

An Empirical Study of U.S. Copyright Publication Cases

Deborah R. Gerhardt*

The article presents the first empirical study of copyright publication case law. Publication is a magic moment in copyright law. For works created before 1989, publication is the pivotal moment when a work could acquire copyright protection that would give its owner powers to control its use for more than a century.¹ But if that owner did not observe required legal formalities, no such powers attach.² 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.³

Notwithstanding the dispositive importance of “publication,” the copyright meaning of the term is not clear, and can be difficult to pinpoint.⁴ Especially in cases involving non-textual works or original documents, the moment of publication is not

* Deborah R. Gerhardt is an Assistant Professor of Law at the University of North Carolina School of Law. This project is supported by a generous grant from the Andrew W. Mellon foundation. The author would like to thank Laura N. Gasaway, Peter Jaszi, and Kevin T. McGuire and UNC law students Cassondra C. Anderson, Rachel Blunk, John Kivus and Satish Chintapalli, who provided coding and research assistance.

¹ MELVIN B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01[B](2010); 17 U.S.C. § 405 (2006).

² NIMMER & NIMMER, *supra* note 1, § 4.01[B]

³ *See, e.g.*, JAMES BOYLE, THE PUBLIC DOMAIN 38-9 (2009) (offering “working definitions” of the public domain).

⁴ Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1770, 1724 (2008) (concluding that “the meaning of publication remains, in many circumstances, fuzzy”); *Werckmeister v. American 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.”).

This draft is a work in progress and is not yet ready for citation.

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. A unique sculpture or painting displayed in an art gallery may be found to be “published,”⁵ while Martin Luther King’s “I Have a Dream Speech,” though broadcast internationally and reprinted in news media, was found to be “unpublished.”⁶

The vast majority of decision-making about the published status of works occurs outside the courts. Everyday, 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 amass collections of art slides they create or purchase in their travels. When the art department decides to phase out slide projectors in favor of new digital technology, they 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 guess based on common practices among similar professionals. If they 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. As Kay Levine aptly noted, “is it not our obligation as academics to [ask whether] . . . anyone can know the state of the law

⁵ See *Scherr v. Universal Match Corp.*, 297 F.Supp. 107 (D.C.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.); *Pierce & Bushnell Mfg. v. Werckmeister*, 72 F. 54, 58-9 (1st Cir. 1896) (holding that display of the original painting in Munich without a copyright notice resulted in publication).

⁶ *King v. Maestro*, 224 F. Supp. 101 (S.D.N.Y. 1963); *Estate of Martin Luther King, Jr. Inc., v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999).

This draft is a work in progress and is not yet ready for citation.

from reading a handful of select cases?”⁷ Knowledge of copyright publication based on a small set of cases can be especially risky since precedent can often seem inconsistent and even contradictory.⁸ 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.⁹ The goal of the project is to determine whether publication has a consistent meaning in different copyright contexts and to identify whether judges respond to a clear set of indicators on a consistent basis 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 scholarly literature by broadening our understanding of publication precedent. The findings will also provide valuable information to lawyers, librarians, publishers and

⁷ Kay L. Levine, *The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. FLA. L. J. L. & PUB. POL’Y 283, 284 (2006).

⁸ NIMMER & NIMMER, *supra* note 1 § 301, APPENDIX 4A *The Senate Report on the Copyright Act of 1976*. (“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.”).

⁹ 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.*, 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 6:30- 6.73; NIMMER & NIMMER, *supra* note 1, §§ 4.01- 4.13 (2010); Cotter, *supra* note 4; Anthony Reese, *Public But Private: Copyright’s New Unpublished Public Domain* 85 TEX. L. REV. 585 (2007); Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185 (1956).

This draft is a work in progress and is not yet ready for citation.

museums to determine whether the general principles they use in practice conform to an accurate understanding of the precedent.

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. Section I provides background on the issue of publication in copyright law. Section II describes the dataset. It sets forth the methodology used for identifying the relevant cases and collecting the data. Section III sets forth descriptive statistics reflected in the dataset and explains what they contribute to our understanding of publication in copyright law. First, the section will set forth general summary statistics such as the distribution of opinions by level of court, type of work, and the year.

The data is also used to clarify some of the publication ambiguities latent in copyright jurisprudence. Statistical analysis will be used to demonstrate how precedent illuminates questions such as: whether only authorized acts may result in publication and whether the distinction between limited and general publication remains a relevant inquiry after Congress defined publication in the 1976 Act. This section 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. Next, various distribution variables are analyzed to determine whether their presence leads to a probability that a court will find publication. Section IV summarizes general conclusions of the study.

