



## ***Thomas* on the Making-Available Right: An Unreasoned and Unreasonable Decision**

by Thomas D. Sydnor II\*

Recently, the Court in *Capitol Records, Inc. v. Thomas* vacated a \$222,000 verdict awarded by a jury of the peers of Defendant Jammie Thomas.<sup>1</sup> The Court held that it committed a “manifest error of law” by instructing the jury that U.S. law provides the “making-available right” required by nine international agreements supposedly implemented by U.S. legislation.

Cases like *Thomas* turn upon whether the Copyright Act provides a making-available right that can be infringed when someone shares a copyrighted file on KaZaA or posts it on a website. As the term is used here, a “making-available right” could encompass either a KaZaA user sharing audio files or a person behind a table stacked with books labeled, “Free Books: Take One.”

Historically, copyright law called this a “publication” right. This right is central to the Western concept of copyrights; it was conferred by every U.S. copyright law from 1790 to 1977; and Congress *inarguably intended* for the Copyright Act of 1976 to confer such a right. Consequently, the question is whether courts must find that efforts to halt unreasoned judicial decisions that evolved under the Copyright Act of 1909 inadvertently denied owners the making-available right that they were meant to have.

In *Thomas*, the analysis of this important issue degenerated from unreasoned to unreasonable to injudicious. At its end, the question lingering was not whether its analysis was sound, but whether its concluding advisory opinion attacking the jury and Congress also created the appearance of partiality.

The problems in *Thomas* began when its analysis of statutory interpretation and judicial precedent became unreasoned: *Thomas* failed to show that the consistent application of *any* principle of law could produce the clashing results achieved. Then its analysis became a self-parody as *Thomas* fired Gatling-gun accusations of unreasonableness at dozens of district-court judges, the Court of Appeals for the Eighth Circuit, other circuit courts, the Supreme Court, three Presidents, six Congresses, the

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\* Thomas D. Sydnor II is a Senior Fellow and Director of the Center for the Study of Digital Property at The Progress & Freedom Foundation. The views expressed in this report are his own, and are not necessarily the views of the PFF board, fellows or staff.

<sup>1</sup> See 2008 WL 4405282 (D. Minn. Sept. 24, 2008) [hereinafter *Thomas* at \*\_\_\_].

Copyright Office, the Patent and Trademark Office, various U.S. Trade Representatives, and the Department of Justice—among others.

Finally, these unreasonable claims became injudicious as the Court offered an advisory opinion, questioned the wisdom of the jury and Congress, and usurped the jury's function by mischaracterizing the Defendant's motives and conduct so egregiously that looting became a non-profit avocation and the deterrence of deceit became "oppressive."<sup>2</sup>

This paper offers a rather critical analysis of *Thomas*. But criticism is warranted: *Thomas* seems to be a relatively detailed analysis of the making-available debate. Consequently, its profound flaws must be exposed before they mislead other jurists.

## I. From Unreasoned to Unreasonable: The *Thomas* Analysis of Whether U.S. Law Provides a Making-Available Right.

The legal analysis in *Thomas* focused on statutory interpretation and appellate precedents. First, *Thomas* opined about whether the most reasonable interpretation of the Copyright Act would confer a making-available right. Then it discussed judicial precedents. Then it backtracked and admitted that legislative interpretations required the Court to adopt any reasonable interpretation of the Act that provided a making-available right. The first and second steps of this analysis were unreasoned. The third was unreasonable—and it refuted the unreasoned analysis that preceded it.

### A. *Thomas* adopted unreasoned and irreconcilable interpretations of "to authorize," and "to distribute."

Judge Ruggero Aldisert asserted that the duty of reasoned decision-making—the duty to show that judicial decisions applied governing principles of law consistently—has become the "heart" of Anglo-American jurisprudence:

Logical reasoning lies at the heart of the common-law tradition.... Without a reasoning process *adhering to rules of logic* to support conclusions, judicial decisions would have been nothing more than decrees, orders and judicial fiat. This would have been anathematic to... our democracy.<sup>3</sup>

But reasoned decision-making can also be anathematic to opponents of a making-available right: if applied consistently, *any* rule for interpreting statutes or judicial precedent will tend to show that the Copyright Act provides the right. Consequently, *Thomas* became lawless and arbitrary: the presumption favoring ordinary meaning was "strong," then wimpy, and then irrefutable; an appellate court's alternative holding was "binding precedent" if it could support a new trial, but not if it could preclude one.

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<sup>2</sup> This paper will focus on *Thomas*'s analysis of whether U.S. law provides a making-available right. As separate paper will address Section K, in which *Thomas* advocates reform of copyright laws that would only encourage commercial piracy, endanger consumers, and undermine copyrights.

<sup>3</sup> Ruggero J. Aldisert, *Logic for Lawyers* 9 (3d ed. 1997) (emphasis added).

Unreasoned decision-making first arose when *Thomas* interpreted the two terms in Section 106 of the Copyright Act that could confer a making-available right. Section 106 grants copyright owners “the exclusive rights to do and *to authorize*” several things, including “*to distribute* copies or phonorecords of the work to the public...”<sup>4</sup> Consequently, Section 106 would grant a making-available right if making a work available to the public was part of the process of “doing” public distribution, or if it “authorized” that work’s distribution.

When interpreting “to authorize” and “to distribute” *Thomas* purportedly applied one rule of law: “There is a ‘strong presumption that the plain meaning of the statute expresses congressional intent that is rebutted only in rare and exceptional circumstances.’”<sup>5</sup> *Thomas* thus misstated the governing law.<sup>6</sup> But that hardly mattered.

Right or wrong, this principle was just stated—not applied consistently. When the ordinary meaning of “to authorize” would preclude a new trial, *Thomas* rejected it at the first whiff of ambiguous legislative history. But when the ordinary meaning of “to distribute” could permit a new trial, (if one ignored the Eighth Circuit’s views on its ordinary meaning), then *Thomas* woodenly dismissed—as “these snippets”—copious extrinsic evidence including past legislation, legislative history, judicial practices, and Supreme Court cases showing that a specialized meaning was intended.

### 1. ***Thomas* on “to authorize”: unspoken intent inferred from ambiguous legislative history trumped ordinary meaning.**

No one in *Thomas* denied that a KaZaA user sharing a copyrighted file with thousands of strangers “authorizes” its distribution, within the ordinary meaning of “to authorize.” The infinitive “to authorize” “ordinarily denotes affirmative enabling action” and “sometimes means simply ‘to permit.’”<sup>7</sup> Nor could any deny that, in the Copyright Act, “[t]here is a ‘strong presumption that the plain [meaning of “to authorize”] expresses congressional intent that is rebutted only in rare and exceptional circumstances.’”<sup>8</sup>

But in *Thomas*, “rare and exceptional circumstances” were found because one ambiguous sentence of legislative history—taken out of context and construed in a way that the Supreme Court had *twice* forbidden— could *imply* that the extracted sentence was intended to *mean* the opposite of what it *said*. *Thomas* thus divined otherwise

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<sup>4</sup> 17 U.S.C. § 106. The Copyright Act defines neither “to authorize” nor “to distribute.”

<sup>5</sup> *Thomas*, at \*5 (citation omitted).

<sup>6</sup> Courts do not presume that *all* undefined statutory terms were intended to have their ordinary meanings. To be sure, legislative history *alone* must be compelling before it can deny ordinary meaning to an undefined term. But other extrinsic evidence—such as prior legislation or judicial decisions—can cause courts to presume that an undefined term was intended to have a *specialized* meaning. See, e.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, (1989) (holding that an undefined term in the Copyright Act had a specialized meaning: “where Congress uses terms that have an accumulated settled meaning under common law, a court must infer... that Congress means to incorporate the established meaning of these terms”). The history of publication rights and the common-law link between distribution and publication make this principle critical to the making-available debate.

<sup>7</sup> *Washington County v. Gunther*, 452 U.S. 161, 169 (1981).

<sup>8</sup> *Thomas* at \*13 (citation omitted).

unspoken intent to narrow the meaning of “to authorize” from one sentence in the Committee Reports on the bills that became the Copyright Act of 1976.<sup>9</sup> This sentence stated, “Use of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers.”<sup>10</sup>

But this sentence expressed *no intent* to narrow the ordinary meaning of “to authorize.” Giving “to authorize” its ordinary meaning would, indeed, “avoid any questions as to the liability of contributory infringers.” By identifying a class of cases that “to authorize” was intended to encompass, Congress neither rejected the term’s ordinary meaning nor expressed intent to exclude other classes of cases it would otherwise encompass.

