IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ELEKTRA ENTERTAINMENT GROUP, INC., et al., Plaintiffs v. GEORGE DENNIS, Defendant	CASE NO. 3:07CV39 DPJ-JCS

AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

The Electronic Frontier Foundation (EFF) submits this Amicus Curiae brief in support of Defendant George Dennis' Motion to Dismiss the Complaint.

STATEMENT OF INTEREST

EFF is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents more than 13,000 dues-paying members including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring broad access to information in the digital age.

EFF submits this *amicus curiae* brief in support of Defendant George Dennis' motion to dismiss Plaintiffs claim of infringement of the "distribution right," 17 U.S.C. § 106(3), because the claim ignores the plain language of the Copyright Act and jeopardizes the delicate balance

struck by Congress in the statutory scheme. Plaintiffs, all prominent companies in the recording industry, have been pressing similar claims in a number of other actions against both individual defendants such as Mr. Dennis and technology innovators. *See Atlantic Recording Corp. v. XM Satellite Radio,* No. 1:06-cv-03733-DAB (S.D.N.Y. filed May 16, 2006) (complaint attached hereto as Exhibit A). Accordingly, the ruling on Defendant's motion may have implications for a wide array of new digital technologies. As advocates for digital media consumers and innovators, EFF has a strong interest in ensuring that the statutorily limited § 106(3) right is correctly applied in this and other cases.[1]

BACKGROUND AND SUMMARY OF ARGUMENT

Defendant George Dennis, like more than 20,000 other individuals, has been sued by several major record companies for allegedly using peer-to-peer (P2P) file sharing software to download and upload music.[2] When individuals use P2P file sharing software to make unauthorized copies of sound recordings,[3] record companies are within their rights to sue them for making unauthorized reproductions. *See* 17 U.S.C. § 106(1) (exclusive right of reproduction).

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[1] EFF has appeared as *amicus curiae* in two other district court cases essentially on all fours with this one, *Elektra Enter. Group v. Barker,* No. 05-CV-7340 KMK (S.D.N.Y. brief filed Feb. 23, 2006) and *Fonovisa v. Alvarez,* No 1:06-CV-011 (N.D. Tex. brief filed June 1, 2006). As in the instant case, those cases also involve individuals accused by record labels of downloading and uploading music over the Internet. A motion to dismiss focusing on the proper scope of § 106(3) is currently pending in *Barker*, having drawn extensive *amicus* filings from the Motion Picture Association of America (MPAA), the Computer & Communications Industry Association (CCIA), the U.S. Internet Industry Association (USIIA), EFF, and the United States. The defendant's motion to dismiss in *Alvarez* was denied pending further factual development. *Fonovisa v. Alvarez*, No. 1:06-CV-011, 2006 U.S. Dist. LEXIS 95559 (N.D. Tex. July 24, 2006).

[2] For an overview of the history of the recording industry's litigation campaign, *see* EFF White Paper, RIAA v. the People: Two Years Later (Nov. 2005) (available at <http://www.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf>).

[3] Strictly speaking, material objects embodying sound recordings are referred to as "phonorecords" under the Copyright Act, with "copies" reserved for material objects embodying all other forms of copyrightable expression. *See* 17 U.S.C. § 101. For convenience, we will refer to phonorecords herein by the more familiar lay term.

In the thousands of suits filed thus far, however, the record companies have also alleged infringement of their distribution rights under 17 U.S.C. § 106(3) in a strategic effort to accomplish a judicial transformation of this limited statutory right into a weapon in the war against new digital media technologies. *See, e.g.*, Exh. A, ¶¶ 41-48 (complaint in *Atlantic v. XM Satellite Radio,* alleging that satellite broadcaster XM Radio infringes the distribution right by transmitting to subscribers who record broadcasters using XM's new Inno receivers).

Plaintiffs' effort, however, is barred by the express language of § 106(3), the legislative history of the Copyright Act, and historical copyright practice. Section 106(3) grants to copyright owners the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). Because the terms "copy" and "phonorecord" are defined to be limited to tangible material objects, the statute thus requires that a physical, tangible, material object change hands before the distribution right can be infringed. By its terms, then, § 106(3) does not encompass transmissions over computer networks.

