



11-1-2011

Copyright Publication: An Empirical Study

Deborah R. Gerhardt

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Deborah R. Gerhardt, *Copyright Publication: An Empirical Study*, 87 Notre Dame L. Rev. 135 (2013).

Available at: <http://scholarship.law.nd.edu/ndlr/vol87/iss1/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

COPYRIGHT PUBLICATION: AN EMPIRICAL STUDY

*Deborah R. Gerhardt**

INTRODUCTION

On August 28, 1963, Martin Luther King ignited the conscience of the world when he delivered the speech *I Have a Dream* from the steps of the Lincoln Memorial. While thousands gathered on the mall and millions watched live on television, King challenged the United States to envision a future in which we live up to our founding principles of equality. He proclaimed, "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'"¹ The speech was a defining moment of the civil rights movement.² In 1999 historians awarded it first place in the list of the 100 most eloquent and significant political speeches of the twentieth-century.³ Both

© 2011 Deborah R. Gerhardt. Individuals and nonprofit institutions may reproduce and distribute copies of this article in any format, at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Assistant Professor, University of North Carolina School of Law. This project was supported by a generous grant from the Andrew W. Mellon Foundation. The author is grateful for helpful feedback on presentations of this paper at the 2010 Annual Conference of the Association of American Law Schools, the 2010 Intellectual Property Scholars Conference at University of California Berkeley School of Law, the 2011 Junior Intellectual Property Scholars Conference at Michigan State University and a workshop at the Chicago-Kent Law School. I am most grateful to Kevin T. McGuire for empirical support throughout this project. Important contributions were also made by Barton Beebe, Oren Bracha, Christopher Buccafusco, Andrew Chin, John Conley, Laura N. Gasaway, Peter Jaszi, Edward Lee, Mark P. McKenna, Mark A. Lemley, David Schwartz, Rebecca Tushnet, Gretchen A. Wagner and Diane L. Zimmerman. Thanks to UNC law students Cassandra C. Anderson, Rachel Blunk, Laura Dickson, John Kivus, Steve Birkos, and Satish Chintapalli, who provided coding and research assistance.

1 Martin Luther King, Jr., *I Have a Dream*, Keynote Address at the March on Washington for Jobs and Freedom (Aug. 28, 1963), *reprinted in* DREW D. HANSEN, *THE DREAM* 71–85 (2005).

2 See HANSEN, *supra* note 1, at 228.

3 See Barbara Wolff, "*I Have a Dream*" Leads Top 100 Speeches of the Century, U. WIS.-MADISON (Dec. 15, 1999), <http://www.news.wisc.edu/releases/3504.html>.

excerpts and the complete text have been printed in newspapers.⁴ It has been broadcast on television and in movie theaters internationally.⁵ Over a million people have viewed the speech on YouTube.⁶ The idea that such a famous speech could be considered “unpublished” defies reason.⁷ But under copyright law, whether the speech has been published is an open question.

The answer is of critical importance because it affects the extent to which the public may have access to the speech and many other works that contribute to our cultural heritage. If the speech was “published” without the notice required by copyright law, it is in the public domain, and may be freely copied, played, posted on the Internet, and used in documentary films because it belongs to all of us.⁸ But if unpublished despite the lack of notice, it is protected by copyright, and the King Estate has the exclusive power to control its distribution until 2058.⁹

The three courts charged with deciding the issue arrived at three different conclusions. In 1963, a New York federal district court held that it was not published, and therefore protected by copyright law.¹⁰ The Court issued a preliminary injunction prohibiting the defendants from selling records of the speech.¹¹ On the day of the March on Washington, CBS was the only network that provided continuous cov-

4 See HANSEN, *supra* note 1, at 167–68. Following the March, the Southern Christian Leadership Conference reprinted the speech in its entirety in its September 1963 newsletter with no copyright notice or other restrictions. The entire speech was also printed in the *New York Post* without a copyright notice. See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 104 (S.D.N.Y. 1963) (“The New York Post in its issue of September 1, 1963 published the complete text of the speech under the title ‘I Have A Dream. . . .’ The Post thereafter offered for sale reprints of the speech. Dr. King says that he has not consented in any way to such reprinting and sale of the speech and did not give to the Post any copy of his speech.”).

5 See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1348 n.1 (N.D. Ga. 1998) (“King’s speech was broadcast live to millions.”), *rev’d*, 194 F.3d 1211 (11th Cir. 1999).

6 Full video of the “I Have a Dream” speech, YOUTUBE, <http://www.youtube.com/watch?v=B3P6N9g-dQg> (last visited Sept. 13, 2011).

7 See Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities*, 33 COLUM. J.L. & ARTS 311, 323, 328 (2010) (“[T]he legal norm became increasingly incoherent and unpredictable. . . . ‘Unpublished’ . . . did not mean unexploited or undivulged. . . . Without a coherent concept of ‘publication’ under the 1909 Act, a number of rather arbitrary distinctions emerged.”).

8 See 17 U.S.C. § 405 (2006); 17 U.S.C. § 10 (repealed 1976).

9 See *infra* note 44 and accompanying text.

10 See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963).

11 See *id.* at 108.

erage.¹² Thirty years later, CBS attempted to use its own video recording of the speech in a historical documentary about the twentieth century.¹³ In 1998, CBS was sued by the King Estate for copyright infringement.¹⁴ This time, a federal district court in Georgia found that the speech was published without notice and is now in the public domain.¹⁵ In 1999, the Eleventh Circuit reversed the 1998 decision and sent it back to the district court, expressly dodging the merits and finding that factual disputes should have precluded summary judgment.¹⁶ Before the legal significance of the facts could be resolved at trial, the case settled.¹⁷

Based on this mixed litigation record, there is no apparent clarity on whether *I Have a Dream* has been published. It is difficult to tell which district court got it right—the one that found the speech to be protected by copyright or the one that found it to be in the public domain. Anyone seeking to make a documentary film about the civil rights movement may feel compelled to use some of this footage, but until the question of copyright publication is clarified, the King Estate will control when the footage may be used and at what cost. A filmmaker who believes that use of this speech is necessary to make a true documentary about Martin Luther King, famous speeches, the civil rights movement, or American history in the twentieth century risks being sued in federal court by the King Estate just as CBS was. Based on a murky question of copyright law, this critical piece of our cultural history will be under the control of the King Estate until 2058.¹⁸ Many cultural treasures—both famous and unknown—remain buried by uncertainty over whether, for copyright purposes, a work has been published.

In an effort to untangle some of this uncertainty, this Article presents the first empirical study of copyright publication case law. Publication is a magic moment in copyright law. For works created before 1976, publication is the pivotal instant when a work could acquire copyright protection that would give its owner powers to con-

12 See TAYLOR BRANCH, PARTING THE WATERS 881 (1988).

13 See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1349 (N.D. Ga. 1998), *rev'd*, 194 F.3d 1211 (11th Cir. 1999).

14 See *id.* at 1348.

15 See *id.* at 1353–54 (“[A]s one of the most public and most widely disseminated speeches in history, it could be the poster child for general publications”).

16 See *Estate of Martin Luther King, Jr.*, 194 F.3d at 1216–17.

17 See David Firestone, *King Estate and CBS Settle Suit Over Rights to Famous Speech*, N.Y. TIMES, July 14, 2000, at A12.

18 See *infra* note 44 and accompanying text.

trol its use for more than a century.¹⁹ But if that owner did not observe required legal formalities, no such powers attach.²⁰ Instead the work becomes part of the public domain, and anyone can use it, copy it, digitize it, or adapt it in other media without having to find and ask its author.²¹

Notwithstanding the dispositive importance of publication, the copyright meaning of the term is not clear and can be difficult to pinpoint.²² Especially in cases involving non-textual works or original documents, the moment of publication is not often apparent. Another source of ambiguity is that publication has a specific meaning in copyright jurisprudence that can be different from a lay understanding of the term. The ambiguous nature of publication in copyright law can lead to results that appear to defy logic. While Martin Luther King's *I Have a Dream* speech, though broadcast internationally and reprinted in news media, was found to be unpublished by one court and published by another,²³ a unique sculpture or painting displayed in an art gallery may be found to be published.²⁴

The question of publication is a daily challenge for anyone who must make decisions about whether works in our museums and libraries may be used and digitized.²⁵ The vast majority of decision making about the published status of works occurs outside the courts. Every day publishers, filmmakers, librarians, museum curators, and teachers decide whether works are protected by copyright based on some understanding of publication. For example, many art professors

19 See 17 U.S.C. §§ 302–304 (2006); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01[B], at 4–6 (2011).

20 See *id.* § 4.01[B], at 4–5.

21 See, e.g., JAMES BOYLE, THE PUBLIC DOMAIN 38–39 (2009) (offering “working definitions” of the public domain).

22 See *Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 324 (2d Cir. 1904) (“Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a ‘general publication.’ There may be also a ‘limited publication.’ The use of the word ‘publication’ in these two senses is unfortunate and has led to much confusion.”); Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1770 (2008) (“[T]he meaning of publication remains, in many circumstances, fuzzy”).

23 See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999); *King v. Mister Maestro*, 224 F. Supp. 101 (S.D.N.Y. 1963).

24 See, e.g., *Pierce & Bushnell Mfg. v. Werckmeister*, 72 F. 54, 58–59 (1st Cir. 1896) (holding that display of an original painting in Munich without a copyright notice resulted in publication); *Scherr v. Universal Match Corp.*, 297 F. Supp. 107, 112 (S.D.N.Y. 1967) (holding that public display of sculpture “The Ultimate Weapon” without clearly visible notice (appearing twenty-two feet off the ground on the back of a soldier) or restrictions on copying resulted in divestive publication).

25 See SUSAN M. BIELSTEIN, PERMISSIONS, A SURVIVAL GUIDE (2006).

amass collections of art slides they either create or purchase in their travels. When the art department decides to phase out slide projectors in favor of new digital technology, administrators and faculty must decide whether it is permissible to digitize the slides and if so, how broadly they may be shared. They must make decisions based on some understanding of what the law is, and because many publication questions are not answered in the statute, they must make their best guesses based on common practices among similar professionals. If the decision makers have access to legal counsel, they may also rely on analogous precedent. But few practitioners have the time to read more than a small number of publication decisions.

In such situations, legal scholars can make significant contributions by empirically analyzing a field of precedent. As Kay Levine aptly noted, “is it not our obligation as academics to” ask “[c]an anyone know the state of the law from reading a handful of select cases?”²⁶ Knowledge of copyright publication based on a small set of cases can be especially risky since precedent often appears inconsistent and even contradictory.²⁷ Based on that call to action and the clear need for clarification on the meaning of publication in copyright law, this project is designed to provide a broader view of publication precedent.

This Article is the first to collect a large sample of federal precedent on the issue of publication in copyright law and examine it empirically.²⁸ The goals of the project are to (1) test the current relevancy of copyright publication, (2) determine whether publication

26 Kay L. Levine, *The Law Is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. FLA. J.L. & PUB. POL'Y 283, 284 (2006).

27 See S. REP. NO. 94-473, at 113 (1975), *reprinted in* 8 NIMMER & NIMMER, *supra* note 19, at app. 4-A (“‘Publication,’ perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, ‘publication’ could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given ‘publication’ a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair.”).

28 Other excellent articles and treatises contribute to our understanding of publication in copyright law, but have not used the systematic empirical approach employed in this study. See, e.g., 1 NIMMER & NIMMER, *supra* note 19, §§ 4.01–4.13; 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 6.30–6.73 (2006); Cotter, *supra* note 22; Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185 (1956); R. Anthony Reese, *Public but Private: Copyright’s New Unpublished Public Domain*, 85 TEX. L. REV. 585 (2007).

has a consistent meaning in different copyright contexts, and (3) identify whether judges respond to a clear set of indicators in making decisions about whether a work has been published. Clarifying the definition of publication and identifying the indicators that are important to judges will contribute to the scholarly literature by broadening our understanding of publication precedent. The findings will also provide valuable information to lawyers, librarians, publishers, and museums to determine whether the general principles they use in practice conform to an accurate understanding of publication precedent found in case law. Congress may also gain valuable insights on how the law of copyright publication may be clarified.

The empirical foundation for this project is a dataset that includes all federal judicial opinions found by the author that address the issue of copyright publication. Part I explains why publication is such an important concept in copyright law and identifies ambiguities that will be clarified in the following discussion. Part II describes the dataset. It sets forth the methodology used for identifying the relevant cases and collecting the data. Part III sets forth descriptive statistics reflected in the dataset and explains what they contribute to our understanding of publication in copyright law. In addition to displaying summary statistics, this Part begins to clarify some open questions related to publication. It explores whether the distinction between limited and general publication remains a relevant inquiry after Congress defined publication for the first time in the 1976 Copyright Act. It also examines whether publication has a singular meaning in copyright law or is dependent on context such as the type of work or legal issue under consideration. Part IV focuses on publication decisions made in the context of public domain cases and illuminates whether some commonly used definitions adequately reflect publication precedent. Statistical analysis is used to determine which distribution variables are important to courts and the extent to which their presence leads to a probability that a court will find publication. Part V summarizes general conclusions and recommendations on how to refine our understanding of publication in the fair use and public domain contexts.

I. THE SPECIAL MEANING OF PUBLICATION IN COPYRIGHT LAW

A. *Publication Triggers Significant Copyright Consequences*

Historically, the meaning of publication has been critical to determining whether a work is protected by copyright or is in the pub-

lic domain and therefore, available for use in the United States.²⁹ Works that pre-date 1989 can enter the public domain in one of two ways: (1) by expiration of the copyright term or (2) by publication without observance of formalities. The primary ambiguity on either track surrounds a single word: publication. From 1909 to 1978, federal legislation provided that the copyright term began when a work was registered with the United States Copyright Office or published with the requisite formalities.³⁰ If a work was published without adherence to the required formalities (including the use of a proper copyright notice) copyright protection would be forfeited,³¹ and the

29 In the Copyright Act of 1790, the initial copyright term lasted “for the term of fourteen years from the recording the title thereof in the clerk’s office.” Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). Published works were to be filed with the clerk’s office before copyright protection would attach, and for unpublished works, a deposit was required before the work was published. *Id.* § 3, 1 Stat. at 125. A copy of the work was to be sent to the Secretary of State “within six months after the *publishing* thereof” *Id.* § 4, 1 Stat. at 125 (emphasis added). Under the Act of 1790, both previously published and unpublished works could be protected by copyright. *Id.* § 3, 1 Stat. at 125. In 1802, notice of the claim to copyright was also required to appear on the work. See Act of Apr. 29, 1802, ch. 26, § 1, 2 Stat. 171, 171 (repealed 1831).

In 1831, Congress continued to provide that the copyright term began at recording. See Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870). However, it provided that “no person shall be entitled to the benefit of this act, unless he shall, before *publication*, deposit a printed copy of the title of [the work] . . . in the clerk’s office of the district court of the district wherein the author or proprietor shall reside” *Id.* § 4, 4 Stat. at 437 (emphasis added).

In the 1870 and 1891 Acts, publication and deposit determined whether a work was entitled to copyright protection. In 1870, Congress made it clear that “no person shall be entitled to a copyright unless he shall, before *publication*, deposit in the mail a printed copy of the title of the [work] . . . addressed to the librarian of Congress, and, within ten days from the *publication* thereof, deposit in the mail two copies of such [work] . . . to said librarian of Congress.” Act of July 8, 1870, ch. 230, § 90, 16 Stat. 198, 213 (repealed 1909) (emphasis added). The Copyright Act of 1891 provided that “[n]o person shall be entitled to a copyright unless he shall, on or before the day of *publication* in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail . . . a printed copy of the title of the [work] . . . [and] two copies of such [work]” Act of Mar. 3, 1891, ch. 565, § 4956, 26 Stat. 1106, 1107 (repealed 1909) (emphasis added).

30 See Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1976) (“[T]he copyright secured by this Act shall endure for twenty-eight years from the date of first *publication*”) (emphasis added); see also Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 352 & n.251 (2008) (discussing manufacturing requirements for effective publishing).

31 See § 9, 35 Stat. at 1077 (providing “[a]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor”).

work would enter the public domain. Pinpointing the moment of publication is critical to calculating the duration of the copyright term. When works were published without observing legal requirements existing at the time, they received no federal copyright protection at all.³² When determining the current copyright status of a work, one must apply the law that existed at the time the work was published.³³ To determine whether a work was published before 1978, it is necessary to determine if and when it was distributed and the effect of publication at that time.³⁴ For example, in 1970, an unpublished manuscript would not be protected by federal copyright law. Publishing a book in 1970 without copyright notice would have destroyed the copyright, and the work would immediately enter the public domain. Publishing the same book in 1970 with an adequate notice would trigger copyright protection.

The 1976 Act changed the moment when copyright protection begins from publication to the moment of fixed creation.³⁵ After 1976, an unpublished book would be protected by federal copyright law as soon as the original expression was written down or fixed in some other way. Initially the observance of formalities was still necessary for copyright protection. Works created between 1978 and 1989 had to be marked with a copyright notice for copyright protection to attach to published works.³⁶ Therefore, for the author of an unpublished work to preserve the copyright, the law required the author to publish the work with a valid copyright notice. However, omission of notice was not always fatal. If the requirement was not observed, the statute provided cure provisions so that the results of inadvertent omissions were not as harsh as they had been under the 1909 statute.³⁷ However, when publication of a work without notice occurred repeatedly, copyright protection could still be lost.

The law changed again in 1989. The formality requirements for copyright protection were abandoned when the United States agreed to conform its copyright laws to the Berne Convention.³⁸ After 1989 all copyright protection automatically attaches to qualified works the

32 See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

33 See *Cotter*, *supra* note 22, at 1726 (“Cases arising today involving works allegedly published prior to 1978 therefore must rely upon more ambiguous definitions derived from pre-1978 case law.”).

34 See *id.*

35 See 17 U.S.C. §§ 102(a), 301(a) (2006).

36 See *id.* § 405.

37 See *id.*

38 See 2 NIMMER & NIMMER, *supra* note 19, § 7.02[B], at 7–14.

moment they are fixed in some tangible form.³⁹ Therefore, after 1989, a book would gain copyright protection from the moment of fixation, and no longer risks losing the copyright if the work is published without a copyright notice.

For all works created before 1976 and for many created before 1989, publication issues remain dispositive in determining whether a work is protected by copyright. Without knowing if and when a work was published, it is difficult to determine the length of copyright protection or whether the work was dedicated to the public domain years ago.

For example, the *I Have a Dream* speech was delivered in August of 1963 to an audience of 200,000 people, telecast to millions and published in its entirety in at least two newspapers without copyright notice.⁴⁰ If these facts mean that the work was published, then the speech is in the public domain and may be freely used by anyone, posted on any website, used in films, and sold in copies. If, however, the facts do not establish publication, the duration of the copyright term must be measured. Martin Luther King applied for copyright protection for the speech as an unpublished work⁴¹ on September 30, 1963.⁴² Following Dr. King's tragic death in 1968, his estate renewed the copyright registration in 1991.⁴³ The relevant copyright provision provides that the copyright shall last for "28 years from the date it was originally secured" and that King's heirs "shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years."⁴⁴ If the copyright terms are not extended again as they were in 1998, *I Have a Dream* will be in the public domain in 2058.

39 See 17 U.S.C. § 301(a).

40 See *supra* notes 4–5 and accompanying text.

41 See *King v. Mister Maestro*, 224 F. Supp. 101, 104–05 (S.D.N.Y. 1963) ("The claim to copyright was under 17 U.S.C. § 12, 'works not reproduced for sale'—unpublished works.").

