P network—may render the inference that the defendant distributed those works “so probable that it is sensible and timesaving to assume”⁶⁰ that the defendant did in fact distribute those works, unless he is able to disprove it.

⁵⁴ *Id.*

⁵⁵ See David Kravets, *An Essay Concerning MPAA Understanding of ‘Making Available’ in the P2P Context*, WIRED Blogs, June 24, 2008, <http://blog.wired.com/27bstroke6/2008/06/an-essay-concer.html> (“It’s impossible . . . to prove members of the public on peer-to-peer networks have actually copied music from somebody else’s share folder.”). *But see* Kasunic, *supra* note 46, at 1161 n.54 (“It appears that some peer-to-peer software create log files that may reveal what particular files were transmitted and the IP addresses of the recipient.”).

⁵⁶ See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 160 (D. Mass. 2008) (explaining “dynamic” IP addressing and how it “makes the plaintiffs’ task of discovering the identity of a particular infringer more difficult. The IP address that they have noted as belonging to a particular user’s computer may be assigned to a different user’s computer in short order.”) (citations omitted).

⁵⁷ MCCORMICK ON EVIDENCE, *supra* note 22, at 574.

⁵⁸ MUELLER & KIRKPATRICK, *supra* note 21, at 189.

⁵⁹ *Id.*

⁶⁰ MCCORMICK ON EVIDENCE, *supra* note 22, at 574. See also WEISSENBERGER, *supra* note 23, at § 301.3 (A presumption “almost always is indicated by a modicum of rational, intrinsic probability.”).

While the specific factors that may give rise to a presumption of distribution are discussed in detail *infra*, a more general look at the probability that an individual user has engaged in infringing distribution is worth considering. Hypothetical user X possesses traits common to many P2P users: (1) X has on his computer a software program designed primarily for P2P file sharing; (2) through the P2P network, X is connected to one-million other users, giving him access to all of the files in their shared folders and granting them access to the files in his own; and (3) X's shared folder contains 100 individual files—some are files of copyrighted works he ripped from albums he purchased himself, and some are files of copyrighted works that he downloaded from other users on the P2P network. X is targeted by the recording industry because an investigator, posing as a P2P user, successfully downloaded five music files containing copyrighted works from X's hard drive. In other words, there is direct evidence of infringement of five copyrighted works.

Putting aside the question of whether this kind of P2P transfer constitutes distribution, these factors can certainly give rise to the inference that X had distributed some if not all of the other ninety-five files contained on his hard drive. Why else would X participate in a P2P file-sharing network but to share files? And, if files in his shared folder contain copyrighted works, does the inference not then arise that he has shared copyrighted works? Certain factors would clearly mitigate these probabilities (perhaps then destroying the presumption of distribution as discussed *infra*), and the possibility exists that a distribution of this sort would not constitute copyright infringement (if, for example, X had the permission of the copyright holder to distribute the work at issue). Nevertheless, the more logical inference is that X had distributed the copyrighted works on his hard drive, thus, lending support to a creation of a presumption of distribution.⁶¹

D. Consistency

Unless there is an amendment to the Copyright Act, the “making available” issue needs to be resolved by the courts. Judge Davis' consideration and reconsideration of the “making available” claim in *Thomas* are emblematic of the courts' unsettled and inconsistent treatment of the issue. A distribution would provide a

⁶¹ See, e.g., *Arista Records, LLC v. Does 1-27*, 2008 U.S. Dist. LEXIS 6241 at *18 (D. Me. 2008) (denial of defendants' motions to dismiss). While conceding that the defendants alleged distribution might somehow be “permitted or otherwise lawful,” the court stated that “it is a perfectly plausible inference that the alleged . . . distribution of the Plaintiffs' copyrighted song recordings over the peer-to-peer network constituted infringement.” *Id.* at *17.

firm basis from which to adjudicate future “making available” claims.

Infringement of the distribution right has, traditionally, required proof of the transfer of a copy of the work.⁶² Support in the case law for the opposing proposition—that making the work available is enough to infringe the distribution right—is limited⁶³ and derives primarily from the Fourth Circuit’s decision in *Hotaling*, where the court held that the defendant library’s completion of “all steps necessary for distribution to the public”⁶⁴ constituted a distribution of the copyrighted work at issue within the meaning of § 106(3).⁶⁵ While a limited number of courts have followed *Hotaling* in ruling on “making available” claims,⁶⁶ the precedential value of the decision appears limited.⁶⁷ At the same time, courts have left room for the “making available” right to survive by looking to the § 101 definition of “publication”⁶⁸ to determine the meaning of “distribute” as used in § 106(3).⁶⁹

⁶² See NIMMER, *supra* note 43, § 8.11[A] (“Infringement of this right requires the actual dissemination of either copies or phonorecords.”); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.5.1, at 7:127 (rev. 3d ed. Supp 2009) (“Courts have historically read section 106(3) to require that, for the public distribution right to be infringed, copies or phonorecords must actually be distributed.”); 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9 (2008) (“[W]ithout actual distribution of copies . . . there is no violation of the distribution right.”). *But see Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary House of Representatives*, 107th Cong. 114-15 (2002) (letter from Marybeth Peters, Register of Copyrights, Rep. Howard L. Berman, Member, H. Comm. on the Judiciary) (“[M]aking [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 (where the work is uploaded without authorization of the copyright holder.)”).