This is not to say that a copyright owner is without recourse with respect to such transmissions (as well as any copies that result from them). Rather, electronic transmissions are properly analyzed within the framework of the reproduction right, § 106(1), the public performance right, § 106(6), or as a matter of secondary liability (e.g., contributory infringement of these rights).

This distinction is not a mere formalism. Expanding § 106(3) to include transmissions upsets the delicate balance struck by Congress in the Copyright Act, disrupting settled expectations in arenas far from P2P file sharing. For example, satellite and cable broadcasters rely on statutory licenses contained in the Copyright Act that presume that transmissions are properly treated as public performances, rather than distributions. Reinterpreting the distribution right to reach transmissions would imperil these broadcasters, as well as the new home recording technologies they provide to their customers. In fact, several of the Plaintiffs have a suit pending against satellite broadcaster XM Radio, pressing the same "transmission + recording =

distribution" theory that they press in this action. *See* Exh. A ¶¶ 41-48 (complaint in *Atlantic v. XM Satellite Radio*). While copyright laws must occasionally be updated to address new technologies, it is for Congress, not the courts, to rewrite the Copyright Act for this purpose. *See Sony Corp. v. Universal City Studios,* 464 U.S. 417, 431 (1984) ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.").

In the words of Professor R. Anthony Reese, author of the leading scholarly treatment of the issue, "the distribution right as currently framed…does not appear to encompass transmissions of copyrighted works over computer networks." *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies*, 2001 U. OF ILL. L. REV. 83, 126-27 (2001) (hereafter "Reese, *The Public Display Right*"). Accordingly, because Plaintiffs' complaint on its face relates only to Internet transmissions and does not allege that any tangible material objects embodying sound recordings changed hands, this Court should grant Defendant's motion and dismiss Plaintiffs' § 106(3) claim.[4]

ARGUMENT

I. The Question Addressed Presents a Pure Question of Law Amenable to Resolution on the Pleadings.

The issue addressed in this brief constitutes a pure question of law properly resolved on a motion to dismiss: whether the § 106(3) distribution right can apply to intangible Internet transmissions. Plaintiffs allege here, as they have in other cases, that their § 106(3) distribution rights are violated when Defendant transmits copies of sound recordings over the Internet. Complaint at ¶ 16 (Defendant…has used, and continues to use, an online media distribution system…to distribute the Copyrighted Recordings to the public and/or to make the Copyrighted Recordings available for distribution to others."). As discussed below, an infringement of the §

[4] EFF takes no position with respect to whether Plaintiffs adequately plead their reproduction claim here. Whether Mr. Dennis may have any applicable defenses is, of course, not a question appropriately addressed on this motion to dismiss.

106(3) distribution right requires *the exchange of tangible physical objects* and does not reach transmissions, even where those transmissions may result in an additional reproduction. Accordingly, because the complaint fails to allege the distribution of a material object, a required element for a § 106(3) infringement claim, Plaintiffs' § 106(3) claim must be dismissed for failure to state a claim. *See Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) ("Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief."); *Keane v. Fox Television Stations*, 297 F.Supp.2d 921, 933 (S.D. Tex. 2004) (same).[5]

II. The Plain Language of § 106(3) Limits the Distribution Right to the Dissemination of Tangible Material Objects.

Copyright is, first and foremost, a creature of statute. *See Sony v. Universal City Studios*, 464 U.S. at 431 ("[T]he protection given to copyrights is wholly statutory."). It represents a carefully crafted set of complex legislative compromises aimed at balancing the interests of both owners and users of copyrighted works. *Id.* at 429. The six limited exclusive rights granted to copyright owners, each carefully delineated by statutory definitions, form the foundation of the copyright edifice. *See* 17 U.S.C. § 106. The scope of each exclusive right is further defined by a web of statutory exceptions, many of which apply differently depending on which exclusive right is implicated. *See, e.g.*, 17 U.S.C. §§ 109 (first sale limitation on distribution right); 110 (exceptions to public performance right); 111 (statutory license for public performance by cable television); 114 (statutory license for public performance by webcasters); 118 (statutory license for public performance by nonprofit broadcasters). In addition, because each exclusive right can