42 See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1349 (N.D. Ga. 1998).

43 See *id.* at 1349 n.3.

44 The relevant section of 17 U.S.C. § 304(a) provides:

(1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of—

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

For certain works created after 1978, publication remains important to determining the length of time they are protected by copyright. Works tend to fall in this category if a personal author cannot be readily identified. For works for hire,⁴⁵ anonymous works,⁴⁶ and pseudonymous works,⁴⁷ the copyright term is “95 years from the year of its first publication” or “120 years from the year of its creation, whichever expires first.”⁴⁸ This provision would be used to measure the copyright term for software or an advertisement created by a team of corporate employees. Therefore, even for many twenty-first century works, the publication date must be known in order to measure the copyright term. Without knowing the detailed history, one would have difficulty calculating the date. Normally, for works that were not registered with the Copyright Office before 1978, the copyright term lasts for the life of the author plus seventy years.⁴⁹ Based on this general rule and the judicial finding that the *I Have a Dream* speech was

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

- (i) the author of such work, if the author is still living,
 - (ii) the widow, widower, or children of the author, if the author is not living,
 - (iii) the author’s executors, if such author, widow, widower, or children are not living, or
 - (iv) the author’s next of kin, in the absence of a will of the author,
- shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

17 U.S.C. § 304(a).

45 The Copyright Act defines a “work made for hire” as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id. § 101.

46 An “‘anonymous work’ is a work on the copies or phonorecords of which no natural person is identified as author.” *Id.*

47 “A ‘pseudonymous work’ is a work on the copies or phonorecords of which the author is identified under a fictitious name.” *Id.*

48 *Id.* § 302(c). This provision also applies to anonymous and pseudonymous works.

49 *See id.* § 302(a).

unpublished, a recent Wikipedia entry claimed that “[u]nder the applicable copyright laws, the speech will remain under copyright in the United States until 70 years after King’s death, thus until 2038.”⁵⁰ That would be true if the work were unpublished and the copyright had not been registered. A more careful analysis reveals that the estate gets an additional twenty-five years of exclusive copyright protection. Because King did register the copyright,⁵¹ and it was in its first term of protection when the 1976 Act passed, the speech is actually protected for ninety-five years from October 2, 1963, the date on which the copyright was registered.⁵²

No matter when a work was created, its publication status remains important for analyzing various other copyright issues.⁵³ For example, since the 1980s, the publication status of a work affects whether others may make fair use of it. One of the four factors analyzed in fair use analysis is “the nature of the copyrighted work.”⁵⁴ Whether a work is considered published or unpublished under this factor is balanced along with other factors in determining whether a use is fair.⁵⁵ Sometimes the unpublished nature of a work can have a dispositive impact on the fair use conclusion. The most famous case demonstrating this principle is *Harper & Row*,⁵⁶ where the Supreme Court decided whether *The Nation* magazine’s distribution of excerpts from President Gerald Ford’s unpublished memoir was a fair use under 17 U.S.C. § 107. The Court emphasized, “[t]he fact that a work is unpublished is a critical element of its ‘nature’” under the second of the four fair use factors, and “the scope of fair use is narrower with respect to unpublished works.”⁵⁷ In *Harper & Row*, the unpublished nature of Ford’s manuscript was the critical piece of evidence that defeated the fair use defense.⁵⁸ The Court articulated the general principle that “the author’s right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.”⁵⁹

50 *I Have a Dream*, WIKIPEDIA, http://en.wikipedia.org/wiki/I_Have_a_Dream (last visited Sept. 13, 2011).

51 See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 104 (S.D.N.Y. 1963).

52 See 17 U.S.C. § 304(a).

53 See PATRY, *supra* note 28, § 6:48; Cotter, *supra* note 22, 1726, 1728–51.

54 17 U.S.C. § 107(2).

55 See *id.* § 107.

56 471 U.S. 539 (1985).

57 *Id.* at 564.

58 See *id.* at 569.

59 *Id.* at 555. But see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 613 (2008) (finding that although the unpublished nature can sometimes be dispositive in fair use cases, the unpublished nature of a work “exert[s] no significant effect on the outcome of the fair use test, but

A work's publication status must also be determined in order to properly register it with the United States Copyright Office. The application form requires the applicant to specify whether the work is published.⁶⁰ Federal law generally requires the copyright owner to deposit one copy of unpublished works and two copies of published works.⁶¹ For some works, such as unpublished pictorial or graphic works, deposit of "identifying material" may be sent instead of an actual copy.⁶² Determining whether a work is published is a basic practical consideration that must be analyzed before a work can be registered. Although registration is not mandatory, for U.S. works, registration is a precondition to filing a copyright infringement claim in federal court.⁶³ The publication status must be determined before the owner of a work may register and deposit it, and then enforce the copyright by suing for infringement in federal court.

Once copyright litigation has begun, the remedies available to a copyright owner differ dramatically depending on when and whether the work was published. If a copyright notice appears on published copies of a work, the innocent infringement defense may not be applied to mitigate actual or statutory damages.⁶⁴ Yet, if the work is deemed unpublished, an innocent infringement defense may not be available even if no notice appeared on the work.⁶⁵ For example, a builder may be tempted to use a housing design he finds on file with his town's zoning board. He may assume that the design is available for others to use if he sees no copyright notice on it. If the architectural plans are considered "unpublished," a defense of innocent infringement will not be available to mitigate damages.⁶⁶

the fact that the plaintiff's work was *published* appears to have exerted a strong effect on the outcome of the test in favor of a finding of fair use").

60 See 17 U.S.C. § 409(8).

61 See *id.* § 408(b); 37 C.F.R. § 202.20(c)(1), (2) (2010). However, one copy may be sufficient if the work was "first published outside the United States." 17 U.S.C. § 408(b)(3).

62 See 37 C.F.R. § 202.20(c)(2)(iv).

63 See 17 U.S.C. § 411(b); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010); *PRC Realty, Sys., Inc. v. Nat'l. Ass'n of Realtors, Inc.*, 766 F. Supp. 453, 461 (E.D. Va. 1991) ("The registration is, after all, merely the plaintiff's 'ticket' to court; the protection of the copyright arises at the time of the creation of the work.").

64 See 17 U.S.C. § 401(d); *Intown Enters., Inc. v. Barnes*, 721 F. Supp. 1263, 1265-66 (N.D. Ga. 1989).

65 See *Intown Enters., Inc.*, 721 F. Supp. at 1266 ("[N]o notice of copyright was required because there was no general publication of plaintiff's architectural plans. In light of this finding, the omission of notice provisions of section 405 are inapplicable and Barnes may not be shielded from liability based on the innocent infringement provision.").

66 *Id.*

The timing of publication also dramatically affects the amount and type of damages available from a copyright infringement claim. A copyright owner can preserve the opportunity to recover statutory damages and attorney's fees by registering the work while it is still unpublished.⁶⁷ If an unpublished work is infringed before the copyright owner applies for registration, the owner may not recover statutory damages or attorney's fees.⁶⁸ Once a work is published, these lucrative remedies will only be available if the work is registered promptly. A copyright owner who registers a work within three months of publication may recover statutory damages⁶⁹ amounting to as much as \$150,000 per work for willful infringement.⁷⁰ Registration within three months of publication also makes the copyright owner eligible to recover attorney's fees.⁷¹ Registration after a work has been published for more than three months eliminates the possibility of recovering statutory damages and attorney's fees.⁷² Therefore, pinpointing the moment of first publication is necessary to preserve eligibility for these remedies or to defend against them.

Copyright protection may be available only if statutory protection for the particular type of work was enumerated in the copyright law at the time the work was first published. For example, architectural works were first given copyright protection when the Architectural Works Copyright Protection Act was enacted in 1990.⁷³ Because copyright protection was not available to them before passage of this Act,

67 See 17 U.S.C. § 412 (2006). The statute provides:

[N]o award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Id.

68 See *id.* § 412(1); *Aerospace Servs. Int'l v. LPA Grp. Inc.*, 57 F.3d 1002, 1003 (11th Cir. 1995); *Zito v. Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1025–26 (N.D. Cal. 2003); *RPM Mgmt., Inc. v. Apple*, 943 F. Supp. 837, 840 (S.D. Ohio 1996).

69 See 17 U.S.C. § 412.

70 See *id.* § 504(c)(2).

71 See *id.* § 412.

72 See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 415 (7th Cir. 1988), *abrogated on other grounds by F.T.C. v. Army Travel Serv., Inc.*, 894 F.2d 879, 880 (7th Cir. 1989).

73 See Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990).

architectural plans published before 1990 have been excluded from federal copyright protection.⁷⁴

Even if a work is protected by a valid copyright, the timing of a work's publication may affect the economic value of the copyright. The date of publication may determine, for example, whether or not an author (or heirs) may terminate a past transfer of copyright, and renegotiate a better deal for a work that turned out to be a commercial success.⁷⁵

The place where a work is first published may also affect its copyright status.⁷⁶ An unpublished work may be protected by U.S. copyright law regardless of the author's nationality or residence.⁷⁷ However, published works may not be protected by U.S. copyright law if they were first published in a country that is not a party to an international treaty, such as the Berne Convention, recognizing reciprocal intellectual property rights for authors from other nations.⁷⁸ Publication in the United States within thirty days of first publication in a non-treaty nation will result in U.S. copyright protection.⁷⁹ The place of publication is also important in determining how many copies of a work should be placed on deposit when a work is registered.⁸⁰ Therefore, pinpointing the timing of publication may be important both for determining whether a work can be protected and for assessing the type and quantity of deposit copies.⁸¹

74 See *Home Design Servs., Inc. v. David Weekly Homes, LLC*, 548 F. Supp. 2d 1306, 1310 (M.D. Fla. 2008) (quoting 37 C.F.R. § 202.11(d)(3)(i) (2008) which excludes from copyright protection the “designs of buildings where the plans or drawings of the building were published before December 1, 1990, or the buildings were constructed or otherwise published before December 1, 1990”). The regulations also indicate that copyright protection is not available for unpublished building designs “that were unconstructed and embodied in unpublished plans or drawings on December 1, 1990, and remained unconstructed on December 31, 2002.” *Id.* § 202.11(d)(3)(ii).

75 See, e.g., *Siegel v. Warner Bros. Entm't. Inc.*, 542 F. Supp. 2d 1098, 1126, 1131 (C.D. Cal. 2008) (finding that filing a termination notice eleven days after the five-year window for filing termination notices prevented the heirs of the “Superman” creator from terminating the copyrights and renegotiating the license fee).

76 See 17 U.S.C. § 104.

77 See *id.* § 104(a).

78 See *id.* § 104(b)(6).

79 See *id.*

80 See *id.* § 104; *id.* § 408(b).

81 For some hypothetical scenarios illustrating the potential importance of this issue, see Cotter, *supra* note 22, at 1746–51.

*B. Despite Its Importance to Many Copyright Issues, the Precise
Meaning of Publication Remains Ambiguous*

Despite the significant legal consequences of publication, determining whether the moment occurred is often difficult. The Second Circuit described the concept of publication as “clouded by semantic confusion.”⁸² The 1909 copyright statute did not define publication⁸³ but it did identify the moment of publication “for works of which copies are reproduced for sale or distribution” as “the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright or under his authority.”⁸⁴ In 1997, Congress retroactively indicated that selling phonorecords was not publication under the 1909 Act.⁸⁵ However, the 1909 Act itself provided no general definition to help in sorting out the issue of publication in many contexts.⁸⁶ This omission was intentional.⁸⁷ Congress apparently found it too difficult to draft a general definition.⁸⁸ As a result, publication became a complicated term of art that generated a host of problems in applying copyright law to specific works. Had Congress foreseen that not defining publication would create so many practical difficulties for courts, they may have included a definition in the 1909 Act. The need for a statutory definition was fulfilled in the 1976 Copyright Act. It defined publication as:

[T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.⁸⁹

⁸² *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956).

⁸³ See *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995) (“Congress declined to define ‘publication’ in the 1909 Act and courts have split over how to *define* the term for copyright purposes.” (emphasis added)), *superseded by statute*, 17 U.S.C. 303(b) (2006), *as recognized in Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1185 (9th Cir. 2008); 1 NIMMER & NIMMER, *supra* note 19, § 4.03[A] at 4-24; 3 PATRY, *supra* note 28 at § 6:30.

⁸⁴ 3 PATRY, *supra* note 28, at § 6:30 (citing 17 U.S.C. § 62 (1909) (repealed 1978)).

⁸⁵ See 17 U.S.C. § 303.

⁸⁶ See *To Amend and Consolidate the Acts Respecting Copyright: Hearing on S. 6330 and H.R. 19854 Before the Joint Comm. on Patents*, 59th Cong. 71 (1906) (statement of Herbert Putnam, Librarian of Congress).

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ 17 U.S.C. § 101.

Still, many ambiguities remain.

One source of confusion surrounding publication is that the copyright meaning of the term can be quite different from how it is used in everyday discourse. Dictionary definitions reflect multiple uses of the term that range widely in scope and breadth. For example, the *Random House Dictionary* defines “to publish” as:

1. to issue (printed or otherwise reproduced textual or graphic material, computer software, etc.) for sale or distribution to the public.
2. to issue publicly the work of: *Random House publishes Faulkner.*
3. to announce formally or officially; proclaim; promulgate.
4. to make publicly or generally known.
5. *Law*—to communicate (a defamatory statement) to some person or persons other than the person defamed.⁹⁰

The copyright meaning of publication is often, but not always, different from the general understanding of the term. It is sometimes broader, sometimes narrower, and its boundaries are more ambiguous. For example, from the perspective of a book publisher or a librarian, a poem sent to a friend in a handwritten letter might be considered unpublished because it did not appear in a book or magazine that was sold to the public. After all it was not issued “for sale or distribution to the public.”⁹¹ For copyright purposes, a poem circulated in this way may be considered published because “by consent of the copyright owner, the original or tangible copies of a work [were] . . . given away, or otherwise made available to the general public.”⁹² Similarly, according to the common understanding of the term publication, a speech broadcast on television would be considered published because the public had access to it. In stark contrast, a work broadcast on television may be considered unpublished as a matter of copyright law.⁹³ Releasing a work through public performance or display alone does not constitute publication as a matter of law.⁹⁴

Another source of confusion is that no general definition of publication exists to infuse the term with a consistent meaning across dif-

90 *Publish Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/published> (last visited Sept. 13, 2011).

91 *See id.*

92 *See Bell v. Combined Registry Co.*, 397 F. Supp. 1241, 1248 (N.D. Ill. 1975) (quoting MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 49 (1972)) (including a poem in many letters to servicemen contributed to a finding that the poem was published).

93 *See Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1217 (11th Cir. 1999).

94 *See* 17 U.S.C. § 101.

ferent legal contexts. Publication in copyright law differs from how the term is defined in defamation law and in other areas of intellectual property law.⁹⁵ Even in copyright doctrine the term does not have a singular meaning.⁹⁶ Professor Thomas Cotter observed that “publication has been pressed into service for too many disparate purposes” to have a singular meaning.⁹⁷ As discussed above,⁹⁸ publication is the trigger for a wide range of copyright issues including whether copyright protection is available at all, and if so, duration, fair use, and the availability of attorney’s fees and statutory damages. The

95 See *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 742, 743 (2d Cir. 1956). Publication is an element of state law defamation claims. See 50 AM. JUR. 2D *Libel and Slander* § 228 (2006). “For purposes of defamation, ‘publication’ does not take on its more common connotation of widespread dissemination. Thus, it is not necessary that the defamation be communicated to a large or even substantial group of persons.” *Id.* For defamation claims, communication to anyone other than the targeted person is sufficient to constitute publication. See *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1552 (10th Cir.1995) (quoting *Magnolia Petroleum Co. v. Davidson*, 148 P.2d 468, 471 (Okla. 1944) (“[P]ublication of a libel is the communication of the defamatory matter to a third person or persons.”)); *Wroten v. Vulcan Chems., L.L.C.*, No. 04-CV-472, 2005 WL 2318149, at *20 (M.D. La. July 18, 2005) (citing *Wisner v. Harvey*, 694 So. 2d 348, 350 (La. Ct. App. 1996) (“The ‘publication’ element of a defamation action requires publication or communication of defamatory words to someone other than the person defamed.”)). Communicating a defamatory statement to only one person other than the target is enough to establish publication, even if that person is enjoined to secrecy. See *Libel and Slander, supra*, § 228.

Publication has also been a source of litigation in patent law. In accordance with 35 U.S.C. § 102, prior publication of an invention may prevent it from being deemed patentable. The statute provides:

A person shall be entitled to a patent unless—

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States

35 U.S.C. § 102 (2006). Generally, a work is considered published if it is “actively disseminated . . . [or] made available to the public . . . as a whole . . . [or to those] interested in the document’s subject matter.” Wesley Kobylak, Annotation, *Meaning of Term “Printed Publication” Under 35 U.S.C.A. § 102(a) and (b), Denying Patentability to Invention Described in Printed Publication Before Invention by Applicant or More than One Year Prior to Date of Patent Application*, 70 A.L.R. FED. 796, § 2[a] (1984).

96 See generally NIMMER & NIMMER, *supra* note 19 (separately analyzing the meaning of publication in the contexts of sound recordings, public performance, film, art, and deposits of works in public collections).

97 See Cotter, *supra* note 22, at 1788.

98 See *supra* Part I.A.

following Parts will for the first time take an empirical look at some of the ways in which publication is analyzed differently depending on the legal issue being decided.

Another challenge is that the definition may change, not just based on the factual or legal context of the work itself, but on the particular element of infringement being examined in any particular dispute. In copyright infringement cases, authors must prove that (1) a work is protected by copyright, (2) another party violated one of the exclusive rights granted by copyright laws,⁹⁹ and (3) no defense, such as fair use, protects the defendant's conduct.¹⁰⁰ The definition of publication may depend on the particular element under consideration. In analyzing the first element (whether a work is protected by copyright), publication may have a dispositive effect on whether it is protected at all. Therefore, it is a gatekeeping concept. If an author cannot get past this step, she has no claim under copyright law. It is this type of publication that is the primary focus of this research. Specifically, this project seeks to clarify whether a particular work is considered published.

When moving on to the second element of copyright infringement analysis (whether an exclusive right has been violated), the publication definition changes. If an author proves what is required for step one, and proceeds to the second element, he or she must establish that one of the exclusive rights belonging to the author was infringed. A copyright gives its owner the exclusive rights "(1) to reproduce the copyrighted work . . . ; (2) to prepare derivative works . . . ; (3) to distribute copies or phonorecords . . . ; (4) . . . [and] to perform . . . ; (5) . . . [and] to display the copyrighted work publicly."¹⁰¹ Because of the distribution right, only the copyright owner has the exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."¹⁰² The distribution right is sometimes referred to as "the right of first publication."¹⁰³ It is violated when an unauthorized person actually disseminates the work. Making a work available to the public is sometimes deemed insufficient to violate the distribu-

99 Copyright infringement occurs when a person "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . ." 17 U.S.C. § 501(a).

100 See *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1013–14 (9th Cir. 2001).

101 17 U.S.C. § 106.

102 *Id.* § 106(3).

103 *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir. 1987).

tion right.¹⁰⁴ In attempting to determine whether the work was the subject of an unauthorized distribution, courts sometimes question whether the defendant actually published the work. In this context, publication has a different meaning than it does in the context of the first copyright infringement element when a court is determining whether copyright protects the work at all.¹⁰⁵ There are two differences. First, the use of the term is different in the context of the distribution right because it targets a potential defendant's conduct and not, as in the first element, the nature of the author's work.

Second, the meaning of "publish" as an act that may violate a copyright owner's distribution right under § 106 is sometimes described as narrower in scope than the definition of publication regarding the status (published or unpublished) of a particular work under § 101. The definition of publication under § 101 includes both actual dissemination and "offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display."¹⁰⁶ Because either dissemination or offering to distribute copies amount to publication under § 101, actual dissemination is not necessary for a work to be considered published. However, under § 106, if a defendant offers to publish a work, but did not actually do so, a court will often find that he has not violated the distribution right.¹⁰⁷ Therefore, the meaning of publication under the second copyright infringement element may be different and narrower than it is under the first.

104 See *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (finding that requiring actual dissemination "is consistent with the language of the Copyright Act"); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (recognizing that most courts have found that violation of the distribution right requires "actual dissemination of either copies or phonorecords" (quoting 2 NIMMER & NIMMER, *supra* note 19, §8.11[A], at 8-124.1)); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) ("106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public."). *But see* *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (finding that distribution occurs when a public library adds an unauthorized copy of a work to its collection and makes that copy available for patrons to borrow).

105 *Cf.* *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 300 (3d Cir. 1991) ("[B]ecause 'publication' and the right protected by section 106(3) are the same, and because a 'publication' can occur when only one member of the public receives a copyrighted work, it follows that a violation of section 106(3) can also occur when illicit copies of a copyrighted work are only distributed to one person.").

106 17 U.S.C. § 101.

107 See *Atl. Recording Corp.*, 554 F. Supp. 2d at 985, 987 (holding that defendant's acts of making music available on the file sharing site K.Z.A. did not amount to "publication").