⁶³ *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (“[T]he support in the case law for the ‘make available’ theory of liability is quite limited.”).

⁶⁴ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

⁶⁵ *Id.*

⁶⁶ See, e.g., *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 969-70 (N.D. Tex. 2006); *Warner Bros. Records, Inc. v. Payne*, 2006 WL 2844415 at *3-4 (W.D. Tex. 2006).

⁶⁷ See, e.g., *In re Napster, Inc.*, 377 F. Supp. 2d 796, 802-805 (N.D. Cal. 2005) (criticizing *Hotaling* as being “contrary to the weight of [other] authorities” and “inconsistent with the text and legislative history of the Copyright Act of 1976”); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008) (citing a lacuna in the Fourth Circuit’s reasoning and stating “[m]erely because the defendant has ‘completed all the steps necessary for distribution’ does not necessarily mean that a distribution has actually occurred.”) (citations omitted).

⁶⁸ 17 U.S.C. § 101 (2006) 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.

⁶⁹ See, e.g., *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d, at 234, 241 (S.D.N.Y. 2008) (relying on the legislative history of the Copyright Act to determine that the terms “distribute” and “publication” are synonymous); *Atl. Recording Corp. v. Anderson*, 2008 U.S. Dist. LEXIS 53654, at *18 (S.D. Tex. 2008) (“‘Distribute’ is not defined in the Copyright Act, but the Supreme Court has equated the term with ‘publication,’ which is defined under the Act.”); *Interscope Records v. Duty*, 2006 U.S. Dist. LEXIS 20214, at *7

Under this analysis, an “offer to distribute copies or phonorecords to a group of persons for purpose of further distribution, public performance, or public display,”⁷⁰ infringes the § 106(3) distribution right.⁷¹

But this dividing line in statutory interpretation has done little to definitively determine the viability of the “making available” right. For instance, the court in *London-Sire Records, Inc. v. Doe I*, which found that “publication” and “distribution” are not synonymous, still allowed “that where the defendant has completed all the necessary steps for distribution, a reasonable fact-finder may infer that the distribution actually took place.”⁷² On the other hand, the court in *Elektra Entm’t Group, Inc. v. Barker*, issuing its decision the same day as the *London-Sire* decision issued, found that “publication” and “distribution” were synonymous but that the plaintiffs’ allegations failed to state a claim because they did not affirmatively plead that the offer to distribute was for the purpose of further distribution, public performance, or public display.⁷³ As Professor Patry aptly stated, in reviewing these and other “making available” decisions on his blog, “[t]he only thing clear from these cases is that the issues will be with us for a long time.”⁷⁴ As it stands today, neither the viability of the “making available” argument nor the various defenses raised in opposition have been conclusively established. A presumption would provide much needed structure to this difficult issue.

II. THE MECHANICS OF PRESUMPTIONS

Having explored why a presumption of distribution would serve as an effective and appropriate response to the “making available” issue, a closer look at the operation of presumptions is in order. “[A] presumption is a standardized practice, under which certain facts are held to call for uniform treatment with

(D. Ariz. 2006) (“[T]he right of distribution is synonymous with the right of publication . . .”). *But see London-Sire Records*, 542 F. Supp. 2d at 169 (“Plainly, ‘publication’ and ‘distribution’ are not identical.”); *Obolensky v. G.P. Putnam’s Sons*, 628 F. Supp 1552, 1555-56 (S.D.N.Y. 1986) (noting that an unconsummated offer to sell a copyrighted work does not constitute infringement).

⁷⁰ 17 U.S.C. § 101 (2006).

⁷¹ *Id.*

⁷² *London-Sire Records*, 542 F. Supp. 2d at 169. As the “reasonable inference” is a close cousin of the presumption, this decision lends indirect support for the creation of a presumption of distribution. Professor Kasunic views this language as “express judicial support” for the use of circumstantial evidence to prove infringement of the distribution right. *See Kasunic, supra* note 46, at 1154 n.35.

⁷³ *Elektra Entm’t Group, Inc.*, 551 F. Supp. 2d at 244-45 (granting plaintiffs thirty days to amend their complaint).