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[5] Because the issue presented is purely a question of law, *amicus* respectfully disagrees with those courts that have deferred the question to summary judgment proceedings. *See Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 968 n.9 (N.D. Tex. Sept. 1, 2006)("At this stage of the proceedings, the court does not believe it is necessary to determine the tangible or intangible nature of the internet transfer or transmission of computer files containing sound records."); *Fonovisa v. Alvarez*, No. 1:06-CV-011, 2006 U.S. Dist. LEXIS 95559 at * 8 (N.D.Tex. July 24, 2006)("This Court is not making a determination as to whether 'making works' available violates the right of distribution.").

be separately assigned or licensed, many copyright owners and licensees control only a subset of the exclusive rights, which in turn means that many contractual licensing arrangements between private parties depend on a careful parsing of the six exclusive rights. Precisely because so much in the copyright system turns on a clear understanding of which exclusive rights are implicated by any particular activity, it is critical that courts attend closely to the statutory scheme, rather than freely embroidering on it based on the equities of any particular case.

A. The Plain Statutory Language and Legislative History Make It Clear that Section 106(3) does not Reach Electronic Transmissions Over the Internet.

Section 106(3) provides that the owner of a copyright has the exclusive right: "**to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending**." When defining the right, Congress expressly limited it solely to the distribution *of copies or phonorecords* of the work, rather than distribution of *the copyrighted work*. *Compare* 17 U.S.C. § 106(4)-(6) (granting the exclusive right to perform or display "the copyrighted work" publicly). This distinction is critical, as the Copyright Act defines both "copies" and "phonorecords" as "material objects" in which copyrighted works are fixed. *See* 17 U.S.C. § 101; *see also* 17 U.S.C. § 202 (distinguishing ownership of work from ownership of copies); H.R. Rep. No. 94-1476, at 53 (1976)[6] (hereafter "1976 House Report") (emphasizing "fundamental distinction" between the intangible copyrighted work and the material objects in which it can be embodied). In short, "the copyright owner's exclusive right of distribution is a right to distribute such tangible, physical things." Reese, *The Public Display Right,* at 126.

The relevant legislative history buttresses the unambiguous statutory language. The 1976

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[6] The 1976 House Report, which is the principal legislative history for the 1976 Copyright Act that forms the basis of Title 17, is reprinted at 1976 U.S.C.A.A.N. 5659 and is included as an appendix to both of the leading copyright law treatises, PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT (3d ed. 2005) and MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (2005).

House Report, in discussing § 106(3), consistently refers to the distribution right as the right to distribute "copies" and "phonorecords," each of which denotes solely material objects. *See id.* at 127 (citing the 1976 House Report at 72). When referring to the intangible copyrighted work, separate from a tangible copy, the 1976 House Report and the Copyright Act, as well as copyright specialists generally, refer to the "work" or "sound recording" rather than "copies" or "phonorecords."

Sound recordings fixed on computer hard drives certainly qualify as "phonorecords." But this truism does not establish that disseminating such a file over a peer-to-peer (P2P) network so that it appears as an electronic file on another computer constitutes a distribution. As an initial matter, files are not magically "disseminated" from one computer to another. Rather, one computer *transmits* the information to another computer, at which point the recipient *records* the information, creating a copy of the original file. The legislative history makes it clear that electronic transmissions fall outside the scope of § 106(3). This is made plain in the legislative history's discussion of the concept of "publication," which unambiguously states that "publication" is not synonymous with "distribution":

> The definition…makes it plain that *any form of dissemination in which a material object does not change hands*—performances or displays on television, for example—*is not publication* no matter how many people are exposed to the works.

1976 House Report at 138 (emphasis added).[7] *See also* Reese, *The Public Display Right*, at 131-32 (discussing relation of "publication" and other copyright provisions to "distribution"). This legislative history, together with the plain language of the statute, makes it clear that Congress intended that § 106(3) be limited to transactions where physical, tangible copies change hands, leaving transmissions and resulting new copies to other exclusive rights (i.e., public performance and reproduction) and secondary liability doctrines.