The following example illustrates the difference. If a song is available for downloading from a web site, it will be considered published for purposes of the first element of copyright analysis.¹⁰⁸ By contrast, making songs available over the Internet through an online file-sharing network has been found to be insufficient to constitute a violation of the distribution right if no evidence of actual distribution was presented.¹⁰⁹ Confusion may arise when a court uses the term publication to describe violations of the distribution right.¹¹⁰

Because the definitions are different, both are not included in this analysis. The focus of this research is the definition of whether the author's original work was published. Therefore, cases were included in the dataset if they analyzed the nature of the work. Cases that focused on a particular defendant's conduct regarding violation of the distribution right (as opposed to the status of the work itself) were omitted from the dataset.¹¹¹ The 446 cases in the dataset revealed additional contextual differences that are discussed in the following Part.

II. CREATION OF THE DATASET

The primary goal of this project is to explore the landscape of federal judicial precedent on copyright publication. The nature of this work has inherent limitations. One of the most important is that precedent does not necessarily reflect the many practical decisions regarding publication that are made every day and never result in con-

108 See 17 U.S.C. § 101.

109 See *Atl. Recording Corp.*, 554 F. Supp. 2d at 982–85.

110 See *Atl. Recording Corp.*, 554 F. Supp. 2d at 984; *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 241 (S.D.N.Y. 2008).

111 See, e.g., *Jackson v. MPI Home Video*, 694 F. Supp. 483, 490 (N.D. Ill. 1988) (evaluating the second fair use factor, the court mentions that the “right of first publication” was violated). Cases were also generally excluded if they did not expressly mention the issue of “publication” even if they appeared to be looking at the same concept. Barton Beebe's empirical study of copyright fair use included cases that used rough synonyms for publication. See Beebe, *supra* note 59, at 623 app. (compiling all cases used to create the data). For example, Beebe includes cases such as *Penelope v. Brown*, 792 F. Supp. 132 (D. Mass. 1992), that do not expressly address the issue of “publication” but instead discuss the “public availability” of a work as part of the second fair use factor. See *id.* at 138 (addressing whether a book was still in print in analyzing the second fair use factor). Cases such as this one do not expressly refer to “publication,” and therefore, were excluded from this dataset.

flict.¹¹² Of those that do lead to differences of opinion, many are resolved prior to litigation, and many litigated decisions are settled or resolved without issuance of a reported opinion. Therefore, this project does not reflect how the concept of publication is understood and implemented in practice by interested communities such as publishers, libraries, and museums.

Federal judicial precedent remains important. “[E]ven if judicial opinions offer a skewed view of what occurs elsewhere in the system, they are a highly valuable source for systematic study, revealing the portion of the legal world that, in many ways, is most important.”¹¹³ Common understandings about precedent affect practical decision making.

[P]ublished opinions are an important ‘communications device’ that travel among the elements of the system, like proteins in a cell. Judges intend their published opinions not only as a communication to the parties in the particular case that gave rise to the opinion, but also as a communication to other judges, other lawyers, other litigants, and other actual and potential participants in the legal system.¹¹⁴

Therefore, practitioners who make decisions based on an understanding of precedent are well served by empirical studies that “deal with larger numbers of cases, which provides a truer measure of broad patterns in the case law.”¹¹⁵ As opposed to focusing on a few cases, this method allows us to see patterns that exist in a much broader group of judicial opinions.¹¹⁶ Empirical analysis can be especially valuable if—like an airplane flying above a large maze—it can help us see a path out of a difficult problem. The dataset was created to capture an overview of copyright publication precedent and to identify paths for future in-depth exploration within this field.

In order to facilitate further study of this issue, the case selection process was not bounded by date or jurisdiction, but was limited to federal authority. State court decisions were excluded. Before 1976, state courts sometimes decided whether a work was published to determine whether federal statutory or state common law copyright

112 See generally James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007) (analyzing the practical implications of copyright’s feedback loop).

113 Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 *CALIF. L. REV.* 63, 92 (2008).

114 Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases*, 53 *UCLA L. REV.* 357, 364–65 (2005) (footnotes omitted).

115 Hall & Wright, *supra* note 113, at 65.

116 See *id.* at 66.

rules were applicable.¹¹⁷ Since 1978, federal law has preempted virtually all questions of copyright law, including the issue of publication.¹¹⁸ Consequently, practitioners and the federal courts are no longer likely to rely on state court precedent for guidance on copyright publication issues. Therefore, state court opinions were not included in the dataset. I attempted to find and include all federal opinions that decided the issue of copyright publication regarding the nature of a particular work.¹¹⁹

The first challenge was to identify the relevant cases. Because publication was not defined by statute until 1976, there was no convenient statutory citation to use as a filter.¹²⁰ Simple electronic searches did not provide the relevant case list because the terms “publish” and “publication” are often used in copyright decisions to describe the factual backdrop of a case. Thousands of cases mention both the words “copyright” and “publish” or “publication.” Far fewer decisions use “publication,” “published,” or “unpublished” as a copyright term of art. Therefore, the initial task was to isolate cases using the term for its copyright law significance. Opinions were included in the dataset only if the court decided a publication issue. If the parties stipulated to the publication status of a work, the case was not included.¹²¹ I selected cases by (1) reviewing U.S.C.A. note references to the copyright statutes that mention “publish” or “publication,” (2) reviewing references in copyright texts, law review articles, and treatises, and (3) conducting keyword searches through LEXIS and Westlaw.¹²² More

117 See 17 U.S.C. § 301 (2006); *Blanc v. Lantz*, 83 U.S.P.Q. (BNA) 137 (Cal. Super. Ct. 1949) (finding that the plaintiff had published a musical composition and therefore had no remedy under state common law).

118 See 17 U.S.C. § 301.

119 Cases that “assumed” a publication issue without deciding it were omitted. See, e.g., *P. Kaufman, Inc. v. Rex Curtain Corp.*, 203 U.S.P.Q. (BNA) 859 (S.D.N.Y. 1978). The dataset also does not include cases in which publication was analyzed as a matter of contract interpretation. See, e.g., *Harris v. Simon & Schuster, Inc.*, 646 F. Supp. 2d 622, 630–31 (S.D.N.Y. 2009).

120 See 17 U.S.C. § 101. This statute contains so many copyright definitions that even for more recent cases, it cannot serve as a useful tool to narrow the field of relevant publication decisions.

121 See, e.g., *Streeter v. Rolfe*, 491 F. Supp. 416, 421–22 (W.D. La. 1980) (holding that the plaintiff stipulated that his turkey decoy was not a published work, and therefore statutory damages under 17 U.S.C. § 412 were unavailable to him).

122 Many cases contain terms that appear from an electronic search to be relevant, but do not actually decide the issue of publication. A Westlaw search, conducted on September 20, 2007, seeking cases that mention, “copyright and publish! or public!” resulted in the retrieval of more than 10,000 cases. These results contain many irrelevant decisions. The terms “publish” and “publication” appear frequently in factual statements even if the copyright meaning of the term is not discussed.

than 800 cases were reviewed for possible inclusion in the dataset. Once a case was identified for inclusion, the cases it cited for a publication principle were checked, and when appropriate, included in the case list. Cases that use the lay definition of publication or were otherwise irrelevant to the goals of the project were excluded.¹²³ As a result of this process, 446 cases were retained for inclusion in the dataset.

For each case, I coded a wide range of variables that would provide additional information about publication precedent. Unlike other copyright principles such as fair use, publication does not have a short list of factors to examine. Consequently, each case was coded for a number of procedural and factual data that might have affected the court's publication analysis.¹²⁴ Some of the variables were designed to capture the factual context in which the publication decision was made such as the type of work, whether the work was unique or existed in multiple copies (such as a print or photograph), and the extent to which the public had access to the work. These variables also capture certain legal conclusions, such as whether the work complied with required copyright formalities. Still others include the judge, the jurisdiction, and the date of the decision. The primary dependent variables are whether the court concluded that the work was published and dedicated to the public domain.

Coder reliability was tested at three points. Initially, the author and research assistants reviewed the codebook together. Some clarifications were made to the instructions before coding began. Next, the author and the research assistants coded a single case independently and then met to assure that all coders entered generally consistent answers. In this way, the author could determine whether there was a common understanding of the variables in the codebook. Additional clarification was made to the codebook at this point. Once a high level of consistency was achieved, the research assistants proceeded to code cases independently, with minimal guidance apart from the codebook itself.¹²⁵

Some of the opinions addressed the issue of publication for more than one work. If material differences appeared in the publication

123 For example, because the project is designed to clarify United States law, cases were removed if they were decided based on the law of a foreign nation.

124 The codebook, available from the author, identifies and explains in substantial detail over 100 variables that were coded for each case.

125 This procedure produced a high degree of consistency in coding. Formally, this can be expressed by calculating kappa, a standard barometer of intercoder reliability. On a random sample of cases, this measure achieved levels of .80 or greater, which suggests a very high degree of uniformity across coders. See GLEN H. ELDER, JR. ET AL., *WORKING WITH ARCHIVAL DATA* 42–43 (1993).

analysis for each work, each factual situation was coded separately. As a result, in the initial dataset, some cases appeared as multiple data points if a particular decision analyzed more than one set of facts with respect to publication. Stated another way, we coded rulings, not cases. In the vast majority of instances, however, there was only one ruling in a case.¹²⁶ There were, of course, exceptions. At the extreme, for example, in *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*,¹²⁷ the district court made publication decisions on fifty-six different choreographic works.¹²⁸

Mark Hall and Ron Wright observe that empirical scholarship reflects better results when “each decision” is given “equal weight.”¹²⁹ One method for adhering to this principle would have been to disregard information about all but one work discussed in each decision resulting in the loss of valuable information about other works in opinions analyzing more than one set of facts. Therefore, I employed a compromise approach. If the court’s examination of two works resulted in coding that was identical for each variable, the two works were counted only once. If the court’s examination of two works resulted in material differences in any relevant variables, the separate coding was preserved.¹³⁰ Whenever appropriate, rulings were collapsed into one observation. As a result, the final dataset reflects only thirty-one decisions that were coded more than once.

For this Article, only one work from each judicial decision was analyzed. As a result, some data from cases involving multiple works are not reflected in the analysis that follows. The information lost

126 This practice was followed in order to reduce judgment calls to be made by the coders and capture as much available data as accurately as possible. However, if all of the multiple results had been treated as separate judicial opinions, the opinions of some judges would have weighed far more heavily than others.

127 224 F. Supp. 2d 567 (S.D.N.Y. 2002).

128 See *id.* at 587–96.

129 Hall & Wright, *supra* note 113, at 83.

130 When the dependent variables were identical and the independent variables were nearly identical, additional findings were discarded if, in the author’s judgment, the differences were so immaterial that they did not reflect a meaningful difference to the court. For example, the coding of two dances, *The Owl and the Pussycat* and *Judith*, were identical except for the variable that captures public performance. The court reported that *Judith* was publicly performed but did not report this information for *The Owl and the Pussycat*. Because this finding did not make a material difference to this court, the coding for *Judith* was maintained as it captured more information, and the coding for the second dance was discarded as merely duplicative. Using this method, the *Martha Graham* district court and appellate decisions demonstrated four clear patterns, each of which was retained in the data. See *Martha Graham*, 224 F. Supp. 2d at 569.

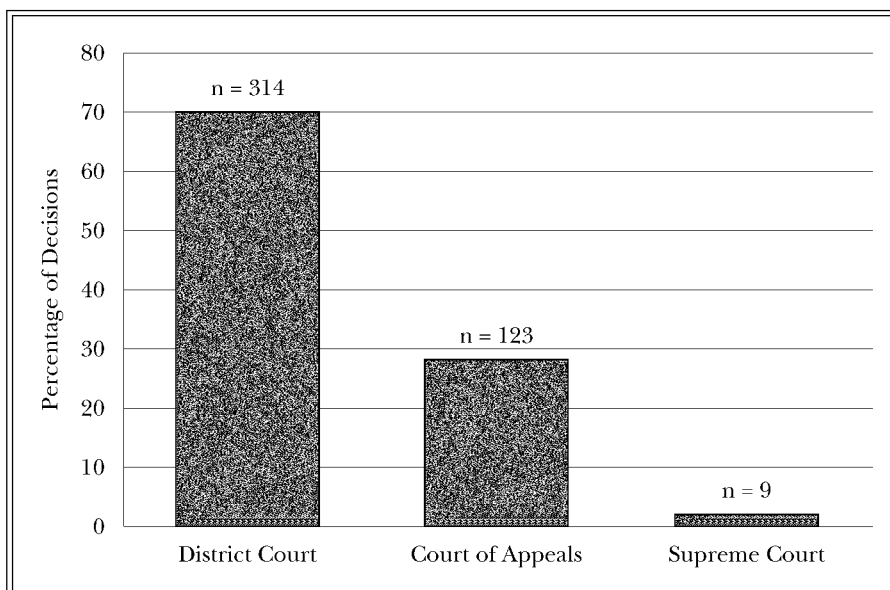
from equalizing the value of each opinion is balanced by the benefits of giving each opinion equal weight. Using this method, no one case works as a soloist whose voice is heard louder than the rest of the crowd. Instead, the goal was to listen to “a chorus [and find] the sound that the cases make together.”¹³¹

III. SUMMARY STATISTICS

A. Overview of All Federal Publication Cases

Applying the methods set forth above, this study reflects the data from 446 judicial opinions on copyright publication. Figure 1 demonstrates the number and percentage of publication opinions decided by district courts, appellate courts, and the United States Supreme Court.

FIGURE 1: FEDERAL PUBLICATION DECISIONS



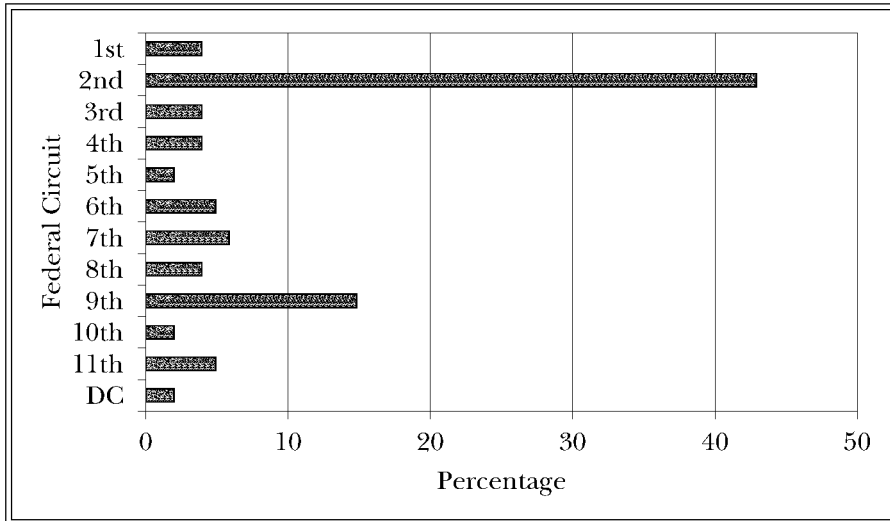
Even from this general overview, it is easy to see how risky it would be to draw any detailed conclusions about publication precedent from looking at just nine United States Supreme Court cases. To get a more complete understanding of the publication landscape, this Article will rely on lower court opinions as well.

It is often asserted that the idea of publication as a copyright term of art developed historically in the context of printed text and there-

¹³¹ Hall & Wright, *supra* note 113, at 76.

fore seems particularly suited to questions involving textual works.¹³² An overview of the circuit distribution of federal cases provides some indirect evidence on this question.

FIGURE 2: PERCENTAGE OF PUBLICATION CASES BY FEDERAL CIRCUIT

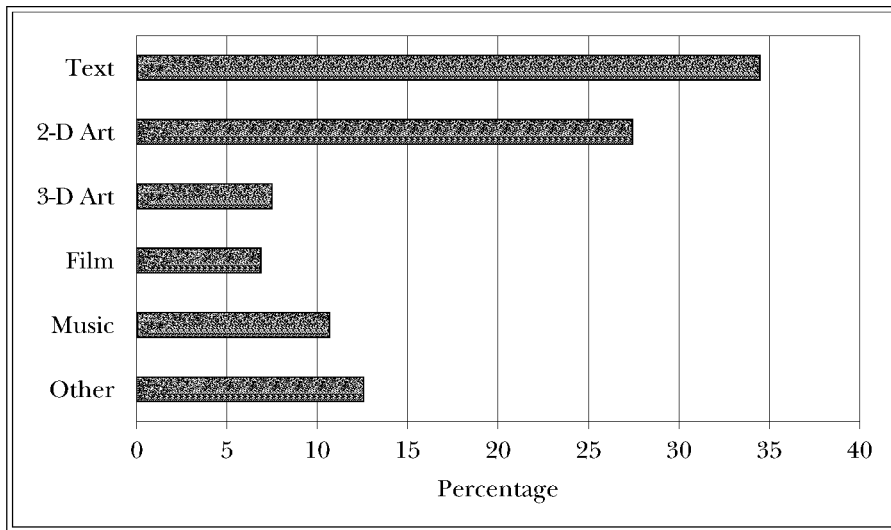


The trial and appellate courts within the Second Circuit—an area spanning the northeastern states in which the publishing industry has a strong presence—resolve more than 40% of cases on the federal docket. Courts in the Ninth Circuit hear 15%, and no other circuit decides more than 6% of copyright publication cases.

A more direct way to see the importance of textual works is to examine how often they constitute the basis for a publication dispute relative to other types of works. Figure 3 shows categories of copyrighted works considered by district courts. As the data in Figure 3 reveal, courts consider textual publications more often than any other category. Indeed, roughly 35% of publication cases pertain to a book,

132 See BIELSTEIN, *supra* note 25, at 18 (2006) (“Copyright arose in a century when text was the chief medium for transmitting information . . . and the explosion of newspapers and books reinforced the certitude that ours was a text-driven society. . . . The framers of the Constitution built this writers’ bias into the copyright and patent protection clause”); 1 NIMMER & NIMMER, *supra* note 19, § 2.04[D][2] (“[U]nder the Statute of Anne, the first copyright statute, books represented the only form of copyrightable works. Although the list of copyrightable works (or as the current Copyright Act would describe them, the “material objects” embodying copyrightable works) had greatly expanded by the time [sic] of the 1909 Act, books remained of primary importance.” (footnote omitted)).

FIGURE 3: TYPE OF WORK AS A PERCENTAGE OF ALL PUBLICATION CASES



play, poem, article, or some comparable printed source.¹³³ Two dimensional art encompasses the next largest share, constituting approximately 27% of the works. Musical compositions and sound recordings make up 10%, three-dimensional art constitutes 8%, and 7% of publication cases address works on film. These broad categorical descriptions do not adequately capture the wide variety of works at issue in publication cases. Subjects of these decisions include works as diverse as Chicago's massive Picasso sculpture,¹³⁴ ribbon flowers,¹³⁵ images of the character Casper the Friendly Ghost,¹³⁶ photographs of Marilyn Monroe¹³⁷ and Harvey Milk,¹³⁸ Star Trek episodes,¹³⁹ the

133 In Figure 3, software, choreographic works, and mixed media such as advertisements containing both textual and visual content (such as drawings or photographs) were included in the "other" category.

134 See *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970).

135 See *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45 (5th Cir. 1995).

136 See *Harvey Cartoons v. Columbia Pictures Indus., Inc.*, 645 F. Supp. 1564, 1571 (S.D.N.Y. 1986) (holding that certain published images of Casper the Friendly Ghost are in the public domain for failure to renew the copyrights).

137 See *Milton H. Greene Archives, Inc. v. BPI Commc'ns, Inc.*, 378 F. Supp. 2d 1189 (C.D. Cal. 2005) (regarding general publication of photos of Marilyn Monroe).