⁷⁴ The Patry Copyright Blog, <http://williampatry.blogspot.com/2008/04/recent-making-available-cases.html> (Apr. 3, 2008, 22:29 EST).

respect to their effect as proof of other facts,”⁷⁵ requiring “the trier [of fact] to draw a particular conclusion on the basis of certain facts.”⁷⁶ To be clear, a presumption, as defined *supra* and used in this Note, differs from a judge’s ruling based upon a rational inference, e.g., fact A being reasonably inferred from fact B.⁷⁷ Even if that inference has statutory or precedential support, it would not constitute “a standardized practice” as used above.⁷⁸ Rather, a presumption dictates

not only that the establishment of fact B is sufficient to satisfy a party’s burden of producing evidence with regard to fact A, but also at least compels the shifting of the burden of producing evidence on the question to the party’s adversary. Under this view, if proof of fact B is introduced and a presumption exists to the effect that fact A can be inferred from fact B, the party denying the existence of fact A must then introduce proof of its nonexistence or risk having a verdict directed or a finding made against it.⁷⁹

Whether a presumption should have greater effect than shifting the burden of production, such as assigning the burden of persuasion, is an issue of great dispute, but “there is seldom doubt that presumptions have at least” this effect.⁸⁰

In a standard copyright infringement suit, the plaintiff must prove two things: (1) that the plaintiff owns a valid copyright, and (2) that the defendant violated one or more of the exclusive rights set forth in 17 U.S.C. § 106.⁸¹ The “making available” issue emerges from the second prong, where the plaintiff attempts to prove that the defendant, by “making available” the copyrighted work, violated the § 106(3) distribution right.

If a presumption of distribution were available, the plaintiff would need to offer proof of certain basic facts tending to show distribution (discussed in detail *infra*) in order to establish the presumption.⁸² Proof of actual distribution would be unnecessary.

⁷⁵ MCCORMICK ON EVIDENCE, *supra* note 22, at 572.

⁷⁶ MUELLER & KIRKPATRICK, *supra* note 21, at 184. See also WEISSENBERGER, *supra* note 23, at § 301.4.

⁷⁷ In several recent “make available” cases, judges have alluded to rational inferences of distribution, usually in pre-trial rulings. See, e.g., *London-Sire Records*, 542 F. Supp. 2d at 169. See also Kasunic, *supra* note 46.

⁷⁸ MCCORMICK ON EVIDENCE, *supra* note 22, at 572.

⁷⁹ *Id.*

⁸⁰ MUELLER & KIRKPATRICK, *supra* note 21, at 185 n.1.

⁸¹ See 17 U.S.C. § 501 (a)-(b) (2006); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

⁸² A contingent case arises where the basic facts are disputed. If no counterproof is offered to disprove the presumed fact, the court would instruct the jury that if it finds the basic facts, then it must find the presumed fact. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510 n.3 (1993) (stating that if party against whom presumption operates fails to offer sufficient counterproof but reasonable minds could disagree on whether the basic

The presumption then would, at minimum, shift the burden of production to the alleged infringer.⁸³ The defendant then would need to offer evidence tending to disprove distribution (“counterproof”). If the defendant fails to offer evidence contesting the presumed fact or only offers evidence contesting the basic facts giving rise to the presumption, then the presumption stands, and the trier must find the presumed fact.⁸⁴ The impact of the presumption would then be felt at two stages of the trial: (1) when a party moves for a directed verdict, and (2) when the judge issues jury instructions.⁸⁵ Thus, in the “making available” context, if a plaintiff establishes the presumption, the defendant’s motion for a directed verdict based upon a failure to prove actual distribution, would, without more, be denied.⁸⁶ If the defendant offers no proof on the question of distribution or attempts only to disprove the basic facts giving rise to the presumption of distribution, and not the presumed fact itself, “the jury will be instructed that if they find the existence of the facts as contended by plaintiff,” they must find that distribution occurred.⁸⁷ On the other hand, if the defendant offers cogent and compelling evidence that no distribution occurred, “the presumption is vanquished and completely put to flight.”⁸⁸

The hard cases arise when, once the basic facts are

facts are established by a preponderance, then if trier finds those facts, it must find the presumed fact); MUELLER & KIRKPATRICK, *supra* note 21, at 197. Of course, if the basic facts fall short, there still might be other evidence sufficient to support a finding of the presumed fact.

⁸³ MUELLER & KIRKPATRICK, *supra* note 21, at 185. This is the general rule in federal courts, as confirmed by Rule 301 of the Federal Rules of Evidence, which says “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet” it. FED. R. EVID. 301.

⁸⁴ See *St. Mary’s Honor Ctr.*, 509 U.S. at 506 (“To establish a presumption is to say that a finding of the predicate fact . . . produces a required conclusion in the absence of explanation.”) (quotations and citation omitted); MUELLER & KIRKPATRICK, *supra* note 21, at 199.

⁸⁵ MCCORMICK ON EVIDENCE, *supra* note 22, at 575-76.

⁸⁶ *Id.* at 576.

⁸⁷ *Id.*; see also WEISSENBERGER, *supra* note 23, at § 301.4 (“Fundamentally, the impact of a presumption turns on whether the instruction will be given: ‘If you find X (base facts), then you must find Y (presumed facts).’”).