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[7] Courts, in related cases, have failed to mention this legislative history in their discussion of the kinship between the definitions of "distribution" and "publication." *See, e.g., Greubel*, 453 F. Supp. 2d at 969 (concluding that "distribution" is synonymous with "publication" without acknowledging the legislative history).

Legislative activity since the passage of the 1976 Copyright Act also supports the view that § 106(3) is properly limited to situations where a material object changes hands. In 1995, Congress addressed the nascent market for "digital downloads" of music by creating a statutory license that permits licensees to "distribute…a phonorecord…by means of a digital transmission which constitutes a digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(A). This license did not expand the § 106(3) to cover transmissions over computer networks, implicitly or otherwise. To the contrary, Congress specifically chose *not* to amend § 106(3). The relevant legislative history shows that this was deliberate; Congress acknowledged that reading § 106(3) to include digital transmissions was controversial and "expresse[d] no view on current law in this regard." S. Rep. No. 104-128, at 17 (1995), *reprinted in* 1995 U.S.C.A.A.N. 357, 364; *see also* Reese, *The Public Display Right*, at 133.[8]

Similarly, although Congress has acted on several occasions to enhance the criminal penalties applicable to those who infringe copyrights by means of computer networks, it has consistently refused to alter the underlying language of § 106(3). *See In re Napster*, 377 F.Supp.2d 796, 804 (N.D. Cal. 2005) (concluding that the Artists' Rights and Theft Prevention (ART) Act of 2005 does not expand the scope of § 106(3)); Reese, *The Public Display Right*, at 133 (explaining that the No Electronic Theft (NET) Act should not be read to expand § 106(3)).

Congressional unwillingness to amend § 106(3) to encompass digital transmission has not been the result of inattention. During the early 1990s, the Clinton Administration undertook a comprehensive inter-agency review of copyright in an effort to update the law in light of digital technologies. The resulting 1995 report, known as "The NII White Paper," specifically proposed an amendment to § 106(3), noting that "it is unclear under the current law that a transmission can

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[8] The statutory structure of § 115 made it unnecessary for Congress to take a position, as the statute makes rights under both § 106(1) and (3) subject to the compulsory license. *See* 17 U.S.C. § 115. As a result, the provision leaves (deliberately) unresolved the question of whether the delivery of digital phonorecord deliveries over the Internet implicates the reproduction or distribution right.

constitute a distribution of copies or phonorecords of a work." INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS at 213 (1995).[9] Although bills were subsequently introduced that would have amended § 106(3) to include transmissions, they did not pass. *See* H.R. 2441, 104th Cong. § 2 (1995); S. 1284, 104th Cong. § 2 (1995); Reese, *The Public Display Right*, at 135.

III. Contrary Precedents are Inapposite and Unpersuasive, and are not Binding on this Court.

Plaintiffs, as they have in previous cases, will likely cite several cases that assume, without analysis, that transmissions over computer networks can violate § 106(3). The only contrary cases address the issue only summarily, in *dicta*, or without considering the statutory language and legislative history. None are binding on this Court. In contrast, the only published circuit court opinion to address squarely the question of whether § 106(3) reaches electronic transmissions rejected the distribution claim. *See Agee v. Paramount Communications*, 59 F.3d 317 (2d Cir. 1995).

In *Agee v. Paramount*, 59 F.3d 317 (2d Cir. 1995), the Second Circuit specifically examined whether the electronic transmission of a sound recording, resulting in a reproduction by a third party, could infringe § 106(3). In that case, Paramount Pictures made copies of portions of plaintiff's sound recording for use in the audio track of a television program. It then transmitted the program to affiliated TV stations, who subsequently made their own copies to transmit to their viewers. The unanimous panel explained that "distribution is generally thought to require the transmission of a 'material object' in which the sound recording is fixed: a work that is of 'more than transitory duration.'" *Id.* at 325. Emphasizing the "distinction between material and non-material embodiments," the court concluded that Paramount's transmission did not infringe the distribution right. *Id.* at 326.