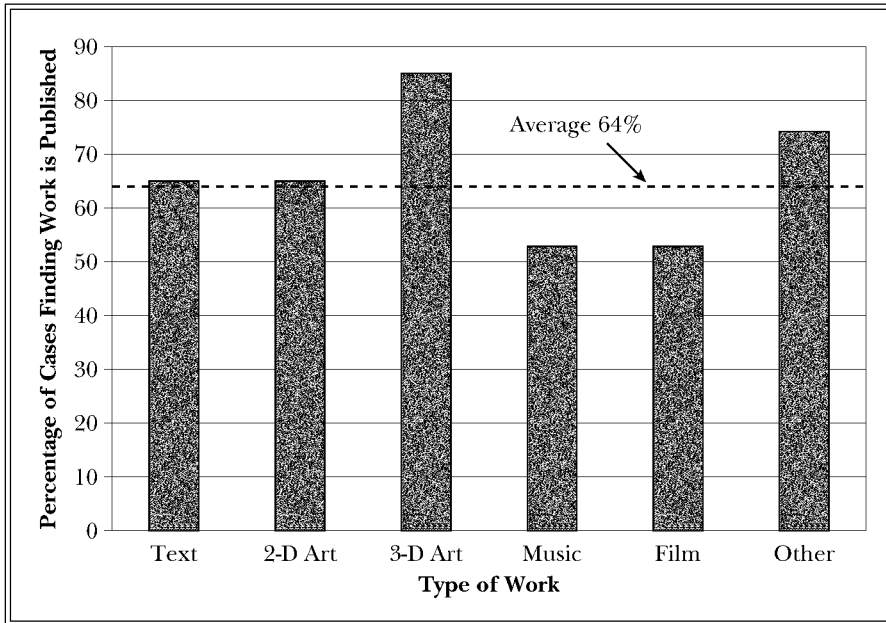
138 See *Pritikin v. Liberation Publ'ns, Inc.*, 83 F. Supp. 2d 920 (N.D. Ill. 1999).

139 See *Paramount Pictures Corp. v. Rubinowitz*, 217 U.S.P.Q. (BNA) 48, 51 (E.D.N.Y. 1981) (finding that publicly performed Star Trek episodes are not in the public domain).

architectural plans for the New Orleans Superdome,¹⁴⁰ the Oscar statuette,¹⁴¹ and Dannon yogurt recipes.¹⁴²

The data also permit us to examine how the type of work affects the publication analysis. Overall, courts find works to be published 64% of the time, and Figure 4 suggests that this general tendency does not differ dramatically across these contexts.

FIGURE 4: PERCENTAGE OF CASES FINDING PUBLICATION
BY TYPE OF WORK



With the exception of three-dimensional art, music, and film, the general categories indicate that most publication disputes are evaluated in a fairly consistent fashion. The general category of two-dimensional visual works, such as paintings, maps, and architectural works, are found to be published 65% of the time, reflecting the overall average publication rate. In stark contrast, three dimensional works such as sculpture and toys are found to be published 85% of the time. Music and film (which includes movies, television programs, and

140 See *Curtis v. Benson*, 959 F. Supp. 348 (E.D. La. 1997).

141 See *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991) (finding that distribution of Oscars to awards recipients was merely a “limited publication”).

142 See *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996).

advertisements for the screen) are found to be published 53% of the time, less frequently than the average of 64%.

B. *Examining Trends in Federal Publication Cases over Time*

For works created after 1976 publication is no longer the triggering event that begins federal copyright protection.¹⁴³ Perhaps for this reason, many prominent scholars have suggested that the concept of copyright publication is less important than it was prior to passage of the 1976 Act and 1989 Amendments.¹⁴⁴ Judging by the cases decided by the U.S. Supreme Court, one might conclude that these congressional enactments clarified the law.¹⁴⁵ Figure 5 shows that most of the justices' publication cases pre-date the 1976 Copyright Act.

Of the nine decisions in which the Supreme Court addressed copyright publication, only *Harper & Row v. Nation* was decided since 1939, and in that case, the question of publication was addressed as part of the fair use analysis, not to determine whether the work had entered the public domain.¹⁴⁶ From the Supreme Court data alone, one may be tempted to conclude that publication (especially in the public domain context) is a dying issue.

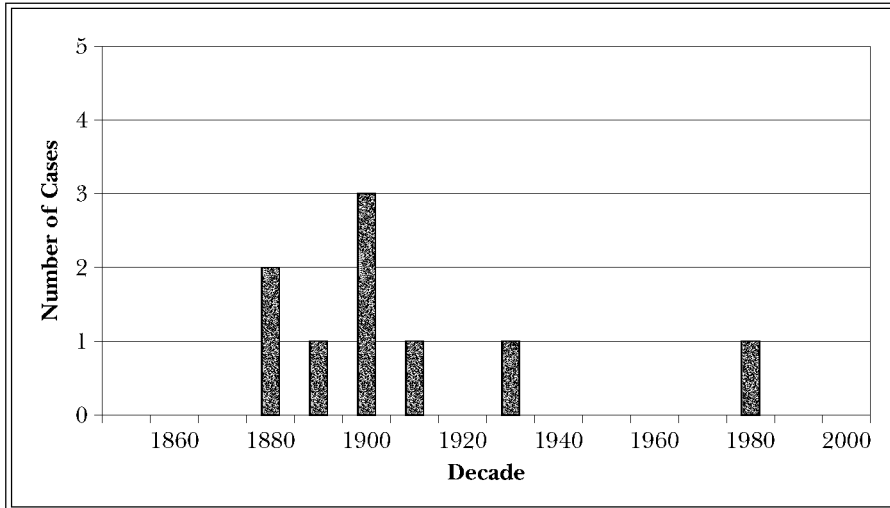
143 See *supra* note 35 and accompanying text.

144 See *infra* notes 147–49 and accompanying text.

145 See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 554 (1985) (holding that the unpublished nature of Gerald Ford's memoir was an important factor in determining that unauthorized publication by a news magazine was not fair use); *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 41–42 (1939) (finding that publication occurred on the date when the work was published in a monthly magazine and that copyright was valid despite a fourteen-month delay in making the required deposit); *Ferris v. Frohman*, 223 U.S. 424 (1912) (holding that public performance of a play is not a publication); *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 300 (1907) (holding that display of a painting is not a publication if "care was taken to prevent copying"); *Mifflin v. Dutton*, 190 U.S. 265, 266 (1903) (finding that twenty-nine chapters of *The Minister's Wooing* by Harriet Beecher Stowe were published when they appeared in *The Atlantic Monthly* without a copyright notice, and therefore, they fell into the public domain); *Mifflin v. R.H. White Co.*, 190 U.S. 260, 264 (1903) (concluding that Oliver Wendell Holmes's book *Professor at the Breakfast Table* was published and fell into the public domain because the notice contained the name of the firm owning the publication but not the name of the author); *Holmes v. Hurst*, 174 U.S. 82, 88–89 (1899) (finding that publication in the form of serial printing of *The Autocrat of the Breakfast Table* with no notice but with the consent of the author resulted in loss of the copyright in the entire book); *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889) (holding that failure of the copyright assignee to observe formalities in all works he published resulted in forfeiture of the copyright); *Callaghan v. Myers*, 128 U.S. 617, 657 (1888) (holding that delivery of copies of a work to the secretary of state constitutes publication).

146 See *Harper & Row Publishers*, 471 U.S. at 554.

FIGURE 5: SUPREME COURT PUBLICATION CASES BY DECADE



In fact, a number of commentators have begun to speak of the importance of copyright publication in the past tense. For example, one prominent practice guide indicates that, “[p]rior to the effective date of the Copyright Act of 1976, publication was of major importance. . . . Publication is less significant under the 1976 Act.”¹⁴⁷ Legal scholars have also made general statements indicating that the importance of copyright publication has diminished since passage of the 1976 Copyright Act. One commentator writes that “[t]he 1976 Act . . . affords the concept of publication less importance than the 1909 Act does.”¹⁴⁸ Another states that “[p]ublication *used to be* of paramount importance under the Copyright Act of 1909. After the passage of the 1976 Copyright Act, publication was no longer a statutory requirement for federal copyright protection for works published on or after January 1, 1978.”¹⁴⁹ Other commentators explain that the importance of publication has declined because it is no longer the moment that

147 1 JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE § 1: 4 (rev. ed. 2009).

148 W. Russell Taber, Note, *Copyright Déjà Vu: A New Definition of “Publication” Under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 860 n.18 (2005) (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01 (2004)).

149 RayMing Chang, *“Publication” Does Not Really Mean Publication: The Need to Amend the Definition of Publication in the Copyright Act*, 33 AIPLA Q.J. 225, 226 (2005) (emphasis added) (footnote omitted).

starts federal copyright protection or passage into the public domain. Publication, they concede, may remain important for other issues.¹⁵⁰

Notwithstanding these qualifications, the general theme remains the same: publication is less important now than it used to be. Such commentary may lead one to believe that publication has diminished in significance so much that the concept is no longer worthy of academic or practical attention. Such assessments are largely impressionistic and made without the benefit of systematic observation.

Therefore, one of the goals of this project is to question the ongoing vitality of publication in copyright law. Copyright practitioners grapple with publication issues frequently, and it may well be that publication continues to be significant under the 1976 Act. The data in several of the following charts show that the issue of publication has been litigated more frequently than many commentators suggest. Tracing the numbers of publication cases decided by federal district courts and courts of appeals from 1849 through 2009, Figures 6 and 7 illustrate that litigation over the meaning of publication has increased dramatically since passage of the 1976 Copyright Act.¹⁵¹

150 See, e.g., BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW §6.1 (2006) (“The 1909 Copyright Act required careful observance of special rules for publication and notice as a condition of statutory copyright protection, and often imposed harsh consequences for seemingly minor lapses in compliance. A technical slip could result in loss of copyright protection and consignment of the work to the public domain. . . . The 1976 Act, by contrast, makes publication and notice permissive or optional for the copyright owner Yet, despite their *diminished importance* under the 1976 Act, publication and notice *remain relevant* to today’s practitioner in several important respects” (emphasis added)); 1 NIMMER & NIMMER, *supra* note 19, § 4.01 (“With the current Act’s virtual abolition of common law copyright by federal pre-emption, the concept ceases to have the full significance it formerly possessed. Publication, nevertheless, continues to be important under the current Act. In analyzing its current significance, it is necessary to distinguish between publications occurring on or after January 1, 1978, and those occurring before.” (footnotes omitted)); Cotter, *supra* note 22, at 1770 (“[W]hile publication is, in one respect, less significant today than it once was, given that publication without notice no longer casts a work into the public domain, publication remains important”).

151 Of course the increase in the number of publication cases should be viewed in relation to the overall growth in copyright litigation. Although the number of reported copyright cases has increased dramatically over the past several decades, the rise in publication cases at the district court level actually began several decades prior to the upward trend in copyright more generally. By contrast, at the appellate level, the pattern of growth in publication cases more closely parallels the rate of change in copyright decisions. See *infra* Figures 6, 7.

FIGURE 6: ANNUAL NUMBER OF DISTRICT COURT CASES
(NUMBER AND 6-YEAR MOVING AVERAGE)

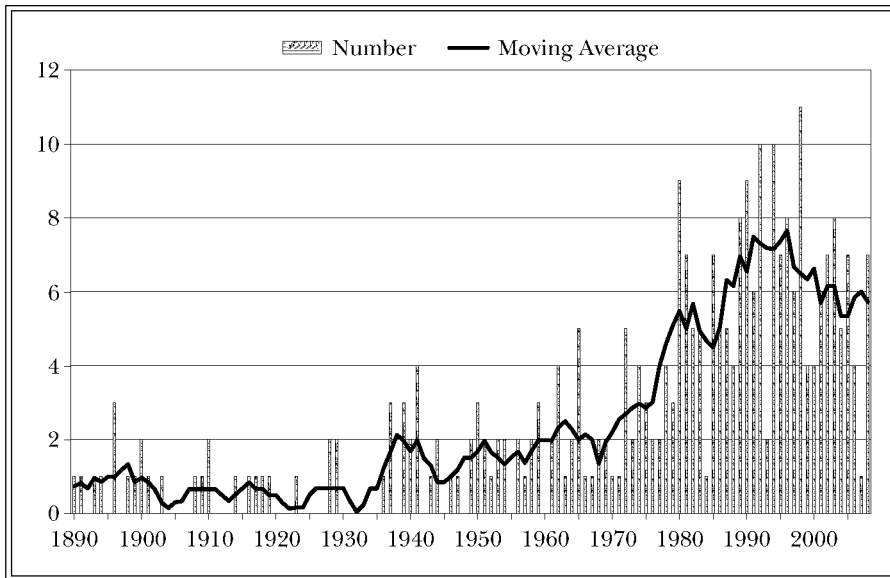
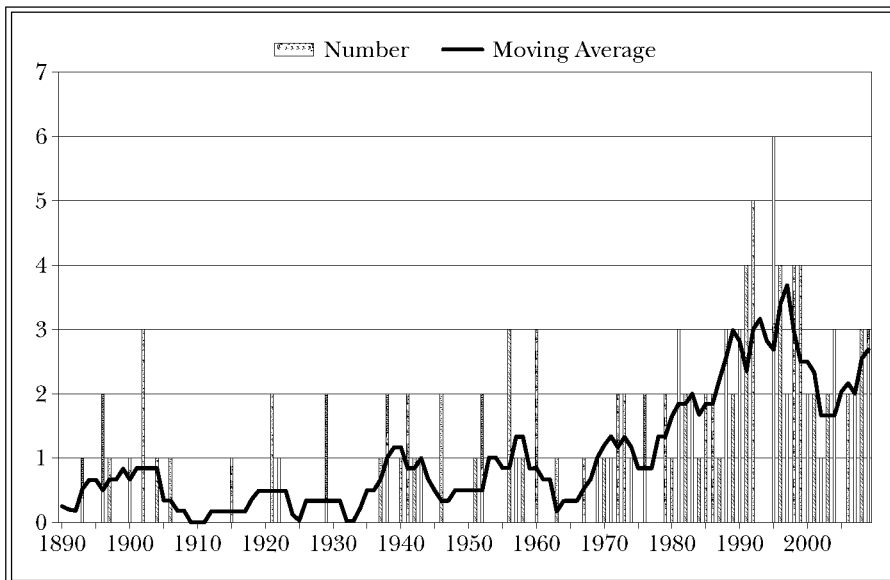


FIGURE 7: ANNUAL NUMBER OF COURTS OF APPEALS CASES
(NUMBER AND 6-YEAR MOVING AVERAGE)

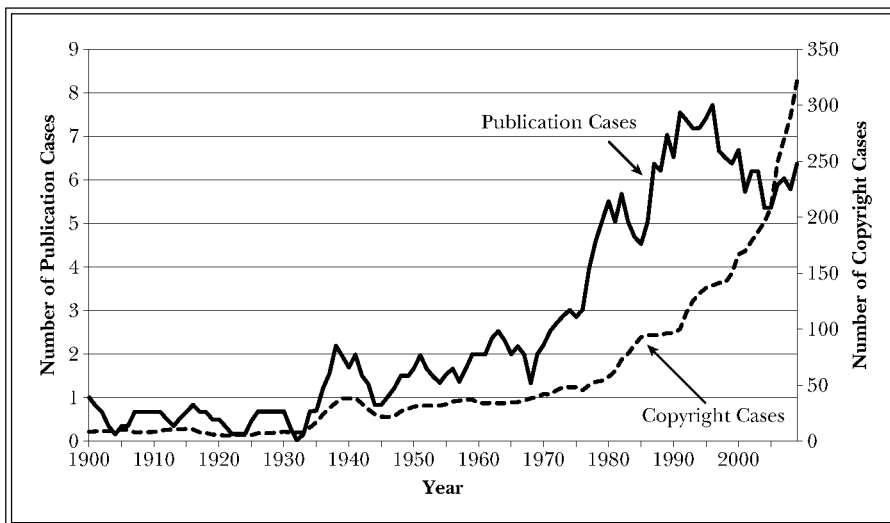


One reason for this increase may be the increased number of issues for which publication is relevant under the 1976 Act. Although

the 1976 Act and later amendments are commonly thought to have reduced the importance of publication, revisions to the federal copyright statutes created new situations in which the question of publication became relevant.¹⁵² Compared to the 1909 Act, the 1976 Act references the concept of publication much more frequently. The text of the 1909 Act mentioned “unpublished” three times, “published” eleven times, and “publication” nineteen times, for a total of thirty-three references while the text of the 1976 Act incorporates “unpublished” thirteen times, “published” ninety-six times, and “publication” seventy-one times, which results in a total of 179 references.¹⁵³ Some of these newer amendments undoubtedly account for the increase in litigation related to the issue of publication.

Figures 8 and 9 demonstrate how the increase in copyright publication litigation compares to copyright litigation rates generally. Figure 8 demonstrates the annual number of district court copyright cases generally compared with district court cases that decided a publication issue.

FIGURE 8: ANNUAL NUMBER OF PUBLICATION AND COPYRIGHT CASES IN DISTRICT COURTS (6-YEAR MOVING AVERAGE)

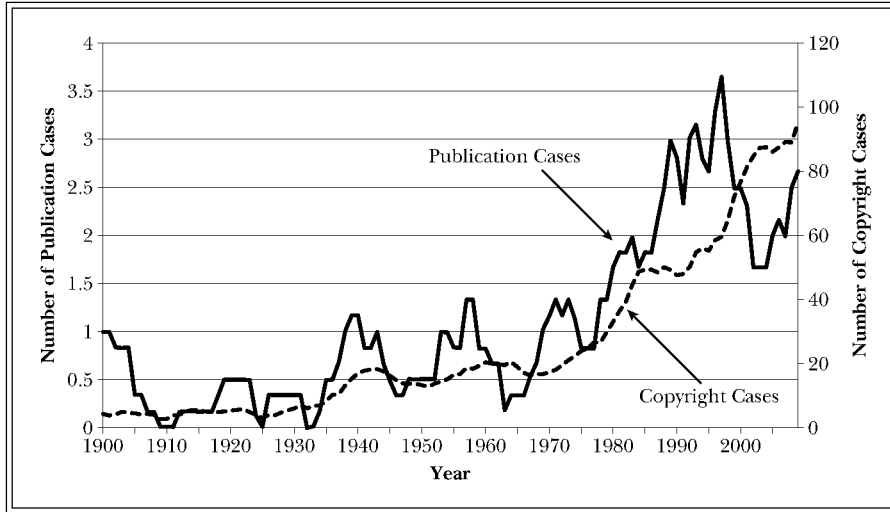


152 See *supra* Part I.A.

153 See Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976); Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

Figure 9 reflects how the annual number of appellate copyright cases compares over time with appellate cases that decide a publication issue.

FIGURE 9: ANNUAL NUMBER OF PUBLICATION AND COPYRIGHT CASES IN COURTS OF APPEALS (6-YEAR MOVING AVERAGE)



Figures 8 and 9 compare the annual number of copyright cases (usually a larger number) with the annual number of publication cases (usually a smaller number).¹⁵⁴ These two charts demonstrate that the increase in publication cases follows the trajectory of copyright cases generally until 2000 when the growth in copyright cases continues to increase. For example, the number of district court copyright cases increased dramatically from 282 in 2008 to 470 in 2009. Because the data are presented in terms of a five-year moving average, their affects are apparent in the chart well before 2009. However, the growth rate of publication cases after the year 2000 appears to have stabilized.

Figures 10 and 11 reflect the copyright issues for which publication cases have been decided.

¹⁵⁴ To estimate the annual number of federal cases that address substantive copyright issues, I searched each relevant year for all cases in Westlaw that mention “copyright” or “copyrights” in the topic field.

FIGURE 10: REASON FOR PUBLICATION DECISIONS

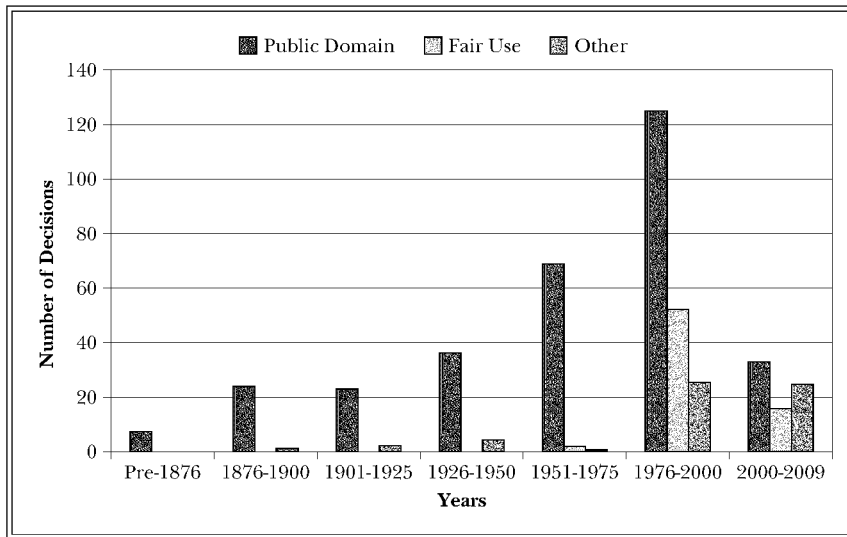


Figure 10 shows how the publication landscape has changed over time by dividing the decisions into three general categories of public domain decisions, fair use cases, and other contexts. Each column reflects twenty-five years except the last one, which shows only 2000–2009. The chart illustrates that over the past century, courts have decided more publication issues to determine whether a particular work was protected by copyright or in the public domain. For each twenty-five year period of time, all three categories show a steady increase in the number of publication issues being decided.