To find that this sentence meant what it did not say, *Thomas* implicitly used the doctrine *expressio unius est exclusio alterius*. *Expressio unius* means that if a statute explicitly applies to classes A, B, and C, then one *may* be able to infer that it was not intended to apply to classes not enumerated, like D. *Thomas* used *expressio unius* to reason as follows: when the Committee Report expressed intent for “to authorize” to encompass cases in which courts would have imposed contributory liability, the Report thus implied Congress’s otherwise unstated intent that “to authorize” should encompass *only* those cases in which courts would impose contributory liability. There are many defects in this reasoning. These are the worst:

**The Supreme Court has unanimously rejected attempts to use *expressio unius* to interpret committee reports:** In *Standefer v. United States*, the Court was “unwilling to ‘apply... [*expressio unius*] to the language employed in a *committee report*” because this “would permit an omission in the legislative history to nullify the plain meaning of a statute.”<sup>11</sup> In *Whitfield v. Hall*, the Court again rejected the “strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute.”<sup>12</sup>

**As a whole, the Committee Reports reveal no intent to narrowly interpret “to authorize”:** Were it lawful to apply *expressio unius* when interpreting a sentence in

<sup>9</sup> See *Thomas*, at \*10. *Thomas* cited three circuit court decisions to support its interpretation of “to authorize,” but only one was a reasoned holding and *all* ultimately rejected *Thomas*’s conclusions. *Venegas-Hernandez v. ACEMLA*, 424 F.3d 50, 58-59 (1<sup>st</sup> Cir. 2005) was a reasoned holding that could support a claim that “to authorize” could be narrowly interpreted, but *Venegas* refutes any claim that it would be *unreasonable* to give “to authorize” its ordinary meaning. *Latin Amer. Music Co. v. Archdiocese of San Juan*, 499 F.3d 32, 46 (1<sup>st</sup> Cir. 2007) just followed the precedent set in *Venegas*. *Subafilms, Ltd., v. MGM-Pathe Comms. Co.*, 24 F.3d 1088, 1093 (9<sup>th</sup> Cir. 1994) (en banc) discussed “to authorize” only in *dicta* while *expressly reserving* the question of whether “liability might attach when a party authorizes an act that *could* constitute infringement, but the ‘attempted’ infringement fails.” *Id.* at 1094 n.8. When the Ninth Circuit answered that question, it twice found that “sharing” a copyrighted file infringes the distribution right. *Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146, 1162 (9<sup>th</sup> Cir. 2007) (“distribution rights ...were infringed by Napster users ... [who made] their collections available to all other Napster users”); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9<sup>th</sup> Cir. 2001)(same).

<sup>10</sup> H.R. Rep. 1476, 94<sup>th</sup> Cong. 2<sup>nd</sup> Sess. at 61.

<sup>11</sup> 447 U.S. 10, 20 n.12 (1980) (emphasis in original, citation omitted).

<sup>12</sup> 543 U.S. 209, 216 (2004) (citation omitted); see also *id.* (noting that the ordinary meaning of statutory text cannot be narrowed by “mere silence in the legislative history”).

a committee report, it would still be error to divine otherwise-unspoken intent by applying *expressio unius* to the *particular* sentence about “to authorize” and contributory liability.

At best, *expressio unius* permits a weak inference that the enumeration of classes *may* imply intent to exclude those not enumerated.<sup>13</sup> Consequently, it cannot be used to imply narrowing intent from one sentence in a report *if other sentences in that report expressed intent to cover classes of cases not enumerated in the first sentence*. For example, if one sentence expressed intent to cover class A, and another expressed intent to cover class B, then the first sentence implied *no* intent to exclude non-enumerated classes—like B or C. For four reasons, the Committee Reports thus prohibit the narrowing construction that *Thomas* imposed.

*First*, the next sentence of those same Reports shows that Congress did intend to impose liability if a work is made available for infringing use: “For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she *engages in the business of* renting it to others *for purposes of* unauthorized public performance.”<sup>14</sup> In this example, the movie has not been rented to others—it has only been made available for rental. Congress thus did not intend for its reference to “contributory liability” to narrow the ordinary meaning of “to authorize.”

*Second*, the Report also expressed intent that courts should continue to impose *vicarious liability*—a form of secondary liability *not enumerated* in the *Thomas* sentence.<sup>15</sup> Again, this foreclosed any inference that forms of liability not specified in that sentence were implicitly excluded.

*Third*, the Report also expressed Congress’ intent “to set forth the copyright owner’s exclusive rights *in broad terms* in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow.”<sup>16</sup> Congress thus intended to use broad terms in Section 106 and to narrow or limit them *only as prescribed in the statute itself*—not in its Committee Reports.

*Fourth*, the *Thomas* interpretation cannot explain why Congress used “to authorize.” If Congress intended *only* to codify contributory liability, then “to authorize” was an absurd means to that end. The ordinary meaning of “to authorize” imposes liability much more broadly. Nor did “to authorize” have any specialized meaning in the law of contributory liability—indeed, “to authorize” no more suggests contributory liability than any random phrase plucked from a hat. So why “to authorize”? Why not “to do or to contribute to the doing of”? Legislators who *only* intended to codify contributory liability would not have used a phrase so ill-suited to their purpose as “to authorize.”

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<sup>13</sup> See Reed Dickerson, *The Interpretation and Application of Statutes* 234-35 (1975) (“Without contextual support... there is not even a mild presumption [favoring application of *expressio unius*].”).

<sup>14</sup> *E.g.*, H.R. Rep. 1476, 94<sup>th</sup> Cong. 2<sup>nd</sup> Sess. at 61 (emphasis added).

<sup>15</sup> *E.g.*, *id.* at 159-60.

<sup>16</sup> *E.g.*, *id.* at 61.

But if you follow *Standefer* and *Whitfield* and recognize that “to authorize” could serve purposes *other than* the one noted in the *Thomas* sentence—then its use is easily explained. The Copyright Act of 1976 was intended to bring U.S. copyrights closer to those required by the leading multilateral copyright treaty—The Berne Convention on the Protection of Literary and Artistic Works.<sup>17</sup> In the Berne Convention, undefined terms have their ordinary meaning, and the undefined term “to authorize” defines the scope of the exclusive rights that signatories must provide.<sup>18</sup> Consequently, when the 1976 Act became the first in U.S. history to use “to authorize” to define the scope of exclusive rights, it advanced the U.S. toward its goal of joining the Berne Convention.

**The Supreme Court has held that the Copyright Act did not codify contributory liability:** *Thomas* held that the words “to authorize” *codified* then-existing standards for contributory liability down to their minute details.<sup>19</sup> But the Supreme Court, in its famous *Sony* and *Grokster* decisions, twice rejected claims that the Copyright Act “codified” the standards for secondary liability.<sup>20</sup> Both *Sony* and *Grokster* thus changed the prior standards for contributory liability—something that the Court could not have done had “to authorize” codified the standards prevailing in 1976.<sup>21</sup>

The *Thomas* interpretation of “authorize” thus defied law and logic. *Thomas* announced that it strongly presumed that “to authorize” would have its ordinary meaning in all but the most “rare and exceptional circumstances.” But then it found such “circumstances” because an ambiguous sentence of legislative history, unlawfully construed to mean what it did not say, *could* suggest a narrower meaning. The Supreme Court has held, “it is difficult to imagine a more violent breach” of the duty of

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<sup>17</sup> *E.g., id.* at 135.

<sup>18</sup> See Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886; 25 U.S.T. 1341, 828 U.N.T.S. 221 (“Authors of literary and artistic works... shall have the exclusive right of authorizing the reproduction of these works...”); Vienna Convention on the Interpretation of Treaties, art. 31(1), 23 May 1969, 1155 U.N.T.S. 331 (giving undefined treaty terms their ordinary meanings).

<sup>19</sup> See *Thomas*, at \*10. Presumably, these were the standards prescribed by the Second Circuit in *Gershwin*, the leading pre-1976 precedent on indirect liability for copyright infringement. See *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>20</sup> *Sony Corp. of Am., Inc. v. Universal City Studios, Inc.*, 464 U.S. 417, 434, 435 n.17 (1984) (holding that the “Copyright Act does not expressly render anyone liable for infringement committed by another,” but that contributory liability is an established common-law doctrine) (*quoted in MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (calling indirect liability a “common law” doctrine).