⁸⁸ MUELLER & KIRKPATRICK, *supra* note 21, at 199. (“[I]n effect the counterproof offered by the adverse party is considered so powerful that no reasonable person could reject it, and the presumption is completely overcome.”) This situation, where the presumption is destroyed, may still present a jury question. See MCCORMICK ON EVIDENCE, *supra* note 22, at 577. Evidence of the basic facts would thus serve as circumstantial proof of distribution. Professor Kasunic makes a compelling argument for the use of circumstantial proof in adjudicating “making available” cases. See Kasunic, *supra* note 46. Professor Kasunic’s support for a greater role for circumstantial evidence in “making available” cases draws upon similar considerations as this Note’s argument for a creation of a presumption of distribution. However, reliance on circumstantial proof to show distribution, while giving copyright owners some means to enforce their distribution right, would not go far enough in firmly establishing the “making available” right so as to bring the U.S. into compliance with our international treaties. A presumption of distribution would account for circumstantial evidence of distribution through a more formal mechanism, thus providing a stronger foundation for the “making available” right.

established, the counterproof offered is “sufficient to support a finding against the presumed fact but not so cogent and compelling that the presumed fact must be rejected.”⁸⁹ The question of what happens in these in-between cases has “plagued the courts and legal scholars” but “[t]he most widely followed theory of presumptions in American law” has been the “bursting bubble” theory.⁹⁰ Under this theory, “the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears.”⁹¹

Because federal courts have exclusive jurisdiction for actions arising under the Copyright Act⁹² (and any suit alleging infringement of the § 106(3) distribution right clearly arises under the Copyright Act), a presumption in “making available” cases would be governed by Rule 301 of the Federal Rules of Evidence. While this rule is subject to certain glosses of interpretation,⁹³ it effectively adopts the bursting bubble rule⁹⁴—a presumption shifts only the burden of production, not persuasion, and when sufficient counterproof is offered, the presumption disappears.⁹⁵

Adoption of the minimalist, bursting bubble approach is appropriate for “making available” cases beyond the fact that Federal Rules of Evidence generally govern copyright infringement claims. As has been pointed out many times,⁹⁶ infringement suits based on the “making available” theory pit large record companies with significant resources devoted to litigation against individual users who generally lack those

⁸⁹ MUELLER & KIRKPATRICK, *supra* note 21, at 201.

⁹⁰ MCCORMICK ON EVIDENCE, *supra* note 22, at 576 (“The view is derived from Thayer, sanctioned by Wigmore, adopted in the Model Code of Evidence, and seemingly been made a part of the Federal Rules of Evidence. It has been adopted, at least verbally, in countless modern decisions.”) (citations omitted). The second main line of doctrine is the reformist approach, championed by Edward Morgan, where presumptions shift the burden of persuasion and do not disappear when sufficient counterproof is offered. The framers of the Federal Rules of Evidence tried to adopt this approach, but were rejected by Congress. *See* MUELLER & KIRKPATRICK, *supra* note 21, at 200-01.

⁹¹ *Id.*

⁹² 28 U.S.C. § 1338(a) (2006).

⁹³ *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 22, at 581. (“[T]here has been willingness on the part of the federal courts to find that certain acts of Congress create presumptions of greater vitality than that provided by Rule 301 or even that certain presumptions in existence at the time of the adoption of Rule 301 are not subject to the procedure set forth in that rule.”).

⁹⁴ MUELLER & KIRKPATRICK, *supra* note 21, at 186-87. (“It is possible, even likely, that [the language of FRE 301] enshrines the minimalist (‘bursting bubble’) theory”).

⁹⁵ WEISSENERGER, *supra* note 23, § 301.3.

⁹⁶ *See, e.g.*, Associated Press, *Elderly Man, Schoolgirl, Professor Among File-Swapping Defendants*, USA TODAY, Sept. 9, 2003, http://www.usatoday.com/tech/news/techpolicy/2003-09-09-riaa-defendants_x.htm; *File Sharing Lawsuits at a Crossroads*, *supra* note 47 (“The targets include the elderly, students, children and even the dead.”).

resources.⁹⁷ Providing the record companies with another distinct advantage, in the form of an evidentiary presumption, raises concerns of fairness.⁹⁸ While the factors supporting a distribution presumption, discussed in detail *supra*, may trump this imbalance of equities, creation of a fragile presumption affords the benefits of the presumption, i.e., compliance with international treaty obligations and a workable framework for handling a difficult and persistent issue, while keeping the benefit gained by the plaintiffs to a minimum. As a practical matter, the creation of a presumption would be a unique judicial response to the “making available” issue without clear precedent in copyright case law. The bursting bubble approach would be the least disruptive, most prudent means of implementing the presumption and have the greatest chance of initially gaining traction as a component of copyright jurisprudence.

Under a bursting bubble theory, a defendant sued for “making available” copyrighted works could destroy the presumption of distribution by presenting evidence that there was no distribution or that the defendant was not responsible for the distribution. If the trial judge determines that the defendant’s evidence is sufficient to support such claims, the presumption of distribution would disappear.⁹⁹ While the facts may still present a jury question despite evidence rebutting the claim of distribution and the subsequent destruction of the presumption, jury instructions regarding the spent presumption would become unnecessary.¹⁰⁰ Alternatively, “the basic facts may not present a natural inference of sufficient strength or breadth to take the case to the jury.”¹⁰¹ In that case, a directed verdict in favor of the defendant would be in order.