After passage of the 1976 Act, the chart reflects an especially dramatic increase in publication issues being heard in fair use cases and in other contexts. The “other” category includes publication issues being decided pursuant to 17 U.S.C. § 412 to determine whether the publication date enables the copyright owner to collect attorney’s fees and statutory damages.¹⁵⁵ Looking at these particular categories by decade helps to explain the increase in the “other” category. The data reflect no publication issues decided in a § 412 analysis before 1980. However, it shows that in the 1980s, four cases were decided, eight were decided in the 1990s, and thirteen were decided between 2000 and 2009.

155 See *supra* notes 67–72 and accompanying text.

FIGURE 11: REASON FOR PUBLICATION DECISIONS BY PERCENTAGES

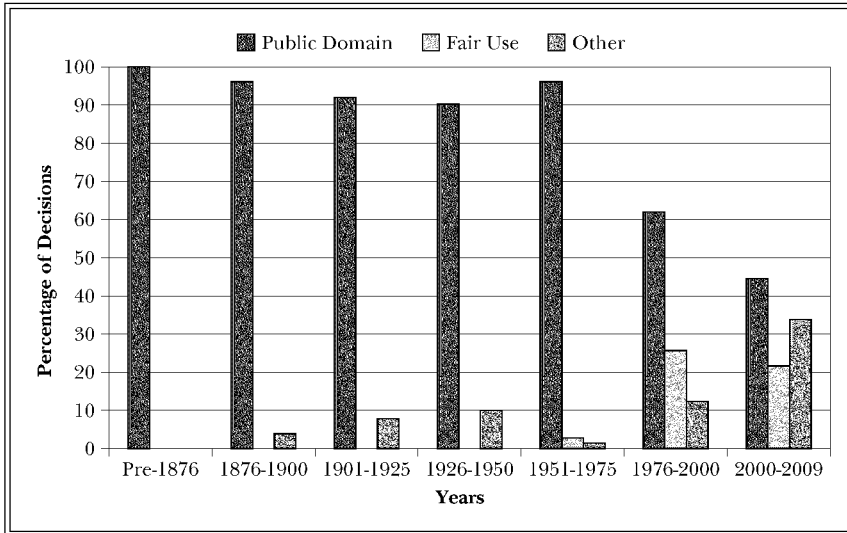


Figure 11 similarly reflects the changing landscape of publication jurisprudence. Although, the number of publication decisions generally has been increasing over time, the precise mix of cases is fluctuating in more subtle ways. On a percentage basis, the number of cases that decide whether a work has fallen into the public domain is decreasing over time, as more and more publication cases are decided in other contexts. Before 1975, 90% or more of publication decisions were made to determine whether a work was in the public domain. Since 1975, public domain decisions have only constituted between 46% and 62% of all publication cases. After passage of the 1976 Act, fair use cases have emerged as a new source for looking at the question of publication. Presently, more than 20% of publication issues are decided in the context of fair use. Therefore, both the number and percentage of these cases have increased substantially. Although a handful of cases decided publication questions outside the public domain context before passage of the 1976 Act,¹⁵⁶ the many new areas

156 See *Callaghan v. Myers*, 128 U.S. 617, 657 (1888) (finding that submission to the secretary of state constituted publication and, therefore, that submission date is the date used when determining compliance with the deposit requirements of the statute); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 898 (8th Cir. 1946) (indicating that since the plaintiff's work was determined to be unpublished there can be no assumption that the defendant's servants were familiar with or had unconsciously copied from the work); *United States v. Backer*, 134 F.2d 533, 536 (2d Cir. 1943) (determining the date of publication to determine the date's effect on the validity of the copyright registration); *Bentley v. Tibbals*, 223 F. 247, 256 (2d Cir.

of publication relevance appear to have spawned litigation that has caused both the raw numbers and percentage of publication cases to expand.

One specific reason for the increase may be the relatively recent use of publication determinations in the context of the fair use doctrine. Although it was not mentioned in § 107 as originally enacted, Congress intended for courts to consider publication status when analyzing the “nature of the copyrighted work” in the second fair use factor.¹⁵⁷ After the Supreme Court addressed the issue of publication in *Harper & Row Publishers v. Nation Enterprises*,¹⁵⁸ more and more courts began to consider whether a work was “published.”¹⁵⁹ Most of the cases that adjudicated the question of publication in the fair use context were decided after 1978.¹⁶⁰

C. *The Continued Relevance of Limited and General Publication*

The 1909 Act did not provide a general definition of publication.¹⁶¹ Because practical applications require definitions, courts crafted definitions for the cases that came before them. In doing so, the federal judiciary developed the concept of “limited” publication as a vehicle to preserve copyrights and prevent inadvertent dedication to the public domain even if works were distributed to some extent without observation of formalities.¹⁶² To take one example, the Ninth Cir-

1915) (explaining how a work that was originally published in England, then imported and then sold in the United States, is published in the United States and would require a copyright notice); *Tribune Co. of Chi. v. Associated Press*, 116 F. 126, 128 (C.C.N.D. Ill. 1900) (holding that publication in London terminated common law copyright, and therefore federal statutory law governed the dispute.); *Shilkret v. Musicraft Records, Inc.*, 43 F. Supp. 184, 186 (S.D.N.Y. 1941), *rev'd* 131 F.2d 929 (2d Cir. 1942) (determining that deposit with the copyright office is not sufficient to constitute publication and that since the work is not published the copyright owner cannot obtain the benefits of § 1(e).); *Hoyt v. Daily Mirror, Inc.*, 31 F. Supp. 89, 90 (S.D.N.Y. 1939) (finding that the copyright claim could not proceed because the plaintiff did not comply with the § 12 deposit requirements promptly after publication).

157 See S. REP. NO. 94-473, at 64 (1975).

158 471 U.S. 539 (1985).

159 See *supra* Figures 6, 7.

160 See *supra* Figures 10, 11.

161 See *supra* notes 83–86 and accompanying text.

162 See *Ladd v. Oxnard*, 75 F. 703, 731 (C.C.D. Mass. 1896) (“The determinations of various courts that, under some circumstances, the delivery of lectures, or the representation of plays, to such of the public as may attend, do not constitute publication, must be regarded as rather of an incidental character, arising undoubtedly to some extent from tenderness for authors, and not establishing any general rule.”); *Keene v. Wheatley*, 14 F. Cas. 180, 199 (C.C.E.D. Pa. 1861) (No. 7,664) (“A limited

cuit defined limited publication as occurring when one “communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale.”¹⁶³ A finding of limited publication means that no legally meaningful publication occurred at all. The safe haven of limited publication has been granted to both modest and extensive distributions.¹⁶⁴ It was distinguished from “general” publication that was thought to occur when “a work is made available to members of the public at large without regard to who they are or

publication of it is an act which communicates a knowledge of the contents to a select few, upon conditions expressly or impliedly precluding its rightful ulterior communication, except in restricted private intercourse.”); Ginsburg, *supra* note 7, at 323 (“‘Unpublished,’ however, did not mean unexploited or undivulged. Public performance of a work did not ‘publish’ it, and therefore did not subject it to formalities, even if the performed work had been widely seen. Borrowing from old English decisions holding that a public performance was not a ‘publication,’ U.S. courts elaborated a parallel universe of ‘unpublished’ works. The rather strained notion of publication was motivated in large part by courts’ awareness that, were the work to be deemed ‘published,’ and had the author not complied with all applicable federal statutory formalities, the work would go into the public domain, and all protection, state or federal, would be lost.” (citations omitted)).

163 *White v. Kimmel*, 193 F.2d 744, 746–47 (9th Cir. 1952).

164 *See* *Aerospace Serv. Int’l v. LPA Grp., Inc.*, 57 F.3d 1002, 1003 (11th Cir. 1995) (finding that a copyright holder’s distribution to a subcontractor and the Federal Aviation Administration of technical specifications for the design of an airport security system was a “limited publication”); *Hirshon v. United Artists Corp.*, 243 F.2d 640, 645 (D.C. Cir. 1957) (finding that the distribution of approximately 2,000 copies of a song to various people in the music business was not a general publication); *Allen v. Walt Disney Prods., Ltd.*, 41 F. Supp. 134, 135–36 (S.D.N.Y. 1941) (holding that distribution of copies of a song to orchestra leaders, along with playing of the song in restaurants and broadcasts over the radio, did not constitute dedication divesting plaintiff of his common law rights); *see also* *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 528–29 (9th Cir. 1984) (holding that copyright owner’s distribution of roughly 200 business cards in seeking employment amounted to a limited publication); *RPM Mgmt., Inc. v. Apple*, 943 F. Supp. 837, 842 (S.D. Ohio 1996) (holding that distribution of building plans to a bank and an individual was a limited publication); *Nat’l Broad. Co. v. Sonneborn*, 630 F. Supp. 524, 534 (D. Conn. 1985) (finding that, for the 1960 version of *Peter Pan*, a course of conduct including the following acts was a mere limited publication: delivery of kinescopes for delayed broadcast, circulation of audition copies to European broadcasters, leasing of copies for broadcasting in five countries and donation to a museum); *Burnett v. Lambino*, 204 F. Supp. 327, 329 (S.D.N.Y. 1962) (“Restricted distribution to a circumscribed class of persons of an unpublished work . . . for the purpose of arousing interest in a possible sale or production, is a sufficiently limited distribution to work no forfeiture of an author’s rights.”); *McCarthy & Fischer, Inc. v. White*, 259 F. 364, 365 (S.D.N.Y. 1919) (holding that where copies of a song were given to “a limited number of artists to sing prior to the date of copyright” but were not sold or given away for any other purpose, there was no general publication).

what they propose to do with it.”¹⁶⁵ The Supreme Court has made the distinction only once, in the 1907 decision, *American Tobacco Co. v. Werckmeister*.¹⁶⁶ In this case, the Court found that exhibiting an original painting without a copyright notice in a gallery that prohibited photography resulted in a mere limited publication that did not divest the work of copyright protection.¹⁶⁷

This distinction between limited and general publication was not mentioned in either the 1909 Act or the 1976 Act.¹⁶⁸ However, the 1976 Act codifies the same basic principle by defining publication as a “distribution . . . to the public.”¹⁶⁹ Through this definition, Congress created a space for private sharing that would not have the same legal significance as a true publication.¹⁷⁰ For this reason, the definition appears to track the same general distinction between limited and general publications.

Now that there is a formal definition of publication in 17 U.S.C. § 101, one may question whether the distinction between limited and general publication has been usurped by the statutory definition in the 1976 Act. Before passage of the Berne amendments in 1989, the question of whether a distribution was limited or general had considerable consequences. Its resolution could determine whether a work was protected by copyright at all.¹⁷¹ Now that both published and unpublished works are eligible for copyright protection, some copyright scholars, including Nimmer, have raised the question of whether the distinction between limited and general publication remains relevant after passage of the 1976 Act.¹⁷²

The data provide interesting insights regarding the continued relevance of limited and general publication. Figures 12 and 13 illustrate how often federal courts expressly use the terms limited or general in making a publication decision.¹⁷³

165 *Burke v. Nat'l Broad. Co.*, 598 F.2d 688, 691 (1st Cir. 1979).

166 207 U.S. 284 (1907), *superseded by statute*, Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976), *as recognized in* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985).

167 *See id.* at 299–300.

168 *See* 3 PATRY, *supra* note 28, §§ 6:30, 6:49; Cotter, *supra* note 22, at 1771–85.

169 17 U.S.C. § 101 (2006).

170 *See* 3 PATRY, *supra* note 28, §§ 6:30 n.11, 6:49; Cotter, *supra* note 22, at 1771–85.

171 *See supra* notes 29–32 and accompanying text.

172 *See* 1 NIMMER & NIMMER, *supra* note 19, § 4.13(b).

173 The data for this category may be somewhat underinclusive, because cases that mention the distinction but did not result in a specific limited or general publication holding were excluded from the data in Figures 10 and 11. *See, e.g.*, *Open Source Yoga Unity v. Choudhury*, 74 U.S.P.Q.2d (BNA) 1434 (N.D. Cal. 2005) (discussing limited and general publication but denying summary judgment motions due to ques-

FIGURE 12: LIMITED AND GENERAL PUBLICATION CASES

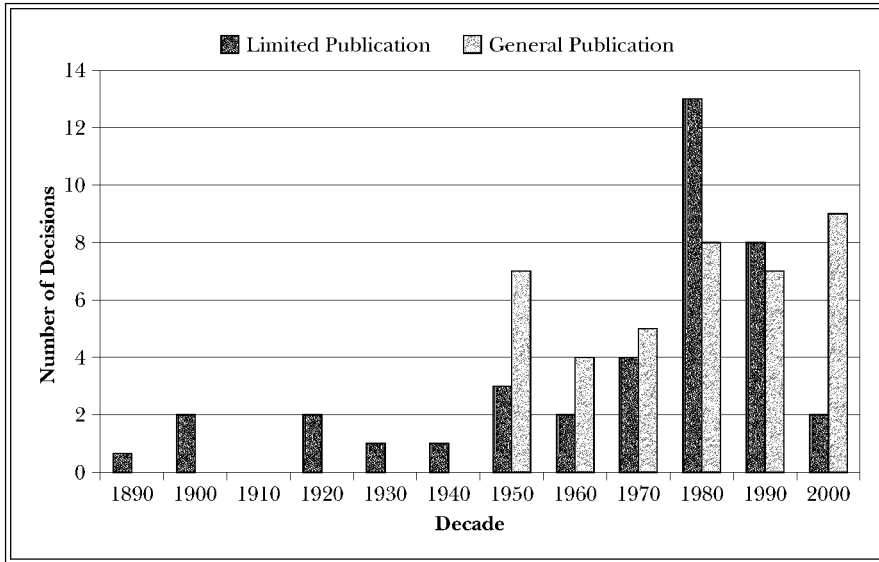


Figure 12 reveals the number of decisions in which the court holds that the distribution of a work amounts to either a limited or general publication.¹⁷⁴ The chart clearly reflects that the use of this distinction has increased since passage of the 1976 Act. Before 1940, the courts used the distinction as reasoning along the way to finding limited publication, and although a few cases made a finding of general publication before 1940,¹⁷⁵ it was not until then that this distinction was articulated with any regularity. Since then, the data show steady attention to this distinction.¹⁷⁶ Even if courts begin to decide fewer cases in the public domain context, the limited/general distinction may survive by continued use in other contexts such as publication issues being decided for purposes of assessing the availability of statutory damages and attorney's fees under 17 U.S.C. § 412.¹⁷⁷

tions of fact); *Bull Publ'g Co. v. Sandoz Nutrition Corp.*, 13 U.S.P.Q.2d 1678 (BNA) (N.D. Cal. 1989) (discussing limited and general publication but denying summary judgment motions due to questions of fact).

¹⁷⁴ Many more decisions discuss the distinction between limited and general publication. This chart reflects only those cases in which a court made a specific finding of limited or general publication with respect to a particular work.

¹⁷⁵ See *Krafft v. Cohen*, 117 F.2d 579, 580 (3d Cir. 1941); *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 F. 54, 58-59 (1st Cir. 1896); *Keene v. Wheatley*, 14 F. Cas. 180, 199 (C.C.E.D. Pa. 1861) (No. 7, 644).

¹⁷⁶ See *supra* Figure 12.

¹⁷⁷ See *Hustlers, Inc. v. Thomasson*, 253 F. Supp. 2d 1285, 1290-91 (N.D. Ga. 2002).

FIGURE 13: PERCENTAGE OF PUBLICATION CASES FINDING LIMITED AND GENERAL PUBLICATION

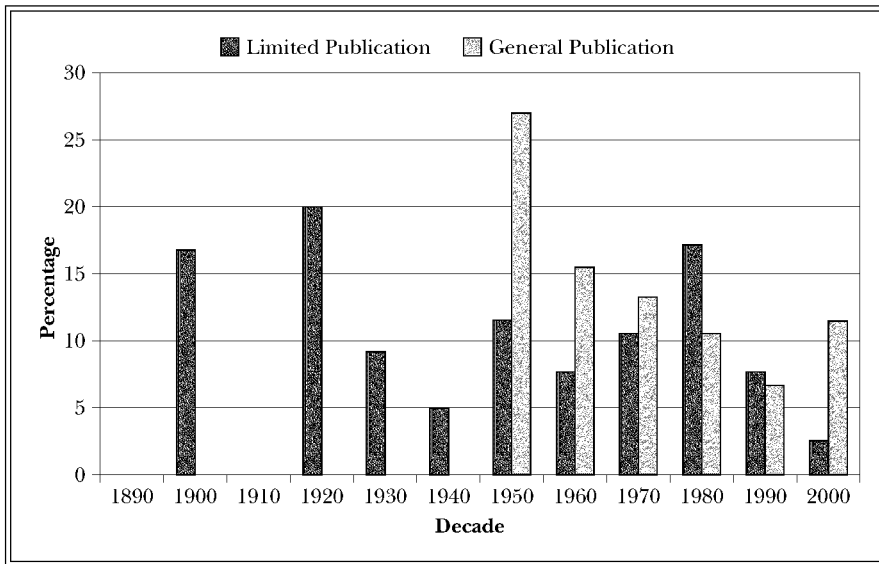


Figure 13 presents the same data presented in Figure 12 but shows the cases finding limited or general publication as a percentage of all publication cases. These data tell a similar tale. Since the 1950s, cases distinguishing between limited and general publication have retained their presence in federal copyright litigation, even as the number of publication cases has increased.

D. *Publication Differences in the Fair Use and Public Domain Contexts*

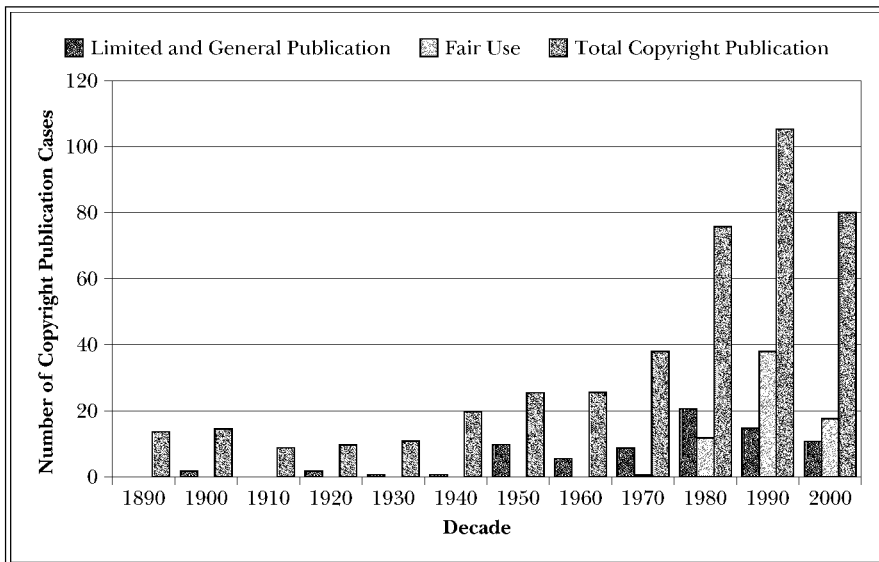
Another important question is whether publication means different things in different copyright contexts. Professor Thomas Cotter says it should,¹⁷⁸ and the data support his intuition. One contextual difference is apparent by taking a closer look at where the limited/general publication distinction appears. This distinction has been used eighty times in publication decisions generally, but interestingly, before 2009, it has not been deployed even once in the fair use context. One possible explanation for this difference is that the fair use cases that address publication issues are all more recent while the limited/general distinction has a long history, dating back to the

¹⁷⁸ See Cotter, *supra* note 22, at 1728 (“[P]ublication can and should mean different things in different contexts . . .”).