<sup>21</sup> *Thomas* also badly misread *Grokster*. *Thomas* argued, “Equating making available with distribution would undermine settled case law holding that merely inducing or encouraging another to infringe does not alone constitute infringement *unless that encouraged party actually infringes.*” *Thomas*, at \*10 (emphasis added). But *Thomas* misread the case: *Grokster* held that if a device distributor intends to induce infringing uses of a device made available to the public, then the distributor is liable for all infringing uses of that device—even those not induced by its own conduct. See *Grokster*, 545 U.S. at 940 n.13. Nor did *Grokster* decide whether distributing a device intended for infringing use could trigger liability even before the infringements occurred. *Dicta* from a case in which the intended infringing uses had concededly occurred cannot prove that liability attaches only after infringing uses occur.

reasoned decision-making than one in which the legal rule or standard applied “is in fact different from the rule or standard formally announced.”<sup>22</sup>

**2. *Thomas* on “to distribute”: unnaturally narrow meaning in another statute trumped plentiful legislative history and Supreme-Court and Eighth-Circuit precedents.**

When analyzing the *Thomas* interpretation of “to distribute,” the inexplicable conflict with its interpretation of “to authorize” is more evident if we look first at the question of whether extrinsic evidence sufficed to show that “to distribute” was intended to have a specialized meaning, and then analyze the Court’s largely nonresponsive efforts to discern the ordinary meaning of a “distribute” right.

**a. *Thomas* refused to find a specialized meaning for “to distribute” in extrinsic evidence far stronger than the one “snippet” that gave “to authorize” a specialized meaning.**

When interpreting “to authorize,” *Thomas* rejected ordinary meaning by implying unstated intent from one ambiguous sentence of legislative history. But even were the ordinary meaning of “to distribute,” not to provide a making-available right, then, in the Copyright Act, “to distribute” was *inarguably intended* to have a specialized meaning encompassing such a right, as shown by copious extrinsic evidence, including plentiful *express* legislative history, 188 years of past legislation, prior judicial practice, and a multilateral treaty to which the United States had just acceded.

From 1790 to 1977, every U.S. Copyright Act had granted authors of copyrighted works an exclusive right of publication.<sup>23</sup> Courts interpreted the undefined concept of publication broadly to encompass both actual distribution of copies of the work to the public and making copies of the work available to the public.<sup>24</sup> In 1961, the Register of Copyrights thus told Congress, “Under our present copyright law ‘publication’ means making copies of a work available to the public.”<sup>25</sup>

But the pre-1976 concept of “publication” had a serious flaw. It served too many functions: 1) it was an exclusive right, 2) it established eligibility for federal copyrights, 3)

<sup>22</sup> *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998); see also *NRDC v. Herrington*, 768 F.2d 1355, 1406 (D.C. Cir. 1985) (finding unreasoned decision-making when an agency made “an exception to its general rule on grounds that entirely discredit the rule itself”).

<sup>23</sup> *Cf. American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 290 (1907) (“copyright, as the term imports, involves the right of publication”).

<sup>24</sup> *E.g. Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706, 707 (6<sup>th</sup> Cir. 1956) (per curiam); see generally Melville B. Nimmer, *Copyright Publications*, 56 COLUM. L. REV. 185, 187 (1956) (concluding that publication occurred when copies of a work were “sold, ... given away, or otherwise made available to the general public... even if a sale or other such disposition does not in fact occur”).

<sup>25</sup> *Register’s Report on the General Revision of the U.S. Copyright Law*, at 39 (House Comm. Print 1961); see also *Supplementary Register’s Report on the General Revision of the U.S. Copyright Law*, at 79 (House. Comm. Print 1965) (“a work has been published if ‘copies’ have been made unconditionally available to the public”).

it defined copyright term, and 4) it triggered the notice requirement that could void copyrights. Consequently, while courts consistently *defined* “publication,” they *applied* it inconsistently—courts applying the same term to similar facts would reach different results, depending on whether “publication” would secure or destroy copyrights.<sup>26</sup>

To end such incoherence, publication had to serve fewer functions—or just one. For example, the Register’s 1961 Report on copyright revision proposed “to retain the exclusive rights... to make and publish copies,” but to use a new concept (“public dissemination”) as the trigger for notice.<sup>27</sup> After this scheme was criticized, the Register’s 1965 Report reversed the order—“publication” became the trigger for notice, and the exclusive right became a right “to distribute” copies of the work to the public. The use of “distribute”—the term that courts used to define publication—signaled intent to encompass a making-available right.<sup>28</sup> The Register thus described the distribution right interchangeably as a right of “publication,” a “publishing” right, and a “public distribution right” and assured Congress that it would still give authors all rights granted previously, including those of “making and publishing copies.”<sup>29</sup>

By 1975, “publication” served one primary purpose: the analogous exclusive right was still “to distribute”; dual state/federal copyrights were eliminated; notice was required only when copies had been “publicly distributed,” and “publication” defined the term of some copyrights. Nevertheless, the Committee Reports on the new Act still stressed that the right “to distribute” encompassed a right to publish: they described the distribution right as a right of “publication,” and a right of “publishing.” The Reports stated: “Clause (3) of section 106 establishes the exclusive right of publications” that gives copyright owners the right “to control... public distribution” of copies of their works—a result possible only if the right “to distribute” can be infringed before distributions to the public have occurred.<sup>30</sup>

Moreover, on this issue, the Committee Reports inarguably expressed the intent of Congress. To combat record piracy, the United States had just successfully negotiated the new norms in the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, which the U.S. ratified in 1973. The Convention required the U.S. to protect producers of sound recordings from “any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.”<sup>31</sup> Unless they *intended* to

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<sup>26</sup> *E.g., American Visuals Corp. v. Holland*, 239 F.2d 740, 743 (2d Cir. 1956); see also *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, at 312 (House Comm. Print 1975) (“‘Publication,’ ... represents [existing law’s] most serious defect.... [T]he courts have given ‘publication’ a number of diverse interpretations, some of them radically different.... [T]he results in individual cases have become unpredictable and often unfair.”).

<sup>27</sup> *Register’s Report on the General Revision of the U.S. Copyright Law*, at v (House Comm. Print 1961).

<sup>28</sup> See *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (holding that when Congress uses terms of art that acquired specialized meaning under common law, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word”).

<sup>29</sup> *Supplementary Register’s Report on the General Revision of the U.S. Copyright Law*, at 15, 16, 19 (House. Comm. Print 1965).

<sup>30</sup> H.R. Rep. No. 1476, 94<sup>th</sup> Cong. 2<sup>nd</sup> Sess. at 62.

<sup>31</sup> Art 1(d), 2, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

exercise their Treaty and Foreign Commerce Powers in bad faith, Congress and the President necessarily concluded that the 1976 Act provided such protection—as it would, if the right “to distribute” subsumed a right of “publication.”

In its 1985 decision, *Harper & Row, Pubs. v. Nation Ent.*, the Supreme Court found this combination of past legislation, judicial practice and legislative history compelling: based upon it, the Court concluded that publication was “an important subsidiary right” subsumed within the broader exclusive right of distribution.<sup>32</sup> Nor was this mere *dicta*: The Court rejected a finding of fair use because the Defendant had usurped the copyright owner’s right to be the first to make the work available to the public.

But *Thomas* rejected the Supreme Court’s analysis. *Thomas* saw nothing persuasive in 185 years of legislation, in judicial practice, in copious, consistent, *explicit* legislative history or in the presumption of good faith that courts accord to the other Branches:

The Court does not find these snippets of legislative history to be dispositive of the definition of distribution. Nowhere in this legislative history does Congress state that distribution should be given the same broad meaning as publication. In any case, even if the legislative history indicated that some members of Congress equated publication with distributions under § 106(3), that fact cannot override the plain meaning of the statute.<sup>33</sup>

But there are two fatal flaws in this quotation.