⁹⁷ *File Sharing Lawsuits at a Crossroads*, *supra* note 47 (“[M]ost defendants cannot afford attorneys and settle for a few thousand dollars rather than risk losing even more.”).

⁹⁸ ELECTRONIC FRONTIER FOUNDATION, *supra* note 9, at 5 (In the majority of these cases, the “targets settled their cases for amounts ranging between \$3,000 and \$11,000. They had little choice—even if an individual has a defense, it is generally more expensive to hire a lawyer to fight than it would be simply to settle.”).

⁹⁹ MCCORMICK ON EVIDENCE, *supra* note 22, at 577. What evidence might effectively rebut the distribution claim is discussed in Part III.

¹⁰⁰ *Id.* See also MUELLER & KIRKPATRICK, *supra* note 21, at 200. (“The trier may still find the presumed fact but only if the natural probative force of the basic facts that brought the presumption into play is sufficient to support such a finding (or the evidence as a whole supports it). Otherwise the presumed fact may not be found, and the presumption does not protect this possibility.”).

¹⁰¹ MCCORMICK ON EVIDENCE, *supra* note 22, at 577.

III. EVIDENCE REQUIRED TO ESTABLISH AND REBUT A PRESUMPTION OF DISTRIBUTION

A. *Creating the Presumption: The Basic Facts*

The type of evidence required to establish the presumed fact and create the presumption, varies depending on the issues involved.¹⁰² While most judicial decisions in “making available” cases have been delivered on pre-trial motions, an examination of those opinions sheds light on what factors hold evidentiary weight in the eyes of judges.¹⁰³ That, coupled with the general proposition that certain basic facts logically lead to the presumed fact, provides some framework from which to explore the actual creation of a presumption of distribution.

In order for a court to presume that infringing distribution has occurred when a defendant has made music files available, the plaintiff must first prove that the defendant’s computer contains or has contained software designed primarily to facilitate the sharing of files, such as P2P software.¹⁰⁴ Evidence should be presented that the defendant knowingly downloaded the program and, if necessary to operate the program, that the defendant created a user account and affirmatively authorized files to be made available to other users of the P2P network. If the frequency of use or the length of time the defendant possessed the P2P software on his hard drive is significant and could be proved, that evidence too would go toward the establishment of the presumption. Log files or other forensic computer evidence would further support the presumption, as would the tampering or destruction of software or hardware by the defendant.

In order for users to share or make files available, the architecture of such programs commonly requires users to place files in a specially designated folder on their hard drive, which is either their shared folder or shared file. Consequently, in order to gain the benefit of the presumption, plaintiffs should also have to show that defendants actively placed files containing

¹⁰² “[T]he presumed facts in most civil cases must be proved by a preponderance of the evidence.” 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 301.02[3][a] (Joseph M. McLaughlin ed., 2d ed. 2005).

¹⁰³ In what appears to be a refinement in pleading strategy, the RIAA has had recent success in getting their suits past the pleading stage by withholding allegations of infringement of the “making available” right, thereby skirting the interpretive morass of the right’s existence, and alleging only infringement of the distribution right. *See, e.g.*, Sony Music Entm’t v. Cloud, 2009 U.S. Dist. LEXIS 45427, at *8-9 (E.D. Pa. 2009); Sony BMG Music Entm’t v. Braun, 2008 U.S. Dist. LEXIS 98753, at *7-8 (E.D. Mo. 2008).

¹⁰⁴ *See, e.g.*, Elektra Entm’t Group, Inc. v. Barker, 551 F. Supp. 2d 234, 236 (S.D.N.Y. 2008) (identifying the “online media distribution system allegedly used by Defendant” as “the Kazaa peer-to-peer file sharing program.”) (Internal quotations omitted).

copyrighted works in their shared folders.¹⁰⁵ It is this act—the placement of files in a shared folder connected to a media distribution system such as a P2P network—that literally constitutes “making available.” Thus, generally proving that the defendant did in fact make files available for distribution must be central to establishing the presumption that the defendant distributed the files.

This consideration is grounded in the *Hotaling* decision, where the court ruled that the library had distributed unlawful copies when it “list[ed] the work in its index or catalog system, and [made] the work available to the borrowing or browsing public.”¹⁰⁶ But, it is worth reemphasizing that, in *Hotaling*, the act of making the work available was found to be sufficient to constitute distribution, whereas, if courts created a presumption of distribution, the act of making files available would be just one of several factors used to establish the presumption, which could then be destroyed by sufficient counterproof. In this sense, a presumption of distribution provides courts with an intermediate approach to give evidentiary weight to the defendant’s act of making files available without finding the act of “making available” to be de facto distribution.¹⁰⁷