1860s.¹⁷⁹ Fair use cases that address the publication issue, by contrast, are a more recent phenomenon.

One may theorize that the limited/general distinction fell into disfavor after the 1976 Act because, once federal copyright law defined publication, the definition may have diminished the need for courts to use the limited/general distinction. Figure 14, however, demonstrates that the passage of the 1976 Act alone cannot explain this contextual difference. The tallest bar in each set represents all publication cases, and again, it demonstrates that litigation over publication issues has increased since passage of the 1976 Act. The third bar demonstrates that beginning in the 1980s fair use cases emerge as a significant portion of the publication docket, constituting between 10% and 40% of publication decisions in the following three decades. However, the first bar in each set shows that in approximately 10% to 25% of the cases, a court is making the distinction between limited and general publication. Yet the data indicate that these two sets of cases do not overlap.

FIGURE 14: LIMITED/GENERAL AND FAIR USE CASES, COMPARED TO ALL COPYRIGHT PUBLICATION CASES



One possible reason for this difference is that courts find the limited/general distinction to be more useful in the public domain context because publication has a dispositive impact on the legal

179 See, e.g., *Pierce & Bushnell Mfg. Co.*, 72 F. at 58–59; *Keene*, 14 F. Cas. at 199.

conclusion. For example, if a work was published in the United States before 1976 without formalities,¹⁸⁰ it is in the public domain.¹⁸¹ If it remained unpublished it may still be protected by copyright.¹⁸² Therefore, in the public domain context, judicial wiggle room in the form of the limited/general publication doctrine gives courts equitable discretion to provide a safety net and prevent a work that had been distributed from losing copyright protection.

Federal courts may not see the need for such wiggle room in fair use cases because the analysis would not turn only on whether a work is published. The fair use doctrine involves balancing four factors¹⁸³ in light of the purpose of copyright law.¹⁸⁴ The statute provides, in part: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”¹⁸⁵ In doing so, it expressly indicates that the publication issue alone should not drive the fair use analysis. Therefore, in the fair use context, whether a work is published is a subset of the considerations relevant under the second factor that addresses the nature of

180 A work may be in the public domain if published without a copyright notice in the United States between 1978 and 1989. However, if a copyright owner attempted to correct the omission, cure provisions in the statute might be applied to preserve the copyright and find that the work was not dedicated to the public domain. *See* 17 U.S.C. § 405 (2006).

181 *See supra* notes 29–32 and accompanying text.

182 *See supra* notes 29–32 and accompanying text.

183 The fair use statute provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

184 *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (explaining that the four § 107 factors “are to be explored, and the results weighed together, in light of the purposes of copyright”).

185 17 U.S.C. § 107.

the copyrighted work.¹⁸⁶ Because other fair use factors also involve analysis of multiple subfactors,¹⁸⁷ the publication issue has less impact on the outcome. For this reason, the courts may have not seen the need to resort to the limited/general distinction, because in a multi-factor test, there are many other opportunities to tip the balance.

Another possible explanation for the absence of the limited/general distinction in fair use cases is that the courts are developing meaningful substantive differences in defining publication depending on whether they are looking at a public domain or fair use issue. Not all public exposure amounts to a publication in cases analyzing whether a work has entered the public domain. For example, public display or performance, according to the 1976 Act definition, does not amount to publication in cases determining whether a work is in the public domain.¹⁸⁸ Under the 1909 Act as well, many publicly available works were treated as unpublished.¹⁸⁹ Some significant doctrinal evidence indicates that in the fair use context, this odd distinction between public accessibility and publication is absent. Instead, courts treat publication as roughly equivalent to “publicly available.”¹⁹⁰ In *Campbell v. Acuff-Rose Music, Inc.*,¹⁹¹ the Supreme Court avoided use of the term publication altogether and simply considered whether the work was “publicly known.”¹⁹² This interpretation of publication

186 Other issues considered in analyzing the second fair use factor include the extent to which the work is creative or factual. See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153–54 (9th Cir. 1986) (“The scope of fair use is greater when ‘informational’ as opposed to more ‘creative’ works are involved.”); Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J.L. & TECH. 461, 520–21 (2010) (“This factor tends to favor the copyright owner when a work is creative but may favor the person seeking to use the work if it is factual.”).

187 Analysis of the first fair use factor, “the purpose and character of the use” can involve examination of the extent to which the work is transformative, educational, and commercial, as well as the different situations stated in the preamble to 17 U.S.C. § 107. See Gerhardt & Wessel, *supra* note 186, at 515–20.

188 See 17 U.S.C. § 101 (“A public performance or display of a work does not of itself constitute publication.”).

189 See Ginsburg, *supra* note 7, at 328 (“The concept of ‘publication’ . . . was not always coterminous with the general notion of ‘making public’ . . .”).

190 See *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 942 F. Supp. 1275, 1283 (C.D. Cal. 1996) (“[T]he evidence in this case indicates that the works were so widely published that every person in America could have seen them on one of the three networks that obtained licenses from Plaintiff in the 48 hours following their creation—a fact that minimizes their ensuing value.”), *vacated on other grounds*, 149 F.3d 987 (9th Cir. 1998).

191 510 U.S. 569 (1994).

192 *Id.* at 586.

appears to conform with Congressional intent.¹⁹³ However, it is quite different from how courts have viewed publication in the public domain context. This perceived difference may also account for the lack of evidence indicating that courts use the limited/general publication distinction in the fair use context. If in fair use jurisprudence courts look simply at whether a work is publicly available and not at the extent of its availability, the limited/general publication distinction would not be necessary to reach that conclusion.

Reflections on these possibilities and additional reasons for the contextual difference are both fertile grounds for further exploration. In light of the contextual difference that has been identified, one should exercise caution before relying on publication precedent in the public domain context that originates from a potentially different understanding of the term from the fair use context.¹⁹⁴

IV. VARIABLES THAT MATTER TO COURTS WHEN DECIDING PUBLICATION CASES IN THE PUBLIC DOMAIN CONTEXT

The preceding analysis establishes that the meaning of publication in copyright law varies depending on the legal context in which it is analyzed. In this section, I seek to clarify the meaning of publication in the public domain context. The Martin Luther King example that launched this discussion illustrates the doctrinal ambiguity over the meaning of publication when courts decide whether a work remains protected by copyright or has been dedicated to the public domain. The goal of this section is to remove some of that ambiguity through analysis of the variables that drive publication decisions. Many attempts have been made to define publication without the benefit of a systematic empirical study. Several commonly used definitions will be tested to determine whether they are consistent with the findings in the data. Specifically, the factual situations in the statutory definition of publication in the 1976 Act and scholarly publication definitions will be tested to determine whether they accurately reflect the cases they purport to describe. In order to focus on these factual

193 See S. REP. NO. 94-473, at 64 (1975) (“A key, though not necessarily determinative, factor in fair use is whether or not the work *is available* to the potential user. If the work is ‘out of print’ and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case” (emphasis added)).

194 Cf. PETER B. HIRTLE, ET AL., COPYRIGHT AND CULTURAL INSTITUTIONS 30 (2009) (asserting that works publicly available at museums should not be treated as though they are in the public domain based on *Wright v. Warner Books, Inc.*, 748 F. Supp. 105 (S.D.N.Y. 1990) in which the publication issue was decided in the fair use context).

questions, this section reflects findings from only the 220 federal district court cases that examine publication¹⁹⁵ in the public domain context.

In this section, I will identify three frequently used definitions of publication and then determine, as an empirical matter, whether they adequately reflect publication precedent. I begin with a basic survey of several factors that are plausibly connected to publication decisions. Then, in order to sort out their relative effects, I develop a set of multivariate explanatory models, using each one to predict whether a court concludes that a work has been published.

A. Frequently Cited Publication Definitions

1. Professor Melville Nimmer's Proposal: Public Possession of Copies

In 1956, before having the benefit of a statutory definition, Professor Melville Nimmer embraced what we may think of as a “hands on” theory of publication as a normative matter.¹⁹⁶ In a foundational article on copyright publication, Nimmer asserted that the “*sine qua non* of publication should be the acquisition by members of the public of a possessory interest in *tangible* copies of the work in question.”¹⁹⁷ This “hands on” definition is appealing in its simplicity. It nicely captures the difference between the lay and copyright meanings of publication. It explains why public exhibitions like performance and

195 Cases deciding publication issues involving sound recordings were omitted from this section because of doctrinal issues that are peculiar to this particular factual context, and therefore are not representative of publication issues generally. “Phonorecords” were traditionally treated differently from “copies.” See, e.g., *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (holding that because a perforated roll for playing music is not a copy, sales of the rolls did not constitute a violation of the distribution right and thereby creating the basis for the premise that sales of phonorecords would not constitute publication); *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995) (finding that record sales result in publication), *superseded by statute*, 17 U.S.C. 303(b) (2006), *as recognized in* *Societe Civile Succession Goino v. Renoir*, 549 F.3d 1182, 1185 (9th Cir. 2008); *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1193 (S.D.N.Y. 1973) (holding that because records are not copies, sales of records do not result in publication). Until 1972, some recordings were protected by state, not federal copyright law, and until the 1976 Act became effective in 1978, there was considerable doctrinal confusion over whether sales of phonorecords could amount to publication of a musical work. Only after passage of the 1976 Act, did Congress make it clear that publication results from “the distribution of copies *or phonorecords*.” Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541, 2543 (1976) (emphasis added).

196 See Nimmer, *supra* note 28, at 197.

197 *Id.*

display do not constitute publication: although the works are broadly accessible, the public cannot obtain copies. Under the “hands on” formulation, distribution of a work that consumers can hold and own constitutes publication. The definition does not work as well in the tougher cases of limited publication or when works are made available through deposit in a government or public archive.¹⁹⁸ Still, some courts have relied on this “hands on” view.¹⁹⁹ Despite the intuitive appeal and occasional judicial use of the “hands on” formulation, the data reveal that public accessibility is not always a precondition for a finding of publication. In the small subset of cases (26 of 446) in which the public could *not* get a copy or the existence of copies was not reported, courts found publication 50% of the time.

2. The Statutory Definition from the 1976 Act

Historically, Congress did not include a definition of publication in federal copyright legislation. In crafting the 1976 Act, Congress conceded a working definition would be helpful, and defined it as follows:

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.²⁰⁰

The definition is broader than Nimmer’s 1956 “hands on” proposal. It does incorporate the concept that if the public can hold tangible copies obtained through sale, offers of sale, rental, lease, or lending, publication is present. However, when the public may experience a work, not through the distribution of copies but from a performance or display, publication is not presumed.

The statutory definition is broader than the “hands on” definition. It incorporates the possibility that a work may be considered published when “offered to the public,” even if no copy is actually

198 Application of this definition would also be problematic with respect to digital copies.

199 See, e.g., *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 37 (1st Cir. 2003); *Nucor Corp. v. Tenn. Forging Steel Serv., Inc.*, 476 F.2d 386, 391 n.8 (8th Cir. 1973); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401–02 (S.D.N.Y. 2002); *Burke v. Nat’l Broad. Co.*, 462 F. Supp. 267, 271 (D.N.H. 1978); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 107 (S.D.N.Y. 1963).

200 17 U.S.C. § 101 (2006).

distributed. Even copies made available by rental, lease, or lending may be considered a broadening of the “hands on” definition because those copies would be temporarily available to the public but are not their copies to own.

3. The Nimmer Treatise Definition: Copies Available by Consent of the Copyright Owner

The Nimmer treatise articulates another important consideration that is missing from the previous two definitions: whether the distribution was authorized by the copyright owner. The treatise authors’ impression of evolving precedent led them to conclude that

publication occur[s] when, *by consent of the copyright owner*, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner, even if a sale or other such disposition does not in fact occur.²⁰¹

In one sense, this definition is broader than the “hands on” approach because it embraces not just the availability of copies, but also includes the additional category from the statutory definition in which copies are “made available” even if copies are not actually distributed. In another sense, the treatise definition is narrower. Under the “hands on” or statutory definitions, unauthorized copies could support a finding of publication. Such pirated works would not be evidence of publication under the Nimmer treatise definition.

This emphasis on copyright owner authorization is interesting because it does not appear in the “hands on” proposal or the 1976 Act’s definition of publication.²⁰² Yet the treatise argues that this requirement is “undoubtedly implied: Congress could not have intended that the various legal consequences of publication under the current Act would be triggered by the unauthorized act of an infringer or other stranger to the copyright.”²⁰³ Before 1989, publication could have severe consequences to a copyright owner. If a work was published without notice and no attempt was made to correct the problem, publication could put the work into the public domain and destroy the economic value of the exclusive distribution right.²⁰⁴

The Nimmer treatise also suggests that in crafting the definition of publication for the 1976 Act, Congress could not have intended for

201 1 NIMMER & NIMMER, *supra* note 19, § 403[A], at 4-24 (emphasis added) (footnotes omitted).

202 See *supra* notes 196, 200 and accompanying text.

203 1 NIMMER & NIMMER, *supra* note 19, § 4.03[B], at 4-28 (footnotes omitted).

204 See *supra* notes 29–32, 180 and accompanying text.

such dire consequences to be removed from the copyright owner's control. Rather, only if the distribution was made "by consent of the copyright owner"²⁰⁵ could the distribution have the legal effect of publication. Acts by unauthorized third parties are irrelevant under this formulation. The legislative history indicates that the statutory definition of publication was drafted in order to straighten out the courts' "number of diverse interpretations [of publication], some of which are radically different."²⁰⁶ Some cases (often citing the Nimmer treatise) echo the idea that only conduct authorized by the copyright owner can inject a work into the public domain.²⁰⁷ Other cases find owner intent or authorization to be irrelevant.²⁰⁸ Therefore, the

205 1 NIMMER & NIMMER, *supra* note 19, § 403[A], at 4-24.

206 *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 2080 (1975) (briefing papers authored by Copyright Office). Interestingly, the Nimmer treatise characterizes the history differently, suggesting that the definition captures the concept of publication that evolved in the federal courts, and was not intended to alter that meaning. See 1 NIMMER & NIMMER, *supra* note 19, §§ 4.03[A]-4.03[B].

207 For this proposition, the treatise cites two cases, the first of which is *Harris Custom Builders, Inc. v. Hoffmeyer*, 92 F.3d 517 (7th Cir. 1996). See 1 NIMMER & NIMMER, *supra* note 19, §4.03[B], at 4-28 n.40. In *Harris Custom Builders*, the court does cite the treatise and states in dicta that "[t]he result here might not be the same if a stranger were the one publishing the work." *Id.* at 520. However, its actual holding is that the copyright was lost as a result of the copyright owner's publication of the work without notice, and in so concluding, the court states, "[a] copyright can be forfeited whether or not the owner of the copyright intends that result." *Id.* at 520. The second case the treatise cites is *Cipes v. Mikasa, Inc.* 346 F. Supp. 2d 371 (D. Mass. 2004). See 1 NIMMER & NIMMER, *supra* note 19, § 4.03[B], at 4-28 n.40. This opinion appears to conflate the definition of "publication" with the definition of the distribution right codified in § 106(3). See *Cipes*, 346 F. Supp. 2d at 375. The Court states that because only the author has the exclusive right to distribute, no one else can publish a work. *Id.* As discussed earlier in Part I.B., this collapsing of the distribution right (focused on the defendant's conduct) and the concept of publication (when analyzing the nature of a plaintiff's work) is problematic, and does not provide sufficient doctrinal support for the assertion that intent is necessary to establish publication.

208 See, e.g., *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n of Chi.*, 320 F. Supp. 1303, 1309 (N.D. Ill. 1970) (holding that copyright was lost through unauthorized sales of images). The Nimmer treatise itself embraces some ambiguity on this point. In a later section, the authors suggest that intent is irrelevant, stating that "forfeiture of copyright . . . may occur as a consequence of publication without proper copyright notice and is effectuated by operation of law regardless of the intent of the copyright owner." 4 NIMMER & NIMMER, *supra* note 19, § 13.06, at 13-281, 13-282 (footnotes omitted). Any ambiguity in these sections could be eliminated by the contention that forfeiture (as distinguished from publication) could only occur by acts of the copyright owner itself, and such acts would of course be authorized. Several cases that discuss intent as irrelevant similarly rely on factual situations in which the decisive act was committed by the copyright owner. See, e.g., *Donald Frederick Evans &*

doctrine reflects ambiguity over the role of copyright owner intent or permission in determining whether publication has occurred.

Not surprisingly, the data reveal that authorization is a consideration that federal courts take into account when making publication decisions. At the same time, the Nimmer assertion that publication occurs only by “consent of the copyright owner” is an overstatement. For the cases in which the work was distributed only without authorization from the copyright owner, 45% resulted in determinations that the underlying work was published. None of these three commonly used definitions map with perfect precision on publication case law. In the next section, a closer examination of their principal elements will yield a more clear understanding of where the gaps lie and why they are there.

B. Analysis of Individual Variables on Publication Decisions

Each publication definition incorporates a variety of different variables. Some, like distribution of authorized copies are described as indicators that publication has occurred. Some, such as public performance and display, are described as not supporting findings of publication. In order to better understand each piece of this complex puzzle, I first examine the individual effect of each factor on publication decisions to determine how case outcomes vary as a function of these variables. Figures 15–17 illustrate the impact of the type of work, its method of distribution, and numerous other related considerations to which judges often call attention in their written opin-

Assocs., Inc. v. Cont'l Homes, Inc., 785 F.2d 897, 912 (11th Cir. 1986) (observing that “[t]he statutory scheme clearly foresees copyright protection being forfeited for some works against the intent of the copyright owner”); *H.W. Wilson Co. v. Nat'l Library Serv. Co.*, 402 F. Supp. 456, 458 (S.D.N.Y. 1975) (citing *Nat'l Comics Publ'ns, Inc. v. Fawcett, Inc.*, 191 F.2d 594 (2d Cir. 1951)) (“However, intent to dedicate a work is irrelevant to whether a work enters the public domain. Publishing a book without copyright notice puts the work in the public domain.”).

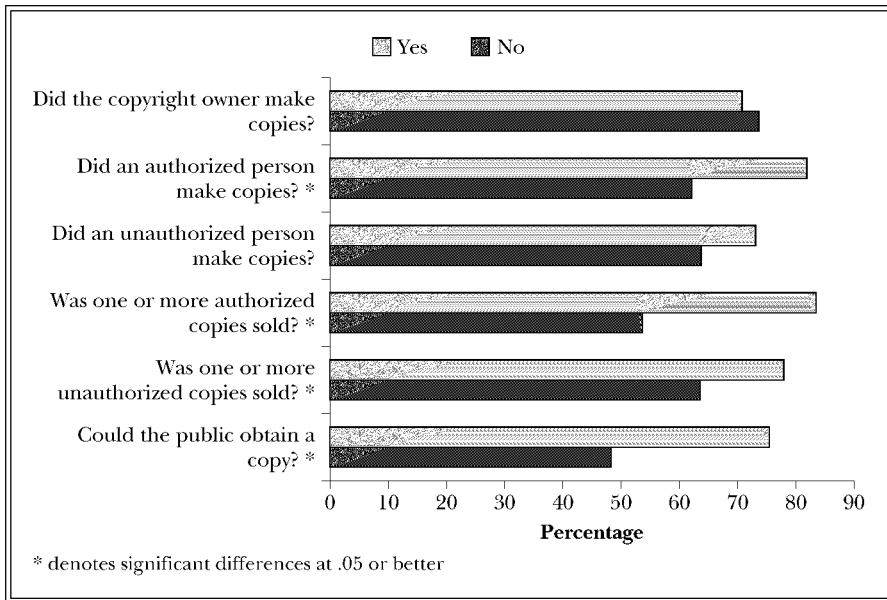
ions.²⁰⁹ These histograms chart a number of interesting effects, many of which are both substantively and statistically significant.²¹⁰

Each of the following three charts isolates individual variables and examines how each one affects findings of publication. Each variable is represented by two bars showing the percentage of district court opinions finding that the work at issue is published. The top bar shows the percentage of cases finding the work published when the court reports that the variable is present. The bottom bar reflects the publication percentage when the variable is not reported or expressly found to be absent. Generally, a substantial difference in length between the two bars indicates that the variable is significant. For example, in Figure 15, the top two bars are designed to show the impact of copies made by the copyright owner. The top bar shows that when district courts report that copies were made by the copyright owner, they find the work at issue to be published 70% of the time. When the court does not mention whether the copyright owner made copies (or affirmatively states that the owner did not make any copies), they find the work to be published 74% of the time. The difference between these bars is not statistically significant. Therefore, the presence or absence of this variable likely does not affect judicial decision making on publication issues in the public domain context.

