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Reproduction, Distribution, and "Making Available"

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When an individual makes a music or movie file available for downloading by others, without the permission of the copyright owner, is that an infringing act? Or does infringement take place only when the file is actually downloaded?

This thorny copyright issue is at the heart of much of the controversy over file-sharing. It's relatively simple for a copyright owner to prove that a file has been made available for download, but it's much harder to prove that a download has actually occurred. So if liability attaches to the mere act of "making available," record labels and movie studios will have an easier time combating file-sharing.

Peter Menell recently wrote an essay for this series that examined this issue through the lens of copyright's "distribution" right. Under Section 106(3) of the Copyright Act, only the copyright owner can authorize the distribution of the copyrighted work (subject to certain exceptions not relevant here). This distribution right has been the focus of the various rulings on the "making available" issue, with some courts holding that making files available equals distribution (and thus infringement) and others requiring actual downloads before distribution is said to occur.

In this essay, I would like to offer up an alternative way to view the issue, based on the way that Section 106 of the Copyright Act divvies up a copyright owner's entitlement into several discrete exclusive rights. The right to distribute is one such right. Another is the right to reproduce. It may be that what is going on in the file-sharing context is not "distribution" at all – regardless of whether a file is actually downloaded. Instead, "reproduction" might be the only right implicated.

Start with the reproduction language in Section 106(1). It gives the copyright owner the exclusive right "to reproduce the copyrighted work *in copies*."[1] Elsewhere in the Act we learn that a "copy" is the term the law uses to describe the physical form of a copyrighted work. So if a CD contains a copyrighted song, the CD is a "copy" – a tangible thing in which the song can be found. A book whose printed pages contain a copyrighted story is a "copy" of that story. The celluloid on which a copyrighted film is printed is a "copy" of that film.

Therefore, when Section 106(1) gives copyright owners the right to reproduce the work "in copies," it means something very specific: the creation of a new tangible instantiation of the work. If I play a CD for you, one might say that I am "reproducing" the music on it, because you can perceive the music's creative content. Nevertheless, I am not infringing the copyright owner's reproduction right, because that right is concerned only with the making of tangible, lasting "copies."

If, on the other hand, I stick the CD in my computer and burn a second CD for you, then I am infringing the reproduction right, because the reproduction has resulted in a new "copy." Where there had been only one copy of the musical work, now there are two.

Turn now to the distribution right in Section 106(3). It too uses the term "copies": the copyright owner has the exclusive right "to distribute copies … of the copyrighted work."[2] The "copy" term appears again in the first sale doctrine, an important limitation on the distribution right

found in Section 109(a): "the owner of a particular copy … lawfully made under this title … is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy." So notwithstanding the copyright owner's distribution right, the owner of a particular physical "copy" of the work is allowed to distribute that copy without permission, as long as it was lawfully made (*i.e.*, as long as the copyright owner authorized the initial creation of the copy).

If one reads these three provisions together, one can see how Congress set out to regulate the market for tangible copies of copyrighted works. Section 106(1) addresses the creation of a new copy in the first place. And once a copy is created, Sections 106(3) and 109(a) define the copyright owner's control over what happens to it – *i.e.*, what happens when a copy changes hands.

What does this all have to do with file-sharing and the "making available" controversy? Well, think about what is going on in the file-sharing context. Suppose User *X* has an mp3 of a song – what the Copyright Act would call a "copy." Her file-sharing software makes that copy available for downloading by others. Across the country, User *Y* uses the software to find the song in *X*'s folder and download it. Voilà: illegal file-sharing.

What is happening here, in a technological sense, is that there are now two "copies" where before there was only one. When *Y* downloads from *X*, it's not as if the copy on *X*'s computer leaves her hard drive, travels through the Internet, and lands in *Y*'s computer. No copy changes hands. Instead, *X*'s copy stays right where it is. What happens is that a new copy appears on *Y*'s hard drive.

So what is happening here in a *legal* sense is arguably not "distribution" at all. It is "reproduction" – two copies where there was previously only one. Viewed in this way, the controversy over whether "making available" constitutes "distribution" is a red herring. Instead, file-sharing never involves distribution at all. It involves only reproduction.

This may seem like legalistic quibbling over arcane terminology, but it has serious implications for how the law handles file-sharing. If file-sharing is all about reproduction, then it is probably the downloader (User *Y* in my example) who is the primary infringer, because it is the downloader whose conduct creates the second copy. But identifying the downloader is even more difficult than determining whether a download occurred, which is why copyright owners have focused on suing the uploader.

Yet if we are dealing with reproduction, not distribution, then suing the uploader (User *X*) is problematic. In many cases, the only way to hold *X* liable will be as a facilitator of *Y*'s infringing reproduction – what the law calls secondary liability. If *X* knows (or should know) of *Y*'s infringement, and materially contributes to it, then *X* is also liable. That's certainly a possibility here, but it's a more complicated case to prove. And if the copyright owners also want to sue the company that provided the file-sharing software, well, then they may have to invent *tertiary* liability – suing *Z* for facilitating *X*'s facilitation of *Y*'s infringement. Yikes.

Given how complicated this all becomes, it is no surprise that courts have decided instead to deal with the issue as one of distribution. That approach focuses squarely on the party who is easiest to identify – the uploader – and the only issue is whether "making available" suffices for her

liability. But when no copy changes hands, and a new copy is created, it is not at all clear that the distribution approach is correct.

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1. The statute actually says “in copies *or phonorecords.*” For present purposes, however, the distinction between a “copy” and a “phonorecord” is irrelevant, so I will use the term “copy” to refer to both.

2. Here too the actual statutory language refers to “copies *or phonorecords*,” and here too it makes no difference for our purposes.