In order to gain the benefit of the presumption, plaintiffs should also be required to produce proof of actual distribution. This has commonly been achieved through the use of independent investigators posing as anonymous users on the P2P network.¹⁰⁸ The role of the investigator in *Atlantic v. Howell*¹⁰⁹ is

¹⁰⁵ See, e.g., *Interscope Records v. Duty*, 2006 U.S. Dist. LEXIS 20214, at *7 n.3 (D. Ariz. 2006) (“[T]he mere presence of copyrighted sound recordings in [defendant’s] share file may constitute copyright infringement.”); see also *UMG Recordings, Inc. v. Green*, 2009 U.S. Dist. LEXIS 39305, at *4-5 (N.D.N.Y. 2009) (stating that [Defendant] concedes that she has used an online media distribution system to download Plaintiffs’ sound recordings, and that she distributed such sound recordings by placing them in her computer’s share folder, thus making them available to millions of others. As a matter of law, such acts constitute an unlawful reproduction of Plaintiffs’ sound recordings and a violation of Plaintiffs’ exclusive right to distribute their recordings).

¹⁰⁶ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

¹⁰⁷ See, e.g., *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 982 (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 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (“The Court can draw from the Complaint and the current record a reasonable inference . . . that where the defendant has completed all the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution actually took place.”); PATRY, *supra* note 62, § 13:9 (“The majority’s decision [in *Hotaling*] can be saved only if it is read to rest on an evidentiary probability that there had been an actual loan of the copy.”).

¹⁰⁸ The Electronic Frontier Foundation, as amicus curiae, has argued that since a copyright owner cannot infringe its own copyright, a third-party investigator acting as agent of the copyright owner also cannot infringe the copyright. See Amicus Curiae Brief of the Electronic Frontier Foundation in Opposition to Plaintiffs’ Motion for Summary

common to many “making available” cases. There, plaintiffs employed a third-party investigator named MediaSentry.¹¹⁰ MediaSentry logged on to the KaZaa file-sharing system, sought out an account with a relatively large number of files available for download (in this case, the defendant had 4000 files available for download), took a screenshot showing the files available for download on defendant’s computer, and then downloaded several of the copyrighted songs (in this case, twelve songs).¹¹¹ Thus, the plaintiffs were able to offer direct evidence of the distribution of twelve copyrighted works. The presumption of distribution would then extend to the works not actually downloaded by the investigative service. Requiring some direct evidence of distribution has the added benefit of forcing plaintiffs to be focused in pursuing their infringement claims.

B. Rebutting the Presumption: Counterproof of the Presumed Fact

As discussed *supra*, if the basic facts are established, the presumption shifts the burden of production to the defendant. If cogent and compelling counterproof is offered, the presumption is destroyed. Under the bursting bubble theory, as embodied in Rule 301 of the Federal Rules of Evidence, the presumption disappears in the face of “evidence sufficient to support a finding of the nonexistence of the presumed fact.”¹¹²

Judgment at 12, *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008) (No. CV 06-02076 PHX NVW), 2008 U.S. Dist. Ct. Motions LEXIS 5933. This argument was roundly rejected by the *Howell* court. See *Howell*, 554 F. Supp. 2d. at 985 (“[T]he recording companies obviously did not intend to license MediaSentry to authorize distribution or to reproduce copies of their works. Rather, ‘the investigator’s assignment was part of [the recording companies’] attempt to stop [Howell’s] infringement,’ and therefore the 12 copies obtained by MediaSentry are unauthorized.” (quoting *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994)) (alteration in original); see also *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1214-15 (D. Minn. 2008) (“The Court holds that distribution to MediaSentry can form the basis of an infringement claim. Eighth Circuit precedent clearly approves of the use of investigators by copyright owners”). For a more developed analysis of the issue, see Kasunic, *supra* note 46, at 1157-60. Professor Kasunic, lining up with the *Howell* court’s reasoning, reaches the conclusion that “[i]f an agent’s authority is limited and the agent’s conduct does not entrap a third party, the use of an agent to substantiate infringing activity is consistent with prevailing precedent. The agent can provide evidence of the infringement by third parties or the defendant in a suit.” (Citations omitted). But see *London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153, 165 (D. Mass. 2008) (“Arguably . . . , MediaSentry’s own downloads are not themselves copyright infringements because it is acting as an agent of the copyright holder, and copyright holders cannot infringe their own rights.” The court ultimately did not see need to reach the issue.). Even if a court were to find that a private investigator’s download of a copyrighted work does not constitute direct evidence of infringement, the evidence would still be relevant to the question of whether a distribution was possible and thus could still be used to create the presumption of distribution.

¹⁰⁹ *Howell*, 554 F. Supp. 2d at 978; see *London-Sire Records*, 542 F. Supp. 2d at 159-60.

¹¹⁰ *Howell*, 554 F. Supp. 2d at 978.

¹¹¹ *Id.*

¹¹² *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037-38 (Fed. Cir. 1992) (construing Rule 301 of the Federal Rules of Evidence as embodying the bursting bubble theory).