209 As discussed above, in some copyright publication cases, courts made findings of limited or general publication. In order to simplify the findings, the dependent variables of (1) not published, (2) limited publication, (3) general publication, and (4) published were collapsed into two summary variables: published or unpublished. A work was treated as published if the court expressly found that a work was published or that there had been a general publication. A work was treated as unpublished if the court found that the work had not been published or if there had been a limited publication. Cases were excluded if the court made no final decision on publication. For example, if summary judgment was denied in a case because the publication issue raised a question of fact, that case was excluded.

210 Because these data are percentages, I calculate their differences by a “difference of proportions” test, a variation of the more commonly used “difference of means test.” In either form, the test determines whether the relevant difference between groups is too large to be attributed to chance. The differences here are considered statistically significant if there is less than a 5% probability that the difference is due to chance. See GEORGE W. BOHRNSTEDT & DAVID KNOKE, *STATISTICS FOR SOCIAL DATA ANALYSIS* 187 (2d ed. 1988).

FIGURE 15: PERCENTAGE OF RULINGS FINDING PUBLICATION WHEN COURTS REPORT FACTS ABOUT THE DISTRIBUTION OF COPIES

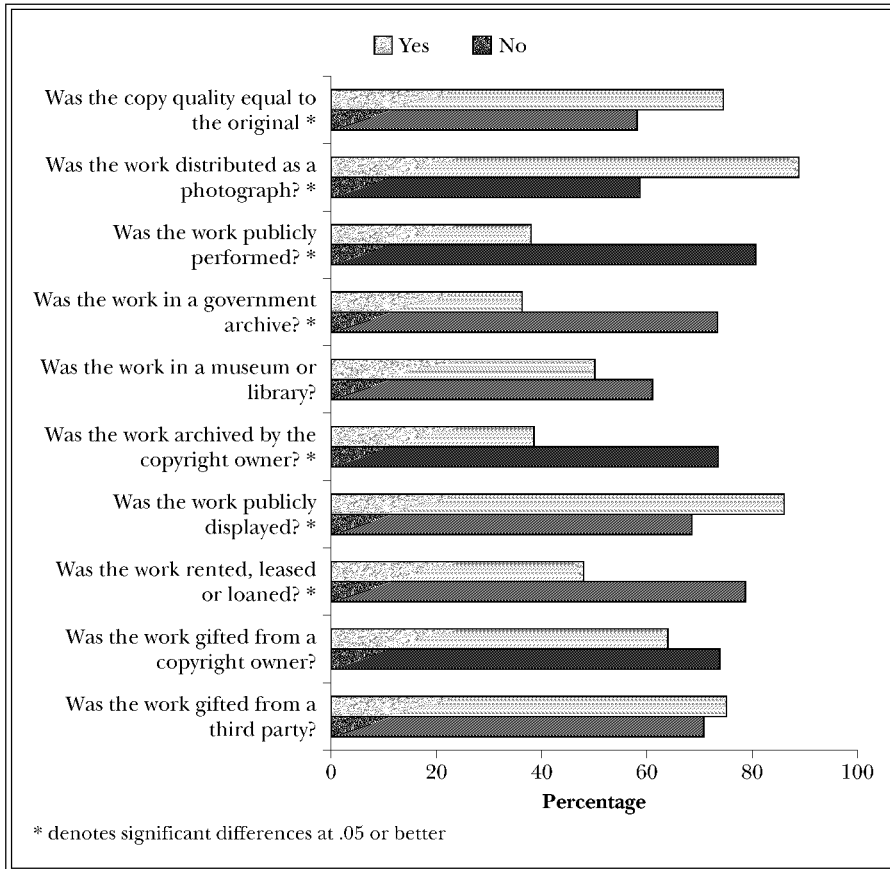


The data in Figure 15 indicate that four of the six variables related to the distribution of copies do make a difference to district courts in deciding publication matters. Their impact underscores the relevance of the “hands on” and authorized copies definitions. Both appear to make a difference. For example, courts that took note of the sale of authorized copies found that the work in question was published virtually 80% of the time. Notice that the *absence* of authorized copies does not prevent courts from concluding that a work is published; district courts still found a work to be published at least 50% of the time even when no authorized copies were reported. And 78% of courts find publication occurred when unauthorized copies are reported. At this level, the data appear to support the theory that the “hands on” definition is strongly related to publication outcomes. When the public can obtain copies, courts find publication 76% of the time. When copies are not available to the public, the likelihood of a publication ruling drops considerably to 48%. Because the t-test²¹¹ reveals that all of these variables appear significant, I will examine them again in the multivariate analysis in the next section to determine the magnitude of their importance when weighed against each other as well as additional variables.

211 See *id.* at 180–85.

Figure 16 illustrates findings with respect to additional distribution variables, including specific transfers mentioned in the statutory definition of publication.²¹²

FIGURE 16: PERCENTAGE OF RULINGS FINDING PUBLICATION WHEN COURTS REPORT ADDITIONAL DISTRIBUTION FACTS



One particularly interesting finding is the data regarding the rental, lease, or lending of a copyrighted work. The statutory definition provides that “rental, lease, or lending” constitutes one form of publication.²¹³ The data support a contrary conclusion, inasmuch as distribution by these means actually tends to reduce the likelihood that a court will find a work is published. The difference is statistically significant in the t-test analysis and will be revisited to determine how

212 See *supra* note 200 and accompanying text.

213 See 17 U.S.C. § 101 (2006).

this variable affects publication decisions when weighed against additional factors.²¹⁴

Figure 16 also presents an interesting anomaly between public performance and public display. Neither constitutes publication according to the definition in the 1976 Act.²¹⁵ For public performance, the data are consistent with the statutory definition: only 38% of publicly performed works are considered published by federal trial courts. Works that have been publicly displayed stand in stark contrast: nearly 87% of courts conclude that such works were published. Judges appear to be indifferent to copy quality generally but photographic copies do incline them to a finding of publication.

Figure 16 also illuminates an important subject of ambiguity that has puzzled both courts and commentators: whether the deposit of a work in an archive may constitute publication. Not enough cases reporting this variable exist to give the findings statistical significance. Nonetheless, it is interesting to note that publication is less likely to be found when works are deposited in a government archive such as a local zoning commission. Publication is more likely to be found in cases where a work is deposited in a public archive such as a museum or library and when the work is given to the archive by the copyright owner. This difference is intriguing because several treatises treat governmental and library deposits as having the same effect.²¹⁶

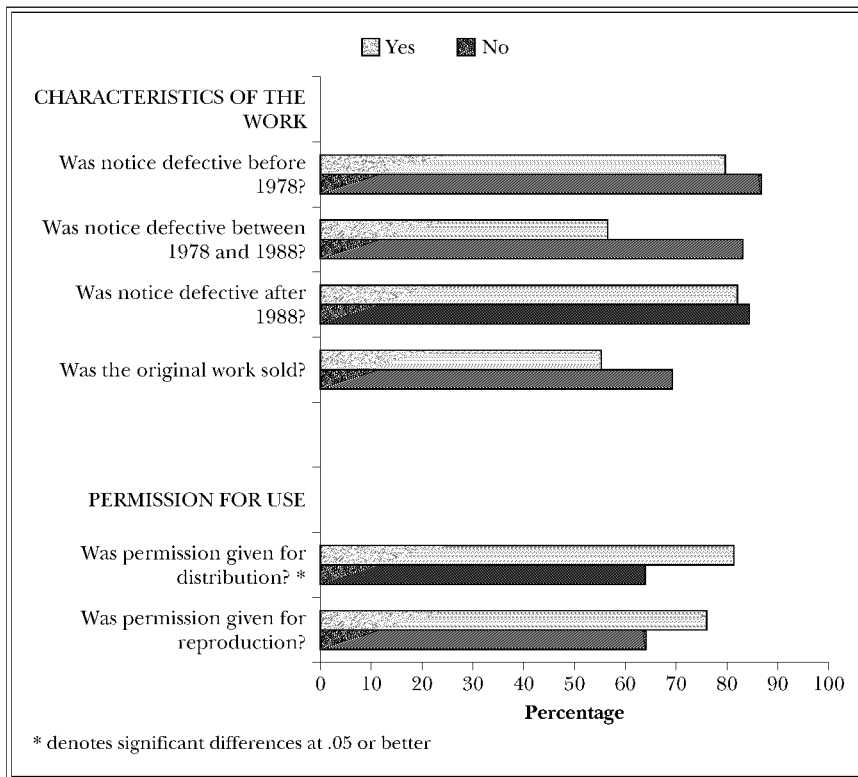
Figure 17 tests the impact of several characteristics of the work itself as well as whether permission was given for whatever distribution occurred.

214 See *infra* Table 2, notes 230–32 and accompanying text.

215 See *supra* notes 188, 200 and accompanying text.

216 See 3 PATRY, *supra* note 28, § 6:50 (“No general publication has been found . . . where architectural plans were filed with local permit authorities or distributed to a limited group of contractors . . . [or] where deposit was made with a library . . .”). Based on the data set forth in this section, I recommend revising such statements to reflect the difference between the two different types of deposits.

FIGURE 17: PERCENTAGE OF RULINGS FINDING PUBLICATION WHEN COURTS REPORT NOTICE, SALE OF ORIGINAL AND PERMISSION



Here the strong impact of copyright owner permission is apparent. More than 84% of district courts find a work to be published when permission is given for distribution, but less than 66% find publication when such permission is not present. In like fashion, permission for reproduction increases the odds of a publication ruling to more than 79%, well above the roughly 66% threshold when there is no reported evidence of such permission.²¹⁷ These findings will be tested below to determine which are most important to courts in making publication decisions.

C. *Multivariate Analysis of Variables Influencing Publication*

Although it is interesting to view the impact of each variable in isolation, it is also important to test them against each other to determine which ones matter most to courts in publication analysis.

²¹⁷ For both variables, the data do not differ significantly depending on whether the permission was express or implied from the circumstances.

Although many courts and scholars have made an array of good educated guesses as to the variables that affect copyright publication, without an empirical examination, we do not know which factors truly matter and to what degree. In this section, I will use probit analysis to measure the impact of a variety of variables.²¹⁸ I will begin generally by examining whether the “hands on” model or the “copyright owner consent” model from the Nimmer treatise is a better tool for predicting whether a work is published. The previous section indicated that neither factor is a necessary prerequisite to a finding of publication. However, as we saw in Figure 15, the presence of either one appears to make a finding of publication more likely. The results of this comparison are set forth in Table 1 and Figure 17.

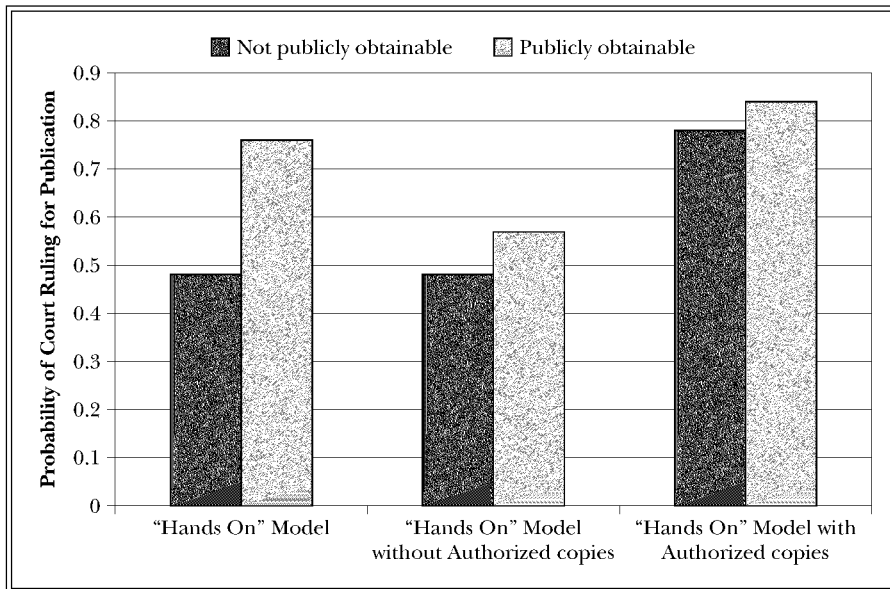
TABLE 1. MODELS OF FEDERAL DISTRICT COURT RULINGS ON PUBLICATION

<i>Variable</i>	Model I	Model II
Publicly obtainable	.74 ** (.25)	.22 (.29)
Authorized copies	—	1.04 *** (.24)
Constant	-.04 (.23)	-.32 (.24)
Log likelihood ratio	8.78 **	28.35 ***
Pseudo $-R^2$.04	.12
N=192		

* $p < .05$, ** $p < .01$, *** $p < .001$

218 Probit is one of several different methods within the family of regression tools. Regression “provides a robust technique for estimating the strength of the relationship between variables.” David C. Dixon, *Appendix A: Regression and Pooled Cross-Sectional Time Series*, in CONTEMPLATING COURTS 423, 423 (Lee Epstein ed., 1995). In its most common form, regression estimates the impact of one or more independent variables on a continuous dependent variable. In some cases, however, the dependent variable is discrete, taking only one of two possible values, and probit is an appropriate technique in such circumstances.

FIGURE 18: IMPACT OF “HANDS ON” MODEL WITH AND WITHOUT CONTROL FOR AUTHORIZED COPIES



For the models in Table 1, the dependent variable is whether the district court found that the work in question had been published (coded 1 if it was published, 0 if it was not). Model 1 estimates the impact of the “hands on” model. Consistent with the interpretive standard offered by Nimmer in 1956, it reveals that when copies are publicly available, a district court is significantly more likely to conclude that the work was published than in those cases where the public could not readily access the work in question. Plausible as these results may be, they do not account for whether the copyright owner authorized the distribution of copies, which is an additional consideration that both Nimmer and various courts have cited as a potentially determinative factor.²¹⁹ Do the effects of publicly obtainable copies persist once authorization is taken into account?

The clear answer, according to Model 2, is that they do not. The principal factor driving the publication determination turns out to be whether copies are authorized for distribution. Whatever impact the public availability of copies may appear to have on its own, that influence is subsumed by the presence of authorized copies. In short, district court judges are relying principally upon the copyright owner’s

219 See *supra* note 201 and accompanying text.

consent, not the availability of copies to the general public, when rendering their judgments.

Figure 18 illustrates the substantive impact of these variables across both model specifications. The estimated effects from Model 1 in Table 1 show (in the first pair of bars) that the “hands on” model produces a substantial change in the probability of a court finding that a work is published. This bivariate finding, of course, merely echoes the basic differences reported in Figure 15.²²⁰

The remaining two sets of bars in Figure 18 show that the impact of authorized copies far outweighs the influence of copies that are publicly available. In the absence of authorized copies, for example, courts have a roughly 40% probability of finding publication. By contrast, when authorized copies are distributed, the probability of finding publication doubles to approximately 80% irrespective of whether the public can access copies. Once I control for the presence of authorized copies, the estimated differences attributable to publicly available copies are rendered negligible. The estimated effects are unequivocal. It is the presence of authorized copies that has significance in determining whether courts will find that a work is published, not the availability of copies to the public.

These findings help to sort out some of the causal connections, but they do not reflect a more systematic accounting of the wider array of factors that might influence the determination of what constitutes publication. The data to this point suggest that broader sets of factors may well play a role in evaluating these copyright disputes. To examine the potential importance of such variables, I divided them into categorical models to determine whether any particular set best describes what is important to courts. The results of this exercise—setting forth the different models that were tested, each in isolation and then taken together—are presented in Table 2.

220 See *supra* Figure 15.

TABLE 2. MODELS OF FEDERAL DISTRICT COURT RULINGS
ON PUBLICATION

<i>Variable</i>	Applicable Law Model (1)	Work Model (2)	Distribution Model (3)	Accessibility Model (4)	Full Model (5)
Copyright Act of 1976	-.11 (.27)	—	—	—	-.52 (.35)
Decision date, 1976 or later	-.14 (.25)	—	—	—	-.04 (.32)
Textual work	—	.22 (.27)	—	—	.41 (.34)
Visual work	—	.50 (.26)	—	—	.69 (.36)
Sale of original	—	-.47 (.50)	—	—	-1.39 ** (.52)
No copyright notice	—	.41 * (.20)	—	—	.21 (.28)
Permission to distribute	—	—	-.11 (.24)	—	.35 (.32)
Publicly obtainable copies	—	—	.15 (.30)	—	-.18 (.37)
Copies of equal quality	—	—	.50 (.51)	—	.78 (.61)
Inferior copies	—	—	.32 (.55)	—	.26 (.66)
Authorized copies made or sold	—	—	1.08 *** (.28)	—	.87 ** (.34)
Unauthorized copies made or sold	—	—	-.02 (.28)	—	-.25 (.36)
Public performance	—	—	—	-1.20 *** (.25)	-1.30 *** (.33)
Public display	—	—	—	.41 (.34)	.55 (.43)
Rental, lease, or loan	—	—	—	-.80 *** (.24)	-.96 *** (.30)
Government archive	—	—	—	-1.59 *** (.42)	-1.55 *** (.51)
Museum/library archive	—	—	—	-.92 (.74)	-1.32 (.84)
Constant	.67 (.14)	.07 (.23)	-.68 (.54)	1.18 (.16)	-.07 (.73)
Loglikelihood ratio	1.32	10.14 *	29.77 ***	53.31 ***	88.22 ***
Pseudo – R ²	.01	.04	.13	.23	.38
N = 192					

*p<.05, **p<.01, ***p<.001

I begin with a somewhat simple model testing the possibility that the outcome of federal publication decisions may be a question of

timing or the source of law. This model does not provide any insight into the type of work or how the copyright owner distributed it. However, it was tested to illuminate whether there was a general bias in the courts that may have changed over time. Specifically, the first model tests whether courts were more or less likely to find publication if they used the understanding of the term that predated passage of the 1976 Act.²²¹ It accomplishes this goal by testing whether the court applied the 1976 Act or the understanding of publication that preceded it.²²² Next, the model tests the date of decision (before or after passage of the 1976 Act) to determine whether courts were inclined to treat publication differently after Congress softened the effects of publication without notice in 1976 and eliminated them altogether in 1989.²²³ Because publication under the 1976 Act no longer necessarily resulted in the harsh consequences of injecting the work into the public domain, one might question whether courts were more likely to make publication findings under the 1976 Act. Irrespective of the source of law, the date of the decision was also worth examining. If one subscribes to the belief that courts are wont to apply the spirit of a new law even if an older version is technically applicable,²²⁴ one might theorize that courts would find publication of pre-1976 works less frequently after passage of the 1976 Act because, due to the relaxed formality requirements, courts may act with more lenience and hesitate to cast works into the public domain. When examined in isolation, neither the source of law nor the decision date results in statistically significant findings. Therefore, despite the new lenience towards copyright formalities under the 1976 Act, these data indicate that neither the date of the decision nor the source of law are significant factors in explaining publication decisions.

The second model departs from timing and the source of law to test whether specific attributes of the work itself affect publication conclusions. This model looks to particular features of the work, such as its nature, whether the copyright owner kept the original, and if the

221 Some opinions decided after 1976 indicate that the court is applying the common law understanding of publication that preceded passage of the 1976 Act. *See* *Open Source Yoga Unity v. Choudhury*, 74 U.S.P.Q.2d 1434, 1439–41 (N.D. Cal. 2005); *Maljack Prods., Inc. v. UAV Corp.*, 964 F. Supp. 1416, 1423–25 (C.D. Cal. 1997).

222 The variable measuring the act is coded not by the date on which the case was decided but by whether the court applied the common law understanding of publication (coded as 0) or the statutory definition set forth in the 1976 Act (coded as 1).

223 *See supra* notes 35–39 and accompanying text.

224 An alternative narrative is the theory that courts are trending towards greater empathy for copyright holders than those who would seek to establish that works are in the public domain.

work was marked with a copyright notice conforming to federal guidelines.²²⁵ Because the importance of publication in copyright law originated in the context of books and other printed materials, one might theorize that courts treat textual works differently than visual works, like art, advertisements, and films.²²⁶ However, the results of this model indicate that, generally, the type of work does not provide a meaningful explanation for publication decisions. When the broad categories of textual and visual works are examined, neither one is a discriminating factor for federal trial courts. Similarly, in the second model, the sale of the original work does not appear to be a meaningful factor. Only one factor stands out from those tested so far. The absence of a copyright notice on the work is an important predictor, one that significantly increases the likelihood of a finding of publication.