First, *Thomas* just denied reality. The Committee Reports describe the right “to distribute” as a right of “publication,” and a right of “publishing;” they state: “Clause (3) of section 106 establishes the exclusive right of publications” that gives copyright owners the right “to control... public distribution.”<sup>34</sup> So the Reports *explicitly* gave distribution “the same broad meaning as publication.” And the significance of the latter term was clear: decades of judicial decisions and the pending bills defined “publication” to

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<sup>32</sup> 471 U.S. 539, 549 (1985); see also *Black’s Law Dictionary* 1469 (8<sup>th</sup> ed. 2004) (defining “subsidiary” as “subordinate”). *Thomas* also wrongly claimed that *Harper & Row* “did not discuss the meaning of the term distribute.” *Thomas*, at \*9. But it did. 471 U.S. at 552 (“The Report of the House Committee on the Judiciary confirms that ‘Clause (3) of section 106, establishes the exclusive right of publications.’”). And it is self-defeating to note that *Harper & Row* once described Section 106 as granting rights “to publish, copy, and distribute.” *Thomas*, at \*9 (citation omitted). As long as Section 106 grants a right “to publish”—and thus, a making-available right—then any error in the Court’s jury instruction was immaterial. At worst, it only misidentified *which* right Defendant *Thomas* infringed by “sharing” files. Finally, *Thomas* claimed that *Harper & Row* did not treat the distribution and publication rights as “synonymous.” *Thomas*, at \*9. That is true: *Harper & Row* treated publication as “an important subsidiary right” subsumed within the broader distribution right. 471 U.S. 539, 549 (1985) (emphasis added).

<sup>33</sup> *Thomas*, at \*8.

<sup>34</sup> H.R. Rep. No. 1476, 94<sup>th</sup> Cong. 2<sup>nd</sup> Sess. at 61-62.

encompass a making-available right.<sup>35</sup> Moreover, the Committees' views on the making-available right *necessarily* reflected those of Congress generally: if Congress and the President were acting in good faith, then they *necessarily* concluded that the right "to distribute"—or the right "to authorize"—provided the making-available right required by the newly effective multilateral record-piracy convention.

The second flaw appears when the *Thomas* quotation is slightly altered:

The Court does not find this one snippet of legislative history—construed as the Supreme Court has forbidden—to be dispositive of the definition of "to authorize." Nowhere in this legislative history does Congress state that "to authorize" should be given the same narrow meaning as "contributory liability." In any case, even if the legislative history indicated that some members of Congress equated "to authorize" with "contributory liability," that fact cannot override the plain meaning of the statute.

So it hardly mattered whether *Thomas* applied the right legal standard for determining whether an undefined statutory term should have an ordinary or specialized meaning. Here, *any principle of law*, consistently applied, would seem to show that the Copyright Act provided a making-available right. Were the law that ordinary meaning always trumps extrinsic evidence, then "to authorize" would provide a making-available right. Were it that ordinary meaning is trumped only by very strong extrinsic evidence, then "to authorize" and "to distribute" would provide the right. And were it that extrinsic evidence usually trumps ordinary meaning, then "to distribute" would provide the right.

Incoherent, unreasoned results—nothing else emerged from *Thomas*' self-contradictory approach to statutory interpretation.

**b. *Thomas* discerned the ordinary meaning of "to distribute" by finding that it would have a narrow meaning in a statute that does not contain the term.**

After spurning the "snippets" of extrinsic evidence that prove that Congress *did intend* to confer a making-available right, *Thomas* tried to show that the ordinary meaning of "distribute" would not encompass a making-available right. But that cannot reveal the ordinary meaning of the Copyright Act's distribution right.

The Supreme Court holds that "Congress' use of a verb tense is significant in construing statutes."<sup>36</sup> This is critical in Section 106. It confers neither a "distribute" right nor a liability right "to have distributed" copies. Ignoring "to authorize," the distribution right granted in Section 106 grants an *exclusive right* that must be understood in two ways. *First*, it is an exclusive right "to distribute," and an Eighth-Circuit district court recently noted that this use of the infinitive mode "is equivalent to 'in

<sup>35</sup> *Neder v. United States*, 527 U.S. 1, 21 (1999) ("[W]here Congress uses terms that have accumulated settled meaning... Congress means to incorporate the established meaning of those terms.").

<sup>36</sup> *United States v. Wilson*, 503 U.S. 329, 333 (1992).

order to'... or 'for the purpose of'...."<sup>37</sup> *Second*, it is also an exclusive right "to do" distribution to the public, and the Eighth Circuit held in *Brummels* that interpreting "distribution" to encompass all steps in "the process of getting goods *from* the manufacturer *to* the consumer... comports with the ordinary, contemporary, common meaning of 'distribution.'"<sup>38</sup> In either sense, the ordinary meaning of the words used thus encompassed steps in the distribution process *preceding* the final transfer that completes it.

*Thomas* ignored all this. Instead, it discerned the "ordinary meaning" of the distribution right by quoting the narrowest dictionary definition of the transitive verb "distribute": "The ordinary dictionary definition of the word 'distribute' necessarily entails a transfer of ownership or possession from one person to another."<sup>39</sup> But the Copyright Act does not confer a "distribute" right.

*Thomas* then buttressed this near-irrelevant analysis by examining how "distribute" was used in other sections of the Copyright Act. After two pratfalls foreclosed the Court's narrow interpretation—and reconfirmed what ordinary meaning and extrinsic evidence already showed—*Thomas* then sought support in *some* other statutes.

*Thomas* first analyzed Section 115 of the Act, and noted, "in other portions of the Copyright Act, Congress has explicitly confined the term 'distribution' to a physical transfer of copyrighted material. For example, in the section of the Act providing compulsory licenses for nondramatic musical works, Congress provides: 'For this purpose... a phonorecord is considered "distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession.'"<sup>40</sup> But unless "to distribute" ordinarily connoted both completed distribution and making-available, then the quoted language would be unnecessary.

*Thomas* then claimed that in the criminal-infringement provisions of Section 506(a), "Congress has explicitly defined 'distribute' to include offers to distribute": it claimed that § 506(a)(1)(C) imposes "criminal penalties for 'the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public.'"<sup>41</sup> But the Constitution authorizes Congress to grant copyrights to *authors*, so constitutional concerns would arise had Congress vested a making-available right exclusively in the Department of Justice.

Fortunately, *Thomas* misread Section 506(a), which imposes criminal penalties only if a copyright granted by Section 106 has been infringed. Section 506(a)(1) and 506(a)(1)(C) state, "Any person who willfully infringes a copyright shall be [criminally] punished... if the infringement was committed... by the distribution of a work... by making it available on a computer network accessible to members of the public...." So

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<sup>37</sup> *United States v. O'Hara*, 143 F. Supp. 2d 1039, 1041-42 (E.D. Wis. 2001).

<sup>38</sup> *United States v. Brummels*, 15 F.3d 769, 773 (8<sup>th</sup> Cir. 1994).

<sup>39</sup> *Thomas*, at \*6 (citation omitted).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Congress could only enact § 506(a)(1)(C) if the Copyright Act granted a making-available right. Otherwise, it would be meaningless.

Oddly, *Thomas* also overlooked the sections of the Act most relevant to a comparative analysis of its uses of “distribute.” Section 401 of the 1976 Act stated: “Whenever a work protected under this title is *published* in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all *publicly distributed* copies....”<sup>42</sup> This Section reveals two points. First, Congress concluded that authors have authority to “publish” their works—a condition met only if the distribution right includes a making-available right. Second, when Congress wanted an obligation or right to be triggered only *after* copies of a work had been distributed to the public, it expressed its intent by using the past tense.

In Section 407 of the Act, Congress also imposed the deposit obligation upon “the owner of copyright or of *the exclusive right of publication* in a work published in the United States....”<sup>43</sup> Again, Congress reconfirmed that the Act provides an exclusive right of publication, i.e., a making-available right.

Nevertheless, after proving that its narrow reading of “distribute” confounded the text and structure of the Copyright Act, *Thomas* sought support from *other* statutes. This comparative analysis of the meaning of “distribute” began by ignoring the Eighth Circuit’s rulings on whether a KaZaA user sharing a file “distributes” it within the ordinary meaning of that term. It ended by deriving a narrow construction from a different statute—one that never contained *any* variant of “to distribute.”

It is a federal crime to knowingly “distribute” child pornography.<sup>44</sup> The KaZaA program was intended to facilitate copyright piracy, but it is also used by distributors of sadistic child pornography. And KaZaA’s creators *chose* to tolerate those pedophiles—lest deterring them show that they could also deter the pirates.<sup>45</sup> KaZaA’s pedophiles and pirates thus raced each other to the Eighth Circuit. The pedophiles arrived first.