The determination of the sufficiency of such counterproof must be made on a case-by-case basis, but according to the general dictates of the bursting bubble theory, the presumption may be rebutted by very slight evidence.¹¹³ While the opinions issued in “making available” claims emerge mainly from pre-trial postures, they still shed light on the evidence deemed relevant by courts considering the issue. Evidence relevant to whether there was distribution, i.e., evidence having the tendency to make the act of distribution by the defendant less probable,¹¹⁴ is a useful basis for the inquiry into the sufficiency of evidence in rebutting a presumption of distribution.¹¹⁵

The court in *Howell*, ruling on the record companies’ motion for summary judgment,¹¹⁶ found that the plaintiffs did not “conclusively indicate that [the defendant] was responsible for making the . . . downloaded recordings publicly available.”¹¹⁷ While certain basic facts were established (or could be concluded to be so by a reasonable trier of fact),¹¹⁸ sufficient counterproof was offered to defeat the summary judgment motion. This evidence included the defendant’s testimony that he did not place the copyrighted sound recordings in the shared folder and that other individuals had access to the computer and could be responsible.¹¹⁹ Further, the defendant “identified evidence

¹¹³ This aspect of the bursting bubble theory—the fragility of the resulting presumption—while a perceived positive in the context of a proposed presumption of distribution, is the primary focus of the theory’s critics. See, e.g., Edward M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937); MCCORMICK ON EVIDENCE, *supra* note 22, at 577.

¹¹⁴ See FED. R. EVID. 401 (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

¹¹⁵ It is worth noting what would *not* be sufficient evidence to destroy the presumption: the testimony of the defendant denying distribution of the copyrighted work or works at issue. Generally, the presumption created under a bursting bubble theory is so fragile that witness testimony denying the presumed fact would be sufficient to destroy it. However, it is not so in the making available cases because, due to the operation of P2P systems, illicit file sharing could occur without personal knowledge of the individual user. Under Rule 602 of the Federal Rules of Evidence, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

¹¹⁶ *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008). While the procedural posture of the court required viewing the evidence in the light most favorable to the defendant, and the issue was whether there existed a disputed issue of fact, the opinion still provides some helpful guidance in determining what evidence might be sufficient to destroy the presumption.

¹¹⁷ *Id.* at 986.

¹¹⁸ *Id.* (“Howell admitted that he downloaded KaZaA . . . , that he created the KaZaA user account through which the files were made available to the public, and that he authorized sharing other types of files.”).

¹¹⁹ *Id.* Note the defendant’s testimony that he did not place files in the shared folder or that others had access to defendant’s computer would not run afoul of Rule 602 of the Federal Rules of Evidence discussed *supra* in note 102, because these are issues which the defendant could have personal knowledge of.

purportedly showing that the KaZaa program was, without his authorization, making files not in the shared folder available for download.”¹²⁰

In *London-Sire Records*, the court, ruling on a motion to quash, suggested possible arguments available to the defendants at later stages of the trial. Defendants may (1) argue that they did not know that logging onto a P2P network would allow others to access the particular copyrighted works at issue; (2) contest the nature of the files; or (3) present “affirmative evidence rebutting the statistical inference that downloads occurred.”¹²¹ Statistical evidence tending to rebut the presumption of distribution might include the relatively low number of users in the given P2P network or the limited time that files were available in the user’s shared folder.

The court in *Arista Records, LLC v. Does 1-27* suggested that evidence that defendants used the P2P network (in this case, Gnutella) to distribute copyrighted works “exclusively to people who already owned them in the CD format” would tend to show permitted or otherwise lawful use of the works.¹²²

These examples suggest that the type of evidence sufficient to rebut the presumption might fall into two general categories. The first is evidence tending to show that defendant did not himself distribute the files at issue, such as evidence that other people had access to defendant’s hard drive or that the software program somehow made the files available without the knowledge of the defendant. The second is evidence showing that any distribution that occurred was not infringement, such as evidence that the distribution was of non-copyrighted works or works for which distribution was permitted, or that placement of files in the shared folder provided access only to those who legitimately owned physical copies of the copyrighted works, i.e., space-shifting. The trial judge would decide if the submission of such evidence is sufficient to destroy the presumption. If the bubble is burst, the trial would proceed as if the presumption never existed.

CONCLUSION: JAMMIE THOMAS REVISITED

Judge Davis’ decision to grant a new trial to Jammie Thomas in *Capitol Records v. Thomas* emerged from a *sua sponte* review of the court’s instruction to the jury that actual distribution need not be shown in order to prove infringing distribution under the Copyright Act. While the court’s indecision reflects the greater

¹²⁰ *Id.*

¹²¹ *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008).

