

**ISSUES IN IT LAW: LEGAL & POLICY
CHALLENGES OF P2P NETWORKS**
**Digital Music & the “Distribution” & “Making
Available” Rights**

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Music Distribution in the Digital/Online Environment

ISSUES/FEATURES:

- Fast, cheap, global
- Technologically easy (e.g. new P2P networks/technology)
- Increasing piracy & enforcement problems for copyright owners

RESPONSES:

- Legislative changes (national or international?)
- Lawsuits (against who?)
- Pressure on intermediaries (ISPs?)

The International Context: the 1996 WIPO Copyright Treaty (WCT)

Article 6(1): the Distribution Right

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**.

[NOTE: Agreed Statement that the word “copies” means *fixed copies that can be put into circulation as tangible objects*.]

Article 8: the Right of Communication to the Public

[a]uthors of literary and artistic works shall enjoy the exclusive **right of authorizing any communication to the public** of their works, by wire or wireless means, *including the making available* to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them

Distribution & Making Available under the US Copyright Act

Distribution under Section 106(3):

- Right to **distribute copies** of the copyrighted work **to the public by sale or other transfer of ownership**, or by rental, lease, or lending

Public performance under Section 106(4):

- For literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, the **right to perform the work publicly**

Section 106(5): Right of public display

Section 106(6): Public performance right for sound recordings

Section 101, US Copyright Act:

To perform or display a work “publicly” means—

- **(1)** to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- **(2)** to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Distribution & Making Available under the Hong Kong Copyright Ordinance?

Section 22(1)(b): “**issue copies** of the work to the public”

[NOTE Section 24: includes copies in electronic form]

Section 22(1)(d): “**make available copies** of the work to the public”

[NOTE Section 26: making available means “by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET).”]

Section 22(1)(e): “**perform, show or play** the work in public”

The Music Distribution Cases in the US

- Pre-2008 (non-P2P): *Hoteling*, *Nat'l Car Rental*, *Perfect 10 v Google*
- 2008 (P2P music): *Elektra v Barker*, *London-Sire v Doe*, *Atlantic v Howell*

Dist. Ct (Minn.) order of a new trial in *Jammie Thomas*:

- Distribution to plaintiff's investigator can be unauthorized distribution
- Distribution not uniformly defined in statute; US courts split on whether merely making available = distribution
- Plain meaning interpretation of Sect. 106(3) = distribution requires actual dissemination

- So at what point would a person who makes available digital files in a shared folder, downloadable by another user using P2P software, be liable for distribution?

London-Sire v Doe (Dist. Ct., MA):

- “where a defendant has completed all the necessary steps for a distribution, a reasonable fact-finder may infer that the distribution actually took place”

Atlantic v Howell (Dist. Ct., AZ):

- “Evidence that a defendant made a copy of the work available to the public might, in conjunction with other circumstantial evidence, support an inference that a copy was likely transferred ...”

Is the situation in Hong Kong similar?

Ct of Final Appeal in *Chan Nai Ming* (May 2007):

- Copyright Ordinance contemplates electronic copies transferrable over the Internet
- Court “expressly leave[s] open the question [whether] “distribution of a copy” necessarily requires the transfer of a copy which was first in the distributor’s possession ... by his use of technology the appellant had caused reproductions of the infringing copies on his computer to appear on the computers of the downloaders ...”

What does this all mean? What's the bottom line?

- Note divergence between minimum standards set by international treaties & national/regional legislation
- Note also divergences between varying national laws
- Unclear when a P2P user who makes available material for others to download will have passed the threshold for distribution
- Does actual technology used matter?
- ***Even if the “making available” theory for distribution is rejected, would a broader right of communication to the public “solve” the problem for copyright owners?***