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[9] Available at <http://www.uspto.gov/web/offices/com/doc/ipnii/>.

The Second Circuit specifically left for another day the question of whether "disseminations must always be in physical form to constitute 'distributions.'" *Id.* at 325. Plaintiffs' § 106(3) claim in this case, however, squarely poses that question. Just as in *Agee v. Paramount*, the defendant here is accused of having made unauthorized copies of sound recordings and of electronically transmitting those sound recordings to others, who, thanks to the transmissions, made their own copies.

From a copyright standpoint, it is irrelevant that Paramount used satellite communications technology to transmit the sound recordings, whereas Mr. Dennis is alleged to have used the Internet. *See* Reese, *The Public Display Right*, at 131 ("If liability for violation of the distribution right turns merely on a user's ability to make a new copy of transmitted material, then any transmitter could be violating the distribution right merely by engaging in transmissions of displays."). Both are electronic transmissions, and both enabled third parties to reproduce the sound recordings in question (in Paramount's case, affiliated television stations recorded the transmissions, while in Mr. Dennis's case, it would be other users of P2P software). Accordingly, just as Paramount's transmissions of sound recordings could not constitute "distributions" within the meaning of § 106(3), Mr. Dennis's transmissions also cannot.[10]

In their efforts to dodge the reasoning of *Agee*, Plaintiffs have in other cases sought to make much of one line in the Ninth Circuit's ruling in *A&M Records v. Napster*: "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights." *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001). Because direct infringement by Napster users was not disputed in that preliminary injunction appeal, the

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[10] In *Agee v. Paramount*, the court noted that transmissions generally implicate the public performance right, but that Congress at the time had not extended the public performance right to include sound recordings. *See Agee v. Paramount*, 59 F.3d at 325. Although owners of sound recording now enjoy a limited public performance right that encompasses digital transmissions, *see* 17 U.S.C. § 106(6), Plaintiffs here have not alleged an infringement of their performance rights.

statement is dicta. *See A&M Records v. Napster*, 239 F.3d at 1013.[11] Similarly, the existence of direct infringement was conceded by the defendants in *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 648 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003), and thus the question of the scope of § 106(3) was never briefed by the parties or analyzed by the court.

The only other cases supporting the contrary view, that transmissions over computer networks can infringe § 106(3), are district court rulings that have included loose language, unsupported by analysis of § 106(3)'s plain statutory language and legislative history. *See, e.g.*, *Fonovisa v. Alvarez*, No. 1:06-CV-011, 2006 U.S. Dist. LEXIS 95559 (N.D.Tex. July 24, 2006) (no analysis); *Arista Records v. Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006) (noting the issue, but declining to resolve it); *Warner Bros. Records, Inc. v. Payne*, 2006 U.S. Dist. LEXIS 65765 (W.D. Tex. 2006) (no statutory analysis); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 402 (S.D.N.Y. 2002) (dicta, no analysis); *Marobie-FL, Inc. v. Nat'l Assoc. of Fire Equip. Distribs.*, 983 F.Supp. 1167, 1173 (N.D. Ill. 1997) (no analysis); *Playboy Enterprises v. Webbworld, Inc.*, 991 F. Supp. 543, 554 (N.D. Tex. 1997) (no analysis); *Playboy Enterprises, Inc. v. Hardenburgh*, 982 F.Supp. 503, 513 (N.D. Ohio 1997) (no analysis); *Playboy Enterps. v. Chuckleberry Publishing*, 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (no analysis); *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp. 1552, 1556 (M.D. Fla. 1993) (no analysis).[12]

None of these cases is binding on this Court, nor are they persuasive on the question of the proper scope of § 106(3). Most of the rulings fail to address the plain language of § 106(3) or explain the basis for extending the right beyond the distribution of material objects. *See* Reese, *The Public Display Right* at 128 & n.174 ("The cases that conclude that a transmission over a

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[11] For the same reason, the Ninth Circuit did not have the benefit of briefing on the § 106(3) issue. The briefs in *A&M v. Napster* are available at <http://www.eff.org/IP/P2P/Napster/>.