But before they did, *United States v. Clawson* required the Eighth Circuit to decide whether a defendant would “distribute” child pornography by making it available to a minor who did not view it. The Eighth Circuit agreed that “applying the ordinary meaning of the term ‘distribute,’” the defendant had “distributed” child pornography to the minor.<sup>46</sup> The Eighth Circuit later applied *Clawson* to cases involving KaZaA users

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<sup>42</sup> Act of Oct. 19, 1976, Pub. L. No. 94-553, 94<sup>th</sup> Cong., 2d Sess., 90 Stat. 2541 at § 401.

<sup>43</sup> 17 U.S.C. § 407.

<sup>44</sup> 18 U.S.C. § 2252A(a)(2); see also *id.* at § 2256(8).

<sup>45</sup> See Kristyn Maslog-Lewis, “Sharman Exec Calls Child Porn Unstoppable” (Dec. 9, 2004) ([http://news.com.com/Sharman+exec+calls+child+porn+unstoppable/2100-1027\\_3-5486666.html](http://news.com.com/Sharman+exec+calls+child+porn+unstoppable/2100-1027_3-5486666.html)) (reporting that KaZaA’s alleged “zero-tolerance policy” for pedophiles was unenforced and unenforceable); *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd*, 2005 FCA 1242, *slip op.* at 82, 85 (Fed. Ct. of Australia Sept. 5, 2005) (same).

<sup>46</sup> 408 F.3d 556, 558 (8<sup>th</sup> Cir. 2005). *Thomas* tried to dismiss *Clawson* and its progeny by arguing that “distribute” may have a specialized, broader meaning under 18 U.S.C. § 2252A. See *Thomas*, at \*8. *Clawson* never reached that issue: it found the “ordinary” meaning of distribute sufficient to cover making-available. 408 F.3d 556, 558 (8<sup>th</sup> Cir. 2005).

who “shared” child pornography. *United States v. Sewell* stated that “the use of KaZaA to share child pornography is sufficient to uphold a conviction for the knowing distribution of child pornography.”<sup>47</sup> *United States v. Griffin* affirmed a finding that a KaZaA user “distributed child pornography by making images of child pornography available to others.”<sup>48</sup>

But *Thomas* found these on-point analyses of the ordinary meaning of “distribute” irrelevant: “The Court does not find the comparison to criminal law persuasive.... [T]he Court is not convinced that a criminal statute ... should carry weight.”<sup>49</sup> This made no sense. Courts usually assess a term’s “ordinary meaning” by surveying its dictionary definitions.<sup>50</sup> The contents of dictionaries do not change when Title 17 of the U.S. Code ends and Title 18 begins. *Thomas*’s contrary claim is *raw ipsa dixit*.

Nevertheless, after holding that the meaning of “distribute” in other statutes did not illuminate its meaning in the Copyright Act, *Thomas* then looked to other statutes—or, at least, to those other statutes that might support a narrow interpretation of “distribute.”

*Thomas* looked first at the Semiconductor Chip Protection Act codified in Chapter 9 of Title 17 of the U.S. Code. *Thomas* asserted that “in [the] context of copyright protection of semiconductor chip products,... ‘to “distribute” means to sell or to lease, bail, or otherwise transfer, or to offer to sell, lease, bail, or otherwise transfer....’”<sup>51</sup>

But *Thomas* erred again: this Act is not a “copyright law.” Indeed, Congress specifically *rejected* the idea of using copyrights to protect “utilitarian” mask works—and, instead, created a special *sui generis* form of protection.<sup>52</sup> And as for why Congress would expressly include offers when defining this new *sui generis* protection for utilitarian objects, the *Thomas* analysis of the Patent Act explains it well enough.

Finally, after decreeing that the “Court does not find the definitive interpretation of the term “distribute” in other titles of the U.S. Code,” the Court found the definitive interpretation of “distribute” in another title of the U.S. Code—in a section that has never contained any variant of “distribute.”<sup>53</sup> The Court thus interpreted “distribute” by scrutinizing the Patent Act, which confers neither an exclusive right “to distribute” nor an exclusive right “to do” distribution.

*Thomas* noted, however, that when the Patent Act conferred exclusive rights of “making, using or selling the patented invention,” courts found that offers to sell the invention did not infringe the “selling” right.<sup>54</sup> *Thomas* then claimed that the Supreme Court’s decision in *Eldred v. Ashcroft* held that strict constructions of the Patent Act are

<sup>47</sup> 513 F.3d 820, 822 (8<sup>th</sup> Cir. 2008).

<sup>48</sup> 482 F.3d 1008, 1011 (8<sup>th</sup> Cir. 2007).

<sup>49</sup> *Thomas* at \*7; but see *Thomas* at \*6 (giving weight to a criminal statute).

<sup>50</sup> See, e.g., *id.*

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

<sup>52</sup> H. Rep. No. 98-781, 98<sup>th</sup> Cong., 2d Sess., at 5-11.

<sup>53</sup> *Thomas* at \*7.

<sup>54</sup> See *Rotec Inds., Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, (Fed. Cir. 2000) (*cited in Thomas*, at \*7).

persuasive authorities for interpreting the Copyright Act.<sup>55</sup> *Thomas* thus derived from the Patent Act, a “principle”: “in the absence of a statutory definition that explicitly includes or excludes offers to sell or distribute, courts interpret liability narrowly and do not include offers....”<sup>56</sup> There are three fatal flaws in this reasoning.

*First*, the Patent Act cannot establish any “principle” relevant to the construction of “to distribute.” The Patent Act does not frame its exclusive rights in the infinitive mode. Nor does it use any variant of “distribute” to define an exclusive right.

*Second*, assuming that courts do follow this “principle” when interpreting the Patent Act, they do not do so when interpreting the Copyright Act. For example, the exclusive right “to publish” was not defined to include or exclude offers to distribute, yet courts interpreted it *broadly* to encompass offers.

*Third*, *Thomas* misread *Eldred v. Ashcroft*. In *Eldred*, the Court warned that patents are much stronger rights that differ in kind from copyrights; “in light of these distinctions, one cannot extract from language in our patent decisions” support for claims that the two rights “entail the same exchange,” or that concepts strictly applied in patent law should be strictly applied to copyrights.<sup>57</sup> *Eldred* thus *rejected* a *Thomas*-like attempt to import the strictures of Patent-Act analysis into the Copyright Act.

Collectively, such errors made the *Thomas* analysis of “distribute” unreasoned in the worst sense—it became a mere result foreclosed by its “supporting” rationale. For example, recall (1) that *Thomas* investigated only the ordinary meaning of the transitive verb “distribute,” (2) that all of its attempts to find Copyright-Act support for a narrow interpretation backfired, and (3) that *Eldred* barred its attempt to extract a narrowing “principle” from the Patent Act. Nevertheless, this was *Thomas*’s penultimate conclusion about the ordinary meaning of “distribute”:

The Court’s examination of the use of the term “distribution” in other provisions of the Copyright Act, as well as the evolution of liability for offers to sell in the analogous Patent Act, leads to the conclusion that the plain meaning of the term “distribution” does not include making available....<sup>58</sup>

There was no reasoning here at all—only a precluded result.

## **B. *Thomas* adopted unreasoned interpretations of judicial precedents.**

*Thomas*’s unreasoned approach to statutory construction recurred in its analysis of precedent. *Thomas* strained to find “binding precedent” in blatant *dicta* extraneous to one of three alternative holdings in *National Car Rental Sys., Inc. v. Computer*

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<sup>55</sup> *Thomas* at \*7 (citation omitted).

<sup>56</sup> *Thomas*, at \*7.

<sup>57</sup> 537 U.S. 186, 217 (2002) (concluding that any strict *quid pro quo* required by the Patent Act was not required by the Copyright Act).

<sup>58</sup> *Thomas*, at \*7.

*Associates, Int'l, Inc.*, a 1991 Eighth Circuit opinion that interpreted a contract.<sup>59</sup> Then *Thomas* strained to deny precedential effect to an *actual alternative holding* in *New York Times Co. v. Tasini*, a 2002 Supreme-Court case that held that “authorizing” database operators to make plaintiffs’ works available online infringed their distribution rights.<sup>60</sup> Again, the net result was unreasoned and incoherent.