¹²² *Arista Records, LLC v. Does 1-27*, 2008 U.S. Dist. LEXIS 6241 at *17 (D. Me. 2008).

uncertainty surrounding the “making available” issue, the court’s decision to grant a new trial provides an opportunity to examine the hypothetical operation of a presumption of distribution and demonstrate how a presumption might address the persistent problems surrounding the “making available” right.¹²³

Let us assume that such a presumption is available at the new trial, and evidence presented at the initial trial is again presented in similar form. The evidence presented going to the basic facts, i.e., tending to show that the defendant distributed the plaintiffs’ copyrighted works, was neatly summarized by the plaintiffs in response to Ms. Thomas’ motion for a new trial:

Plaintiff’s evidence showed that Defendant had approximately 1,700 digital audio files—many of them Plaintiffs’ copyrighted sound recordings—in the KaZaA shared folder on her computer at the time Plaintiffs’ investigators detected her infringement. Plaintiffs’ evidence further showed that Defendant had copied many of these sound recordings from other KaZaA users and that she had made Plaintiffs’ copyrighted sound recordings available for download to potentially millions of other KaZaA users In addition, Defendant testified that she had studied the *Napster* case in college and was specifically aware that copying and sharing copyrighted music files over the Internet is illegal. Finally, the evidence produced at trial demonstrated that Defendant refused to accept responsibility for her actions, and that she intentionally concealed her infringement by providing Plaintiffs, her counsel, and her own expert with a computer hard drive that she knew would have no evidence of her infringement because it was a new hard drive.¹²⁴

On the other hand, the thrust of Ms. Thomas’ defense was one of statutory interpretation—that infringing distribution requires proof of actual distribution and none was produced at trial¹²⁵—with little evidence rebutting the basic facts tending to

¹²³ Judge Davis’ decision granting a new trial suggested some amenability to alternate, reasonable interpretations of the distribution right that would allow for alignment of the Copyright Act and the U.S. international treaties under the *Charming Betsy* rule. Whether he, or any other judge faced with the next “making available” question, would see the creation of a presumption of distribution as an alternate, reasonable interpretation of the distribution right or as a disguised means of proving distribution without having to prove actual distribution—an interpretation Judge Davis has ruled is unreasonable—is an open question.

¹²⁴ Plaintiffs’ Response In Opposition to Defendant’s Motion for New Trial, Or in the Alternative, For Remittitur at *8-9, *Capitol Records v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497), 2007 U.S. Dist. Ct. Motions LEXIS 81806.

¹²⁵ Ms. Thomas’ attorneys suggested in their closing argument that someone else had used the defendant’s name and IP address to infringe the copyrighted works at issue, but no evidence was presented to prove this point. See Eric Bangeman, *RIAA Trial Verdict is in: Jury Finds Thomas Liable for Infringement*, ARS TECHNICA, Oct. 4, 2007,

show that distribution occurred.¹²⁶

In this scenario, evidence of the basic facts would appear sufficient to establish the presumption of distribution, i.e., evidence, obtained through a third party investigator, that the defendant had P2P software on her computer, had affirmatively participated in the P2P network by downloading files from other users and placing files in her own shared file, and had attempted to tamper with the evidence of her participation in the P2P network. The burden of producing evidence rebutting the presumption of distribution would then be shifted to the defendant, and this was a burden she did not appear to carry.

Weighing the plaintiffs’ evidence, the jury would still need to find the basic facts to be so, but the problematic jury instruction of the initial trial would give way to one instructing the jury that, if they find that the basic facts were established, they must find that distribution occurred. If the jury finds that the plaintiffs’ proof failed in this regard, they could still find that distribution occurred, using the evidence of the basic facts as circumstantial proof of distribution.¹²⁷ Alternatively, if the basic facts were not sufficiently strong to take the case to the jury, the judge could direct a verdict in favor of the defendant.

The presumption would thus address the difficulties inherent in the “making available” issue. Copyright owners, in attempting to enforce their distribution rights, would not be hamstrung by the dearth of direct evidence in the digital environment as long as they offered proof that the defendant took nearly every step necessary to distribute the copyrighted works. If no counterproof could be offered by the defendant, the jury would be permitted to weigh that evidence and, possibly, reach the natural inference that the defendant distributed the works at issue. Most significantly, a presumption would give courts a reasonable method with which they could align the Copyright Act with the U.S.’s international treaty obligations by effectively providing the “making available” right to copyright owners. In this way, the “making available” issue could be resolved by “making available” a presumption of

<http://arstechnica.com/tech-policy/news/2007/10/verdict-is-in-ars> (quoting Ms. Thomas’ attorney as saying to the jury, “[t]here are certainly alternative explanations, because my client didn’t do it. . . . Someone used her name and IP address—it’s not impossible.”).

¹²⁶ If Ms. Thomas had presented clear and compelling evidence that she did not distribute the copyrighted works, the presumption would disappear. Under the bursting bubble theory, evidence that was less than clear and compelling would still be sufficient to destroy the presumption. In either case, jury instructions pertaining to a presumption would be unnecessary. But, in the words of the plaintiffs’ attorney, Ms. Thomas only offered “theories and speculation,” not hard evidence. *Id.* (quoting the RIAA’s attorney during closing argument).

¹²⁷ See generally Kasunic, *supra* note 46 (discussing the potential of circumstantial evidence to prove infringement of the distribution right).

distribution.

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