[12] Plaintiffs may also raise two Supreme Court rulings, neither of which addressed the statutory language of § 106(3). *See MGM v. Grokster*, 125 S. Ct. 2764, 2782 (2005) (opining that P2P users may infringe copyrights, without expressing any view on which exclusive right might be infringed); *New York Times v. Tasini*, 533 U.S. 483, 498 (2001) (suggesting in dicta that LEXIS/NEXIS might be engaged in distribution).

computer network is a distribution offer no explanation for how such activity constitutes a transfer of a material object within the scope of § 106(3).”). In many of these cases, moreover, the invocation of the distribution right was redundant and unnecessary, as the defendants had also infringed either the reproduction or public display right. Finally, these cases have as their common root a case, *Playboy v. Frena*, 839 F.Supp. at 1556, that has been criticized by commentators and includes no rationale to support its expansive view of § 106(3). *See* Reese, *The Public Display Right*, at n.174; David J. Loundy, *Revising the Copyright Law for Electronic Publishing*, 14 J. MARSHALL J. COMPUTER & INFO. L. 1, 21 (1995) (criticizing *Frena* for misapplying § 106(3)).[13]

IV. Misreading § 106(3) to Encompass Transmissions Undermines Other Provisions of the Copyright Act.

Some may question whether the careful parsing of exclusive rights is important in this case. After all, if P2P file sharers are infringing Plaintiffs’ reproduction rights when they download, what’s the harm in “piling on” with a distribution claim when they upload? Rulings

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[13] To the extent Plaintiffs may invoke the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), those treaties provide no support for their position. As an initial matter, those treaties are not self-executing and thus lack any binding legal authority separate from their implementation through the Copyright Act. In addition, these treaties are solely concerned with ensuring minimum protections for *foreign* rightsholders. Nothing about them purports to limit U.S. sovereignty with respect to the treatment of domestic copyright owners. *See* Jane C. Ginsburg, *International Copyright: From a Bundle of National Copyright Laws to a Supranational Code?*, 47 J. COPYR. SOC’Y U.S.A. 265, 270 (2000) (“[T]he Berne minima apply to a Union member's protection of works from other Berne members; no Berne member is obliged to accord its own authors treaty-level protection.”). Furthermore, as noted above, when considering how to implement the “making available” obligations of the WIPO treaties, Congress specifically considered and rejected proposals that would have amended § 106(3) to include transmissions. See H.R. 2441, 104th Cong. § 2 (1995); S. 1284, 104th Cong. § 2 (1995). Existing copyright law doctrines (including the exclusive rights of reproduction and public performance, along with secondary liability doctrines) together provide copyright owners with ample recourse against those who make their works available online, thereby satisfying the WIPO treaties without having to distort the plain statutory language of § 106(3).

that misconstrue the scope of § 106(3), however, have the potential to cause serious disruption in contexts far removed from P2P file sharing.

Fundamental to the edifice of copyright law has been a distinction between the reproduction and dissemination of material objects—activities regulated by the reproduction and distribution rights—and the transmission of works to the public—activity regulated by the rights of the public performance and display. *See* Reese, *The Public Display Right*, at 92-138. When one person "uploads" a file to another, the work is transmitted over the Internet such that the recipient is left with a complete copy of the transmitted work at the end of the transmission. *See id.* at 130. While it may be tempting to describe this set of events as a "distribution," it is important to recall that § 106(3) does not encompass all acts of distribution, but is instead statutorily cabined to the exchange of material objects. Instead, from the perspective of § 106 of the Copyright Act, P2P file sharing principally implicates the right of reproduction (and potentially public performance), rather than distribution.[14] *See* Reese, *The Public Display Right*, at 129-30.