In *National Car Rental*, National was sued for breaching a software-licensing agreement that barred it from using the software to process data for third parties. National argued that because this contract barred it from distributing the “functionality” of the software to others, it was equivalent to the distribution right and preempted by the Copyright Act. The Eighth Circuit rejected this silly argument for three reasons:

First, National cites no authority in support of this proposition. Second, even with respect to computer software, the distribution right is only the right to distribute *copies* of the work. As Professor Nimmer has stated, ‘infringement of the distribution right requires an actual dissemination of either copies or phonorecords.’ Finally, courts have specifically held that copyright protection in computer software does not extend to the software’s function.<sup>61</sup>

The Nimmer treatise quoted in the sentence after the second holding contains the phrase relevant to *Thomas*: “actual dissemination.”<sup>62</sup> But in *National Car Rental*, these words are—literally—the dictionary definition of non-precedential *obiter dicta*. BLACK’S LAW DICTIONARY defines *obiter dictum* as, “A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision of the case and therefore not precedential.” It illustrates *dicta* as follows: “any statement of law enunciated by the judge or court *merely by way of illustration*...”<sup>63</sup>

*National Car Rental* is this definition in action. The Eighth Circuit’s italics show that its second holding was that the distribution right related to *copies*, not “functionality.” The Court then illustrated this quoting a supporting sentence from a treatise that supported the Court’s point, but also happened to contain the extraneous phrase, “actual dissemination.” Consequently, the latter words are *dicta* under even the most stringent *dicta*-detection test: The Court’s second holding is valid even if its illustrative second sentence is rewritten as, “infringement of the distribution right requires *an offer to disseminate* either copies or phonorecords.”

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<sup>59</sup> 991 F.2d 426, 434 (8<sup>th</sup> Cir. 1991).

<sup>60</sup> 533 U.S. 483, 506 (2002).

<sup>61</sup> *National Car Rental*, 991 F.2d at 434 (emphasis in original). The third holding best exposes the absurdity of National’s claims: *nothing* in Section 106 can grant *any* right in the “functionality” of software. 17 U.S.C. § 102(b). *National Car Rental*’s third holding would thus be its “primary” holding.

<sup>62</sup> Nimmer’s “actual dissemination” language had no persuasive value in *Thomas* apart from *National Car Rental*. Defendant Thomas noted that the Nimmer quotation about “actual dissemination” did not persuade the Court when she quoted it during the preparation of jury instructions. See Defendant’s Second Memorandum of Law in Support of Her Motion for a New Trial at 3 n.2, *Capitol Records, Inc. v. Thomas*, No. 06-cv-1497 (MJD/RLE) (June 30, 2008).

<sup>63</sup> *Black’s Law Dictionary* 1102 (8<sup>th</sup> ed. 2004) (emphasis added).

Nevertheless, *Thomas* looked at this dictionary-definition *dicta*, reversed *National Car Rental's* holding, and twice found binding precedent:

The *National Car Rental* decision is the binding law of the Eighth Circuit on the meaning of § 106(3)... While the Eighth Circuit did provide multiple reasons for its holding that National did not distribute functionality, one of those grounds was that distribution required actual dissemination of a copy. Therefore, the statement that “infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords” is not dictum.<sup>64</sup>

Again, *Thomas* got the law wrong. It claimed that “National did not distribute functionality.” But the Eighth Circuit held that National *must be presumed to have done so*: the counterclaim had to “be read to claim that National’s... processing of data for third parties is the prohibited act.”<sup>65</sup> Consequently, its second holding did not turn on whether “functionality” was “actually disseminated” to third parties.

Nevertheless, *Thomas* did correctly state one principle for assessing the precedential value of an appellate opinion: The “actual dissemination” language in *National Car Rental* cannot be denied—or given—precedential value just because it was associated with the second-best of three alternative holdings. But again, this principle was only stated, not applied consistently. This became clear when *Thomas* shifted its analysis toward to the two alternative holdings in the Supreme-Court case *Tasini*.

In *Tasini*, the plaintiffs alleged that their reproduction and distribution rights in 21 articles were infringed when their “Print Publishers” sent copies of their articles to “Electronic Publishers,” including one who put their articles in an online database. No evidence showed that *any* of plaintiffs’ articles—much less all 21—had been displayed or copied by any database users.<sup>66</sup> Moreover, plaintiffs argued that the defendants should be directly liable for their own infringing acts—not that they should be secondarily liable for the infringing acts of third parties.<sup>67</sup>

In short, *Tasini* thus resolved a question like the one in *Thomas*: Does an unauthorized defendant infringe the reproduction and distribution rights by making copyrighted works publicly available over the Internet? The Court’s answer was clear:

[T]he Print and Electronic Publishers have exercised at least some rights that § 106 initially assigns to the Authors: ...[Electronic Publishers like] LEXIS/NEXIS, by selling copies of those Articles through the NEXIS Database, “distribute copies” of the Articles “to the public by sale,... and the Print Publishers, through contracts

<sup>64</sup> *Thomas* at \*13; see also *id.* at \*14 (“*National Car Rental*... is binding upon this Court.”).

<sup>65</sup> See *National Car Rental*, 991 F.2d at 433.

<sup>66</sup> Brief for Petitioners at n.34, *New York Times Co. v. Tasini*, No. 00-201, (Jan. 5, 2001).

<sup>67</sup> *Tasini*, 533 U.S. at 504; see also *Thomas*, at \*11 (“the [*Tasini*] plaintiffs had not made any contributory infringement claims”).

licensing the production of copies in the Databases, “authorize” reproduction and distribution of the Articles....

\* \* \*

We conclude that the Electronic Publishers infringed the Authors’ copyrights by reproducing *and distributing* the Articles in a manner not authorized by the Authors.... We further conclude that the Print Publishers infringed the Authors’ copyrights *by authorizing* the Electronic Publishers in that endeavor.<sup>68</sup>

On its face, *Tasini’s* holding on the distribution right foreclosed most of the *Thomas* analysis. It also *overruled* any precedential value in the “actual dissemination” language from *National Car Rental*. *Thomas* thus found that *Tasini’s* holding on “distribution” was not *really* a binding precedent.<sup>69</sup>

*Thomas* noted that *Tasini’s* holding on the distribution right was an *alternative holding*. It then concluded that *Tasini’s other alternative holding*—on the reproduction right—was its “primary” holding, and thus, the only one that was a precedent.<sup>70</sup> But that was a clear error of law. The Supreme Court has held for 80 years that its “secondary” alternative holdings are precedents.<sup>71</sup> Regardless of whether *Tasini’s* holding on the distribution right is its “primary” holding, it is a binding precedent.

In conclusion, the *Thomas* interpretation of precedent was as unreasoned as its statutory interpretation. Any rule of law that could find “binding precedent” in the dictionary-definition *dicta* “actual dissemination” associated with the second of *National Car Rental’s* three alternative holdings would—if applied consistently—surely find that “precedent” overruled by the Supreme Court’s alternative holding in *Tasini*.

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<sup>68</sup> *Tasini*, 533 U.S. at 498, 506.

<sup>69</sup> *Thomas* also misread *Tasini*. *Thomas* claimed that *Tasini’s* analysis did not “presuppose that the Articles were offered to the public but not downloaded.” *Thomas* at \*11. But it did: no evidence showed that any of plaintiffs’ articles had been downloaded from NEXIS. The providers of NEXIS thus infringed Plaintiffs’ distribution rights merely by making their works available. *Thomas* also asserted that *Tasini* did not hold “that the Print Publishers were directly liable for making available the Articles to the public.” *Id.* at \*11. But *Tasini* held both that “the Print Publishers, *through contracts licensing the production of copies* in the databases ‘authorize’... distribution of the articles,” and that “the Print Publishers infringed the Authors’ copyrights by authorizing the Electronic Publishers *to place the Articles in the Databases*....”<sup>69</sup> *Tasini* thus specified the act of the Print Publishers that first infringed the distribution right: they did so “through contracts licensing the production of copies” and “by authorizing the Electronic Publishers to place the Articles in the Databases.” These acts precede any exchange of copies—or even any actual making-available—but *Tasini* held that they sufficed to *directly* infringe Plaintiffs’ distribution right by “authorizing” future infringements.

<sup>70</sup> See *Thomas*, at \*11.

<sup>71</sup> See, e.g., *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 341 (1928) (“It does not make a reason given for a conclusion in a case *obiter dictum* that it is only one of two reasons for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered..., but we can not hold that the [interpretation of the procedural statute] in the opinion is not to be regarded as authority except by directly reversing the decision in that case....”).