Instead of the characteristics of the work, many cases and scholarly definitions focus primarily on distribution in defining publication. Therefore, one might expect an array of distribution variables to have a meaningful impact on judicial decisions. The third model examines these considerations by accounting for a variety of distributional characteristics.²²⁷ Despite their suggested importance, only one appears to make a meaningful contribution to the courts' decision making. The distribution of authorized copies continues to make an important difference to courts, even when additional distribution variables are measured against its impact. Therefore, it is clear that in making publication decisions, courts particularly look to facts indicating whether the copyright owner authorized the distribution of copies. Against this backdrop it is interesting to note that the existence of unauthorized copies bears no relationship to findings of publication. Therefore, if a court noted that an author permitted a publisher to sell copies of her novel, that fact would make a court more likely to find that work was "published." However, if instead a publisher distributed copies of the novel without the author's permission, that distribution is not as likely to affect the court's analysis one way or the other. Stated differently, the distribution of authorized copies is the guiding force in resolving publication issues, not merely the availability of copies.

225 Each variable was coded as 1 when present and 0 when absent or not reported.

226 See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, HARV. L. REV. (forthcoming 2012), available at <http://papers.ssrn.com/abstract=1911352>.

227 Again, each one was coded as 1 when present and 0 otherwise.

The data on copy quality are somewhat surprising. One may theorize that a court is more likely to find publication when the quality of the copies is equal to the quality of the original work. For example, one may expect a magazine article to be published when it simply reprints a text, but that a sculpture may not be published if photographs of the original were printed on postcards. In the first instance, the copy quality is equal to the original because both contain the exact same information. In the second example, the copy quality is inferior because the two dimensional postcard does not reflect all the information we can see from walking around the three dimensional work. Because more information is contained in a copy of equal quality—and less is present when the quality is inferior—one could plausibly hypothesize that publication would be more likely in the first instance. Interestingly, the data do not support this theory, instead indicating that copy quality bears no relationship to publication decisions.²²⁸ Taking all of the variables in the distribution model together, the theme that emerges is that permission of the copyright owner determines whether a work is published.

A difficult question—with no readily agreed upon answer—is whether the public availability of a work bears upon the determination of whether a work is published. For example, conventional wisdom among copyright experts is that deposits in museums, archives, and government offices should be treated similarly and reduce the finding of publication.²²⁹ The fourth model, which examines variables that gauge the means of public access, yields some interesting findings as well. This model indicates, for example, that courts treat government archived deposits differently from works found elsewhere. Evidently courts do not so readily regard works as published when they are placed in government archives. Deposits made into museum or library collections, on the other hand, do not sway courts from the norm in other publication cases. Based on this difference between the two types of deposits, practitioners and copyright scholars should not assume that courts will treat works filed in government archives similarly to works that are donated to museums or library collections.

Another surprising finding evident in the public accessibility model can be seen through the treatment of works that were rented,

²²⁸ For examples of publication in cases where copy quality was inferior, see *Bell v. E. Davis International, Inc.*, 197 F. Supp. 2d 449, 459 (W.D.N.C. 2002), *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978), and *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 782–83 (S.D.N.Y. 1968).

²²⁹ See *supra* note 216.

leased, or loaned. Here, an interesting gap occurs between the statutory definition and judicial opinions. In the 1976 Act, publication is defined to include the “distribution of copies . . . by rental, lease, or lending.”²³⁰ Based on the statute, one may expect that when one of these variables is present, a work is more likely to be deemed published. The opposite trend is reflected in the data. Courts are significantly less likely to conclude that a work is published when a work was rented, leased, or loaned. From this finding, it becomes clear that the presence of authorized copies does not tell the whole publication story. Rather, the public accessibility of copies matters, at least in this context. Despite the fact that the work was made available in authorized copies, a finding that the copies were rented, leased, or loaned²³¹ is one that courts use to support a finding that a work has not been published. One factual scenario that may illustrate this tendency is the distribution of films for viewing in public movie theaters.²³² Although the films are distributed in the form of authorized copies, the film reels are not available to the public and are loaned to the theaters with the expectation that the copy will be returned. Such a fact pattern is not as likely to result in a finding of publication.

The accessibility model also reveals an intriguing anomaly between public performances and displays. According to § 101 of the 1976 Act, neither variable should be considered as evidence of publication. Although the statutory definition treats these distributions the same, courts weigh their impact differently. One may expect from the definition that both variables would weigh in favor of a finding that a work is unpublished. Consistent with this expectation, the data indi-

230 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541, 2543 (1976).

231 Licensed works were also treated as works that were rented, leased, or loaned.

232 See, e.g., *Paramount Pictures Corp. v. Rubinowitz*, 217 U.S.P.Q. 48, 50 (E.D.N.Y. 1981) (declining to follow Nimmer treatise and instead finding no publication where distribution of *Star Trek* episodes under two types of licenses, library licenses and booking licenses, as library licenses provided that the television stations received copies of all seventy-nine ‘Star Trek’ episodes which the stations retained for the term of the license (at the end of the term, the stations were required to return all the prints to Paramount) and under booking licenses, television stations received the episodes one by one for broadcast and returned them within forty-eight hours of broadcast); *Patterson v. Century Prods., Inc.*, 19 F. Supp. 30, 34 (S.D.N.Y. 1937) (finding that distribution of the film reel was no more than a limited publication because “Patterson’s loan of the film without charge to certain religious, charitable, and educational organizations was so hedged round with conditions that the purpose of the author not to reproduce copies for sale or for rent and not publish it generally is clearly manifest”); cf. 1 NIMMER & NIMMER, *supra* note 19, § 4.11[A], at 4-56 (“[W]here distribution of a film is made on an unrestricted and commercial basis, such distribution constitutes a general publication.”).

cate that public performance substantially reduces the likelihood that a court will find a work to be published. The data do not validate the same expectation for works that are publicly displayed. Although the public display finding falls short of statistical significance, it indicates a tendency in the opposite direction—that public display may increase, or, at a minimum, does not decrease the likelihood of a publication finding.

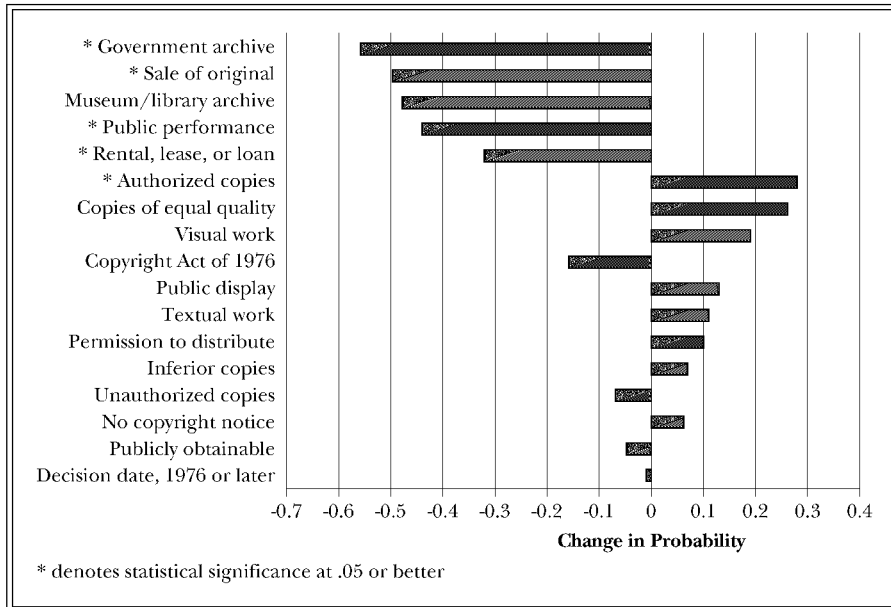
To this point, the story that emerges from the data is that each set of explanatory factors, except for those in the first model, can help account for publication decisions. In one way or another, the relevant factors emphasized by doctrine and legal scholarship bear directly upon how judges resolve cases in this copyright context; judges are likely to consider the characteristics of the work, as well as how that work is distributed and accessed. But what are the relative weights of these various decisional perspectives? To answer this question, the final model in Table 2 combines these explanations into a single equation.

In the Full Model, five variables emerge as statistically significant to courts in making publication decisions. Specifically, a finding of publication is more likely when authorized copies are reported. A conclusion of publication is less likely if the court reports that (1) the original was sold, (2) the work was publicly performed, (3) the work was rented, leased, or loaned, or (4) the work was deposited in a government archive. Taken in isolation in Model 1, the estimate for the sale of the original was just shy of statistical significance, but its somewhat stronger effect was masked by failing to account for possible confounding factors. The results in the Full Model reveal that once other variables are held constant, courts are less likely to make a finding of publication if the original work, such as an original sculpture or painting, is reported to have been sold. Whether the work was marked with a valid copyright notice—a significant predictor in the second model—carried no particular statistical weight. In this model, its importance was eclipsed by competing explanations.

In order to illustrate the magnitude of each variable, Figure 19 plots the probabilistic impact of each of the coefficients in the Final Model. Technically, these data reflect, for each variable, the estimated change in the probability of a finding of publication, holding other variables at their mean values. More substantively, the data reveal the relative impact of each variable, reflecting the extent to which the presence of each case characteristic increases or decreases the likelihood of a court ruling that a work is published. Positive changes (increases in the likelihood that a work will be considered

published) are represented by deviations to the right, while negative changes are shown as leftward deviations.

FIGURE 19: ESTIMATED EFFECTS ON A FINDING OF PUBLICATION



The variable exercising the greatest impact is a finding that a work was deposited in a government archive. These are cases in which the court made specific findings that the work was deposited in the files of some sort of governmental organization. Architectural plans deposited in the offices of zoning boards are common examples within this category.²³³ Such a finding reduces by 56% the probability of finding that the work was published. A finding that the original work was sold has a similar effect, decreasing the likelihood of publication by 50%. Deposits in museums and libraries appear to reduce the likelihood of publication as well, but this estimate should be viewed with some circumspection, since it is not over the threshold of statistical significance.

Public performance also considerably reduces (by 44%) the likelihood of a ruling of publication. A finding that a work was rented, leased, or loaned also significantly decreases the probability of a find-

²³³ See, e.g., *McIntosh v. N. Cal. Universal Enters. Co.*, 670 F. Supp. 2d 1069, 1097–98 (E.D. Cal. 2009) (finding limited publication); *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 186 F. Supp. 2d 1, 18 (D. Mass. 2002) (finding no publication); *MacMillan Co. v. I.V.O.W. Corp.*, 495 F. Supp. 1134, 1145 (D. Vt. 1980) (finding limited publication).

ing of publication by 32%. The presence of authorized copies also produces a substantial change but in the opposite direction. It increases by 28% the likelihood of publication. The effects of the remaining variables are more negligible given that none of them is statistically significant.

Taken together these results tell an important story: when deciding if a work is published in the public domain context, courts look at copyright owner conduct, intent, and the work itself to determine whether copies were distributed or made available to the public. In particular, what copyright owners choose to do with their work affects how federal judges view these cases. For example, the distribution of authorized copies argues in favor of publication. Despite this tendency, when the authorized copies are rented, leased, or loaned, the distribution significantly diminishes the likelihood that a work will be deemed published. Courts are less likely to find publication in this context even though this particular distribution is considered a publication in both the Nimmer treatise and the statutory definition of publication.²³⁴ These results show that courts apply a much more nuanced view of publication than the general view that publication occurs by distribution of authorized copies similar to the original.

A finding of public performance is another indicator at the heart of many case outcomes. Such a finding is often mentioned when works are seen but not distributed. When courts note this fact, they are especially likely to conclude that a work is unpublished. One reason why public performance is mentioned so prominently may be that it marks an important way in which copyright publication is different from the common meaning of the term. Here public availability does not work as a synonym for publication, a finding that stands in contrast to the fair use context, where the judges often conflate those two terms.²³⁵ When copyright owners intend to show but not distribute a work, courts respond accordingly by ruling that the work is not published. Interestingly, the performance variable demonstrates that courts look not at a general intent to make the work known, but the specific intent to make copies publicly available. In sum, when an author intends to distribute copies—or alternatively takes steps to restrict distribution—judges weigh that intent when resolving copyright cases.

Quite apart from the issue of distribution, the prominence of notice advances our understanding of how courts view the sale of an original work. The sale of the original is not expressly mentioned in

234 See *supra* notes 200–01 and accompanying text.

235 See *supra* note 190 and accompanying text.

the statutory definition. However copies are referenced. The definition of copies appearing in the same section of the act states that an original or “first fixed” version is, for copyright purposes, to be treated like a copy of a work.²³⁶ The Nimmer definition explicitly includes the sale of an original work as publication. It provides that “publication occur[s] when, by consent of the copyright owner, the *original* or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public.”²³⁷ The data show that courts do not follow this aspect of the statutory or Nimmer publication definitions. The sale of an original work substantially decreases the likelihood that the court will find that the work was published. Clearly, when considering whether a work is in the public domain, courts treat the sale of an original work differently from the sales of copies. Exploring the reasons for this distinction will be fertile ground for future research.²³⁸

V. CONCLUSION: REFINING PUBLICATION DEFINITIONS TO REFLECT COPYRIGHT PRECEDENT

These data substantially advance our understanding of copyright publication precedent. The empirical approach does not explain the

236 The definition provides:

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

17 U.S.C. § 101 (2006). This definition remains ambiguous because it does not specify whether a single original, never duplicated, falls within the plural term of “copies.” But by defining copies as both “material objects” and a “material object in which the work is first fixed,” it appears to leave the door open to this possibility.

237 1 NIMMER & NIMMER, *supra* note 19, § 4.03[A], at 4-24 (emphasis added) (footnotes omitted) (citing *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 F. 54 (1st Cir. 1896)).

238 One reason for this difference may be the lingering effects of *Werckmeister v. American Lithographic Co.*, 134 F. 321 (2d Cir. 1904), in which the Second Circuit Court of Appeals held that the exhibition of an original painting did not constitute publication. *See id.* at 326. In this case, the copyright in the painting had been assigned but the artist retained the original. *See id.* at 323. Nonetheless, the opinion includes the following dicta:

It must be conceded that the author of a work of art does not lose his common-law copyright by exhibition in his studio for purposes of sale, and that the same rule would be applied to an association of artists exhibiting their work in a common gallery solely for this purpose.

Id. at 330.

results in any one particular case. Rather, through analysis of many judicial decisions this Article has sought to illuminate some general principles that emerge from patterns reflected in the data. Looking at these patterns advances our understanding of copyright publication in the following ways. The claim that publication is of diminished importance since passage of the 1976 Copyright Act finds no empirical support in this study. Instead, the data demonstrate the opposite trend. Since 1976, federal courts have seen an increasing number of copyright cases that involve publication issues. One demonstrated reason for this increase is that in addition to cases adjudicating the question of whether a work is in the public domain, federal courts are more frequently confronting publication issues in other copyright contexts, especially fair use.

The data support the idea proposed by some commentators that courts treat the meaning of publication differently depending on the copyright question under consideration. Because the issues courts consider important to this inquiry change with the legal context, an important step in clarifying publication is to articulate a definition for each context. This Article advances that goal by explaining how the meaning of publication differs in the fair use and public domain contexts.

When courts decide publication issues in fair use cases, publication means “publicly available.”²³⁹ Although the distinction between limited and general publication remains relevant in public domain cases, the data indicate that federal courts have not applied it in fair use cases. Due to the multi-factor nature of fair use analysis, courts use a black and white approach to publication instead of working in shades of grey as they do when determining if a work is in the public domain. Fair use analysis involves balancing four factors in light of the purposes of copyright law.²⁴⁰ Publication is one variable taken into consideration under one of the factors.²⁴¹ Because fair use decisions generally do not turn on this factor alone, the nuanced limited/general distinction is not a necessary tool in this context.

When courts look at publication in fair use cases, they focus primarily on whether the second publisher has violated the author’s right of first publication.²⁴² If an author has not yet decided to distribute a work, courts are generally less inclined to give someone else

239 See *supra* Part III.D.

240 See 17 U.S.C. § 107.

241 See *supra* note 54 and accompanying text.

242 See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548–49 (1985).

that privilege through the back door of the fair use doctrine. If a work has been made publicly available to some extent, the right of first publication is not at issue, and courts do not need to resort to the limited publication doctrine, because equitable considerations may be weighed through other fair use factors. Consequently, the case law reflects an understanding of publication in the fair use context that is quite different from the more nuanced approach applied in other copyright contexts.

Under the statutory definition of publication, public performance and displays do not amount to publication. Despite this statutory exclusion, in the fair use context where courts focus on public availability, it would be logical to treat public performance and display as instances of publication. Of the three opinions that decided whether *I Have a Dream* was published for purposes of determining whether the speech is in the public domain, only one retains precedential value—the one that concluded that the speech is unpublished in the public domain context.²⁴³

One should not expect the same analysis or the same conclusion if the publication question were considered in the fair use context. Dr. King delivered the “I Have a Dream Speech” speech as an open gesture of moral leadership. He chose a meaningful public setting and gave the press advance copies to make it easier for them to reprint his message. He chose the final version to be made public. In doing so, Dr. King took full advantage of his right of first publication by choosing the ideal time and dramatic setting for its delivery. If the King estate were to challenge the reprinting of the speech in a book, and the publisher asserted fair use as a defense, a court would likely find that the speech was “published” because of its widespread public availability. In the fair use context, courts focus on the work’s public accessibility in deciding publication issues.

The data reflect a more nuanced understanding of publication in the public domain context. The presence of authorized copies is the strongest indicator that a court will find a work to be published. However, if the copies are treated in a way that demonstrates contrary intent, such a consideration may mitigate the presence of authorized copies. The most prominent mitigating factors that lead courts to find limited publication or no publication at all are when the work is

243 See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 107–08 (S.D.N.Y. 1963). The district court decision in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1354 (N.D. Ga. 1998) (granting summary judgment for the defendant based on a finding that the speech is in the public domain), *rev’d*, 194 F.3d 1211 (11th Cir. 1999), was overturned for improperly deciding questions of fact. See *Estate of Martin Luther King, Jr., Inc.*, 194 F.3d at 1220.

deposited in a government archive, the original is sold; copies are rented, leased, or loaned; or if the work was publicly performed.

These findings reflect some significant gaps between the patterns in judicial decisions and some common definitions of publication. The “hands on” definition requires the presence of publicly available copies. As a general matter, it is the presence of authorized copies that is more significant to courts, than whether copies are available whether authorized or not. The more recent Nimmer definition set forth in the current treatise requires copyright owner authorization for a publication to occur. It therefore fails to embrace situations in which the unauthorized distribution of copies is taken into account in determining that a work is published. The Nimmer treatise definition, relying on one 1896 case, also provides that the sale of an original work constitutes publication. However, the data indicate that though this may sometimes occur, the sale of an original work is more often an indicator that the court will find the work to be unpublished. The statutory definition does not include any particular intent requirement. It embraces the idea that works made available to the public are to be considered published. However, depositing a work in a government archive tends, more often than not, to be a factor leading to the conclusion that a work is unpublished. Similarly, the statute defines rental, lease, and lending as a distribution that constitutes publication. Yet in practice, courts view this fact to weigh in favor of the conclusion that the work has not been published.

The story that emerges from these gaps is that courts use their own nuanced view of what constitutes publication, and rely heavily on the copyright owner’s intent with respect to authorized copies. When the facts show that they are distributed freely, it weighs in favor of publication. When the work is made accessible in a way that demonstrates that the copyright owner is retaining control over the copies, publication is less likely to be found. Although these data looking at past decisions allow for statistical prediction, they are not a crystal ball. One cannot guarantee that future publication decisions will follow the patterns of the past. Still, if we accept that courts rely on a wide range of considerations including precedent in the form of judicial decisions, these data construct a picture of the empirical regularities that underlie this important domain of copyright law.²⁴⁴

²⁴⁴ With the hope that other scholars will look into the publication data and find additional insights, the code book used for gathering the data and an excel spreadsheet containing all the data will be available on the author’s web site upon publication of this Article.