The distinction is not a mere exercise in formalism, as an increasing number of activities in the digital age involve "transmit and reproduce" functions. This is vividly illustrated by the recent lawsuit filed by several of the Plaintiffs against satellite broadcaster XM Radio. *See* Exh. A (complaint in *Atlantic v. XM Satellite Radio*). As a broadcaster, XM transmits music to millions of subscribers. When satellite radio broadcasters (like XM and Sirius) transmit music to subscribers, they rely on a statutory license that applies only to the public performance right in sound recordings. *See* 17 U.S.C. § 114(d)(2). Those same satellite radio broadcasters, however, also sell devices that enable their subscribers to record transmitted music for later playback. *See*

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[14] To the extent Plaintiffs contend that file sharers "authorize" reproduction or distribution, that must be framed as a secondary liability claim, which Plaintiffs have not pled here. *See Venegas-Hernandez v. ACEMLA,* 424 F.3d 50, 57 (1st Cir. 2005) ("[M]ost (perhaps all) courts that have considered the question have taken the view that a listed infringing act (beyond authorization) is required for a claim.").

Walter S. Mossberg & Katherine Boehret, *A Portable Player For Both Satellite Radio, MP3s*, WALL ST. J. (May 17, 2006).[15] In the lawsuit against XM, the plaintiffs contend that because XM's broadcasts can be recorded, they constitute "distributions" under § 106(3). *See* Exh. A, ¶¶ 41-48 (complaint in *Atlantic v. XM Satellite Radio*). This expansive interpretation of the distribution right (the same one urged in the instant case) would effectively render the statutory license a dead letter, as satellite radio broadcasters would be forced to negotiate with copyright owners for distribution rights.[16]

Similarly, cable and satellite television broadcasters rely on a statutory license that permits them to transmit copyrighted programming to their subscribers. *See* 17 U.S.C. §§ 111, 122. Like the statutory licenses relied on by satellite radio broadcasters, however, the statutory license is limited to the public performance right and does not encompass § 106(3). Yet millions of American cable subscribers routinely use VCRs and digital video recorders (DVRs)—often supplied by their cable or satellite TV provider—to turn those transmissions into "downloads." By injecting uncertainty about the applicability of the distribution right to these activities, Plaintiffs' reading of § 106(3) could undermine the settled expectations of this industry.

Several other copyright exceptions and statutory licenses that treat transmissions as public performances would be jeopardized if this Court adopts Plaintiffs' reading of § 106(3), including those affecting libraries and nonprofit broadcasters. *See* 17 U.S.C. §§ 110, 118. Finally, expanding the scope of § 106(3) would also threaten to upset existing private contractual arrangements that are premised on the traditional division of distribution, reproduction, and performance rights.

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[15] Available at <http://ptech.wsj.com/archive/solution-20060517.html>.

[16] Although the XM subscribers are making reproductions with these satellite radio recorders, those "time-shifted" copies are themselves subject to a statutory licensing regime, *see* 17 U.S.C. § 1008, and may also qualify as a fair use, *see Sony v. Universal City Studios*, 464 U.S. at 447-55.

CONCLUSION

For the reasons discussed above, Plaintiffs' § 106(3) claim should be dismissed for failure to state a claim on which relief may be granted.

Dated: April ___, 2007

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION
By its attorney,

/s/John D. Moore____
John D. Moore (MBN # 10610)
Law Offices of John D. Moore, P.A.
301 Highland Park Cove, Suite B
Ridgeland, Mississippi 39157
601-853-9131
Fax: 601-853-9139
Email: john@johndmoorepa.com

Fred von Lohmann
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
Phone: (415) 436-9333 x123
Fax: (415) 436-9993
Email: fred@eff.org

Attorney for Amicus Curiae
Electronic Frontier Foundation

Certificate of Service

I hereby certify that on April 6, 2007, I electronically filed the foregoing with the Clerk of Court using the ECF system, which electronically notified the following:

Heather White Martin
BALCH & BINGHAM, LLP - Jackson
401 East Capitol Street, Suite 200
Jackson, MS 39201-2608
601/965-8174
866/883-6419 (fax)
hmartin@balch.com

Ernest O. Spencer, III
E. O. SPENCER, III, PLLC
5760 I-55 North, Suite 100
Jackson, MS 39211
601/899-1723
espencer@eoslaw.com

Karen H. Spencer
SPENCER & SPENCER, PLLC
5760 I-55 North, Suite 450
Jackson, MS 39211
601/899-1723
khspencer@eoslaw.com

s/John D. Moore