**C. Unreasoned became unreasonable: *Thomas* attacked the Court, dozens of other judges, the Eighth Circuit, the Supreme Court, and many Congresses, Presidents, and agencies.**

A famous FAR SIDE cartoon shows a cow lying on a couch, telling his psychiatrist, “Maybe it’s *not* me y’know?... Maybe it’s the *rest* of the herd that’s gone insane.” The cartoon gently suggests that if we find ourselves concluding that vast swaths of our fellow creatures must be unreasonable, then the real problem may be more localized.

Section I of *Thomas* found that for decades, and in all three Branches of the federal government, most officials enacting, executing, or interpreting domestic and international copyright laws have been *unreasonable*: they interpreted the Copyright Act as no reasonable person could.

This finding occurred as *Thomas* tried to clear another interpretive hurdle. For over 200 years, the Supreme Court has held that, when possible, courts must construe domestic laws to effectuate the international obligations of the United States—a principle that some call the “*Charming Betsy* doctrine.”<sup>72</sup> This doctrine is highly relevant because, in 1971 and again from 1996 to 2006, the U.S. entered into nine multilateral or bilateral agreements that required the U.S. to provide making-available rights. As a result, *Thomas* held that the Court was obligated to adopt any *reasonable* interpretation of the Copyright Act that would provide a making-available right.<sup>73</sup> Predictably, *Thomas* then leapt to the only conclusion that would void the jury’s verdict; it found that the herd had been insane for *forty years*:

The Court acknowledges that past Presidents, Congresses, the Register of Copyrights have indicated their belief that the Copyright Act implements WIPO’s make-available right. The Court also acknowledges that, given multiple reasonable constructions of U.S. law, the *Charming Betsy* doctrine directs the Court to adopt the reasonable construction that is consistent with the United States’ international obligations. However,... Plaintiffs’ interpretation of the distribution right is simply not reasonable.<sup>74</sup>

And with that, *Thomas* collapsed its rickety tower of clashing results, unreasoned decisions, and distinguished precedents. This extreme claim was itself unreasonable, and it triggered cascading absurdities:

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<sup>72</sup> *Thomas*, at \*16.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* *Thomas* also found that the WIPO Copyright Treaty and Performances and Phonograms Treaty are not “self-executing.” *Thomas*, at \*16 (citing *Medellin v. Texas*, 128 S.Ct. 1346, 1365 (2008)). But the WIPO Treaties use the directory “shall” language indicative of self-executing treaties. *Medellin*, 128 S.Ct. at 1358. Moreover, when Congress intended for *copyright treaties* to be non-self-executing, it so stated explicitly. See, e.g., Berne Convention Implementation Act of 1988, Pub. L. 100-568, §§ 2-3, 102 Stat. 2853, 2853 (1988). This finding was also extraneous question-begging: if the Copyright Act already provided a making-available right, then the Treaties *were* self-executing, in this respect. See *Restatement of the Law, Third, Foreign Relations Law of the United States*, § 111(3) (1987).

**The only case supporting the narrowing of “to authorize” became adverse:** The First-Circuit decision in *Venegas* was the only reasoned holding that *Thomas* cited to support its narrowing construction of “to authorize.” But when *Thomas* claimed that it would be *unreasonable* to give “to authorize” its ordinary meaning, *Venegas* became an adverse authority. *Venegas* thrice admitted that its narrowing construction was very strained. “Admittedly, the better bare-language reading would allow the claims in question....” “Looking only at the statutory language, one might well think that authorization alone could well be infringement.” “[T]he authorizing person could (as a matter of language) be treated as an infringer subject to statutory damages even if no infringing act ... actually occurred.”<sup>75</sup> Nevertheless, *Venegas* adopted the narrow construction for two now-inapplicable reasons.<sup>76</sup> Consequently, *Venegas* itself refutes any claim that it would be *unreasonable* to give “to authorize” its ordinary meaning.

***Thomas* accused the Court of unreasonable decision-making:** In *Thomas*, Judge Davis had already found that he committed a manifest error of law that resulted in a miscarriage of justice. Section I found that he committed an *unreasonable*, manifest error of law that resulted in a miscarriage of justice.

***Thomas* accused many other judges of unreasonable decision-making:** Dozens of federal district and appellate judges have concluded that the Copyright Act provides a making-available right.<sup>77</sup> *Thomas* concluded that all those judges were *unreasonable*—no rational judge could interpret the Copyright Act as they did.

<sup>75</sup> *Venegas-Hernandez v. ACEMLA*, 424 F.3d 50, 57-58 (1<sup>st</sup> Cir. 2005).

<sup>76</sup> *Id.* at 59. First, *Venegas* thought that “the stakes are low enough”—nothing important seemed to turn on how “to authorize” was interpreted. Second, it wanted to keep First and Ninth Circuit interpretations consistent—a goal that would now require the First Circuit to reverse *Venegas* and find that the Act provides a making-available right. See, *supra*, n.9.

<sup>77</sup> *Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146, 1162 (9<sup>th</sup> Cir. 2007) (“distribution rights ... were infringed by Napster users ... when they used the Napster software to make their collections available to all other Napster users”); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9<sup>th</sup> Cir. 2001) (“Napster users who upload file names to the search index for others violate plaintiffs’ distribution rights.”); *Hoteling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4<sup>th</sup> Cir. 1997) (holding that making a work available in a public library infringes the distribution right); *Agee v. Paramount Comms., Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (equating distribution with “publication”); *Ford Motor Co. v. Summit Motor Prods., Inc.* 930 F.2d 277, 299 (3<sup>rd</sup> Cir. 1991) (“‘Publication’ and... section 106(3), then, are for all practical purposes synonymous”); *Elektra Ent. Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (holding that “to distribute” encompasses offers to distribute); *Atlantic Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551, at \*8 (S.D. Tex. March 12, 2008) (making files available “on KaZaA constituted a ‘distribution’ for the purposes of ... copyright infringement”); *Advance Magazine Pubs., Inc. v. Leach*, 466 F. Supp. 2d 628, 638 (D. Md. 2006) (“Defendant operates... an online database of literary works, and by making available... Plaintiff’s publications, he has infringed its right to distribute”); *Artista Records, LLC v. Greubel*, 453 F. Supp. 2d 961, 969 (N.D. Tex. 2006) (“the courts have recognized that making copyrighted works available to others may constitute infringement by distribution”); *Elektra Ent. Group, Inc. v. Brimley*, No. CV205-314, 2006 WL 2367135, at \*2 (S.D. Ga. Aug. 15, 2006) (“use of a peer to peer [network] to share music files infringes copyright”); *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at \*3 (W.D. Tex. July 17, 2006) (equating distribution and publication); *Interscope Records v. Duty*, No. 05-CV-3744-PHX-FJM, 2006 U.S. Dist. LEXIS 20214, at \*7 (April 14, 2006) (“the right of distribution is synonymous with the right of publication”); *Columbia Pictures Inds. v. T & F Ent., Inc.*, 68 F. Supp. 2d 833, 839 (E.D. Mich. 1999) (finding *prima facie* copyright infringement because defendants “held... video cassettes out for

**Thomas accused the Eighth Circuit of unreasonable decision-making:** When *Thomas* claimed only that the *best* interpretation of the Copyright Act would not provide a making-available right, it could distinguish adverse precedents by finding them non-binding and then unpersuasive. But that tactic backfired when *Thomas* declared *unreasonable* all interpretations of “to authorize” or “to distribute” that would provide a making-available right. In *Clawson*, it was *unreasonable* for the Eighth Circuit, “applying the ordinary meaning of the term ‘distribute,’” to hold that a defendant distributed child pornography by making it available to a minor.<sup>78</sup> In *Brummels*, it was *unreasonable* for the Eighth Circuit to hold that “any reasonable construction” of “distribution” would encompass all steps in “the process of getting goods *from* the manufacturer *to* the consumer”—even those preceding actual transfer.<sup>79</sup>

**Thomas accused the Supreme Court of unreasonable decision-making:** For the same reason, *Thomas* also necessarily declared five Supreme-Court decisions unreasonable. It was *unreasonable* for *Tasini*’s allegedly “non-primary” holding to find that the Print Publishers infringed the plaintiffs’ distribution rights by “authorizing” the Electronic Publishers to make them available to the public—or to find that one Electronic Publisher infringed the plaintiffs’ distribution rights absent any evidence they their works were actually accessed or downloaded. It was *unreasonable* for *Harper & Row* to hold that “publication” was “an important subsidiary right” subsumed within Section 106. It was *unreasonable* for *Eldred* to refuse to import the strictures of Patent-

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distribution to the general public”); *Expeditors Int’l v. Direct Line Cargo Mgmt. Servs.*, 995 F. Supp. 468, 477 (D.N.J. 1998) (holding that “to authorize” has its ordinary meaning); *Marobie-FI, Inc. v. Nat’l Ass’n of Fire and Equip. Distribs. And Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1173 (N.D. Ill. 1997) (holding that making files available on a website infringes the distribution right); *Playboy Ent., Inc. v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (holding that the defendant violated an injunction because making plaintiff’s works available on a web site infringed its distribution right); *Playboy Ent., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (holding that making files available for downloading infringed the distribution right); *The Walt Disney Co. v. Video 47, Inc.*, 972 F. Supp. 595, 602 (S.D. Fla. 1996) (holding that defendants infringed by “holding out for rental” unauthorized videotapes); *Curb v. MCA Records, Inc.*, 898 F. Supp. 586, 593-94 (M.D. Tenn. 1995) (holding that an interpretation of “authorize” that ties “the authorization right solely to a claim of justiciable contributory infringement appears contrary both to well-reasoned precedent, statutory text, and legislative history”); *Playboy v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (holding that making files available on an Internet BBS infringes the distribution right); *Wildlife Int’l, Inc. v. Clements*, 591 F. Supp. 1542, 1546 (S.D. Ohio 1984) (holding that defendant infringed copyrights “by selling or offering to sell... 22 copyrighted works”).

<sup>78</sup> 408 F.3d 556, 558 (8<sup>th</sup> Cir. 2005). Other unreasonable interpretations of “distribute” include *United States v. Carani*, 492 F.3d 867, 876 (7<sup>th</sup> Cir. 2007) (“The notion that [defendant] could knowingly make his child pornography available for others to access and download without this qualifying as ‘distribution’ does not square with the plain meaning of the word.”); *United States v. Christy*, 65 M.J 657 (Army Ct. Crim. App. 2007) (“We hold that ‘sharing’ child pornography files using peer-to-peer file-sharing software constitutes ‘distribution of child pornography....’”); *United States v. McVey*, 476 F. Supp.2d 560, 562 (E.D. Va. 2007) (interpreting distribution to “include acts such as posting material involving the sexual exploitation of a minor on a website for public viewing”); *State v. Perry*, 697 N.E.2d 624, 628 (Ohio 1998) (“Posting software on a bulletin board where others can access and download it is distribution.”).

<sup>79</sup> 15 F.3d 769, 773 (8<sup>th</sup> Cir. 1994) (holding “that this definition comports with the ordinary, contemporary, common meaning of “distribution”).

Act analysis into copyright law. And it was *unreasonable* for *Sony* and *Grokster* to find that the Copyright Act did not codify 1976-era standards for contributory liability.

**Thomas also hurled claims of unreason at six Congresses, three Presidents, three Registers of Copyrights, and many Undersecretaries of Commerce for Intellectual Property, Trade Representatives, and Attorneys General:** *Thomas* not only slung accusations of unreasonable decision-making at all three levels of the federal judiciary, it also found that forty years of domestic and international copyright policy were undone by the unreasonable Legislative and Executive Branches of the federal government.

According to *Thomas*, this unreasonable conduct began in 1965 when the unreasonable Register of Copyrights, the late Abe Kaminstein, unreasonably concluded that an exclusive right “to distribute” would encompass a right of publication. In 1967, unreason spread when the unreasonable House Committee on the Judiciary, reporting a similar bill, unreasonably concluded, “The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, *publication*, performance, and display—are stated generally in section 106.”<sup>80</sup>

Unreason recurred in 1975 when the next Register of Copyrights, Barbara Ringer, unreasonably failed to correct the unreasonable claims of her predecessor.<sup>81</sup> Then the House and Senate Judiciary Committees unreasonably equated the distribution right with a publication right. The 94<sup>th</sup> Congress then unreasonably concluded that the Copyright Act of 1976 provided the making-available right required by the new multilateral treaty that had just come into force. President Ford reached similar unreasonable conclusions, and signed the Copyright Act of 1976 into law.

In 1998, unreason afflicted all three Branches of the federal government. Relying partly upon the decisions of unreasonable federal judges, a third Register of Copyrights, the Undersecretary of Commerce for Intellectual Property, and an Assistant Secretary of State unreasonably testified that U.S. law provided a making-available right.<sup>82</sup> Once again, all relevant committees of jurisdiction in both Houses of Congress unreasonably

<sup>80</sup> S. Rep. 83, 90<sup>th</sup> Cong., Sess. 1, pt. 2 at 23.

<sup>81</sup> See *Second Supplementary Register’s Report on the General Revision of the U.S. Copyright Law* (House Comm. Print 1975).

<sup>82</sup> *Hearing on WIPO Copyright Treaties Implementation Act (H.R. 2281) and On-Line Copyright Liability Limitation Act (H.R. 2180) before the Subcomm. On Courts, the Internet and Intellectual Property of the House Comm. On the Judiciary*, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 16, 1997 (testimony of Marybeth Peters, the Register of Copyrights) (citing and summarizing then-existing decisions); see also *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing before the Subcomm. On Courts, the Internet and Intellectual Property of the House Comm. On the Judiciary*, 107<sup>th</sup> Cong. 114-115 (2002) (Letter from Marybeth Peters); *Hearing on WIPO Copyright Treaties Implementation Act (H.R. 2281) and On-Line Copyright Liability Limitation Act (H.R. 2180) before the Subcomm. On Courts, the Internet and Intellectual Property of the House Comm. On the Judiciary*, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 16, 1997 (testimony of Bruce Lehman, Assistant Secretary of Commerce for Intellectual Property); *WIPO Copyright Treaty (WCT) (1996) and WIPO Performances and Phonograms Treaty (WPPT) (1996), before the Comm. On Foreign Relations*, Exec. Rpt. 105-25, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 29-30, Oct. 14, 1998 (testimony of Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs).

agreed. The 105<sup>th</sup> Congress then unreasonably concurred, and its unreasonable law was signed by the unreasonable President Clinton.

Then, from 2003 to 2006, unreason ran amok. For example, the copyright-related provisions of a proposed Free Trade Agreement (“FTA”) are scrutinized by many federal agencies. As a result, the six multilateral or bilateral FTAs enacted from 2003 to 2006 were the result of unreasonable interpretations adopted by the relevant Committees and Members of the 107<sup>th</sup>, 108<sup>th</sup>, and 109<sup>th</sup> Congresses, another President, the Register of Copyrights and all of the Undersecretaries of Commerce for Intellectual Property, the U.S. Trade Representatives, and the U.S. Attorneys General who served from 2003-2006—they were all *unreasonable*.

In summary, once Section I of *Thomas* concluded, the Defendant had her new trial—but only because an admittedly unreasonable judge belatedly discovered that for over forty years—so far as copyright law was concerned—all three Branches of the federal government were one vast unreasonable herd.

To be sure, sometimes the lonely voice is right, and the herd *really is* insane. But not in *Thomas*. For example, it is obviously *reasonable* to conclude that the lone, ambiguous, illegally construed sentence of legislative history that could narrow the meaning of “to authorize” should not trump the “strong presumption” favoring ordinary meaning. Indeed, if the law makes it reasonable to conclude otherwise, then it also makes it equally or more reasonable to conclude that “to distribute” was intended to have an ordinary or specialized meaning that provides a making-available right.

## II. Conclusion

The saga of *Thomas* may yet have a relatively happy ending. Recently, the Plaintiffs filed a motion asking the Court to certify the *Thomas* decision for appellate review. That motion could bring some much-needed appellate guidance to the making-available debate. The interests at stake are too important for its resolution to be further delayed.

The Progress & Freedom Foundation is a market-oriented think tank that studies the digital revolution and its implications for public policy. Its mission is to educate policymakers, opinion leaders and the public about issues associated with technological change, based on a philosophy of limited government, free markets and civil liberties. The Foundation disseminates the results of its work through books, studies, seminars, conferences and electronic media of all forms. Established in 1993, it is a private, non-profit, non-partisan organization supported by tax-deductible donations from corporations, foundations and individuals. PFF does not engage in lobbying activities or take positions on legislation. The views expressed here are those of the authors, and do not necessarily represent the views of the Foundation, its Board of Directors, officers or staff.