I. The Special Meaning of “Publication” in Copyright Law

Historically, the meaning of “publication” has been critical to determining whether a work is protected by copyright or in the public domain and available for use in

This draft is a work in progress and is not yet ready for citation.

the United States.¹⁰ Works that pre-date 1989 can enter the public domain in one of two ways: by expiration of the copyright term or by publication without observance of formalities. The primary ambiguity on either track surrounds a single word: “publication.” From 1909 to 1978, the federal copyright term began at publication,¹¹ and if a work was “published” without adherence to certain formalities (including the use of a proper copyright notice) copyright protection would be forfeited, and the work would become part of the public domain.¹² Pinpointing this moment is critical to calculating the

¹⁰ 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.” Copyright Act of May 31, 1790 § [1][a]. 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.* at § 3. A copy of the work was to be sent to the Secretary of State “within six months after the *publishing* thereof.” *Id.* at § 4 (emphasis provided). Under the Act of 1790, both previously published and unpublished works could be protected by copyright. *Id.* at § 3. In 1802, notice of the claim to copyright was also required to appear on the work. *Id.* at § 2[a].

In 1831, Congress continued to provide that the copyright term began at recordation. See, Copyright Act of 1831, § 1. 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.* at § 4 (emphasis provided).

In subsequent revisions before 1909, recordation remained the point at which copyright duration began. However, 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.” Copyright Act of 1871 § 90 (emphasis provided). The Copyright Act of 1891 provided that “No 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].” Copyright Act of 1891, § 4956 (emphasis provided).

¹¹ 17 U.S.C. § 24 (1909) (“[T]he copyright secured by this title shall endure for twenty-eight years from the date of first *publication*.”) (emphasis provided).

¹² 17 U.S.C. § 10 (1909) (providing “Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; 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 . . .”).

This draft is a work in progress and is not yet ready for citation.

duration of the copyright term. When works were published without observing legal requirements existing at the time, they would have no federal copyright protection at all.¹³ When determining the current copyright status of a work, one must apply the law that existed at the time the work was published.¹⁴ To determine whether a work was published before 1978, it is necessary to look at past federal case law for the meaning of “publication.”¹⁵

The 1976 Act changed the moment when copyright protection begins from publication to the moment of creation.¹⁶ However, initially, the observance of formalities was still necessary for copyright protection. Works created between 1978 and 1989 also required the observance of formalities for copyright protection to attach to published works.¹⁷ However, if these formalities were not observed, the statute provided cure provisions so that the results of inadvertent omissions were not as harsh.¹⁸ The formality requirements for copyright protection were abandoned in 1989 when the United States agreed to conform its copyright laws to the Berne Convention. After 1989, all copyright protection automatically attaches to qualified works the moment they are fixed in some tangible form.¹⁹ For works created before 1989, publication remains dispositive in

¹³ See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

¹⁴ Cotter, *supra* note 4 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.”).

¹⁵ *Id.*

¹⁶ 17 U.S.C. § 102(a) (2006).

¹⁷ 17 U.S.C. § 405 (2006).

¹⁸ *Id.*

¹⁹ 17 U.S.C. § 301(a) (2006).

This draft is a work in progress and is not yet ready for citation.

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 many works created after 1978, publication remains important to determining the length of time a work is protected by copyright. For “anonymous works, pseudonymous works, and works made for hire,” the copyright term runs for “95 years from the year of its first publication” or “120 years from creation, whichever expires first.”²⁰ Therefore, even for many twenty-first century works, the publication date must be known in order to measure the copyright term.

No matter when a work was created, its publication status remains important for analyzing various other copyright issues.²¹ 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 work.”²² Whether a work is considered published or unpublished under this factor is balanced along with other factors in determining whether a use is fair.²³ Sometimes the unpublished nature of a work can have a dispositive impact on the fair use conclusion. For example, in *Harper & Row*,²⁴ the Supreme Court had the task of deciding whether the Nation’s distribution of excerpts from President Gerald Ford’s unpublished memoir was a fair use under 17 U.S.C. Section 107. The Court

²⁰ 17 U.S.C. § 302(c) (2006).

²¹ PATRY, *supra* note 8, § 6:48, Cotter, *supra* note 4, 1726, 1728-51.

²² 17 U.S.C. § 107(2) (2006).

²³ *Id.*

²⁴ *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

This draft is a work in progress and is not yet ready for citation.

emphasized that “the fact that a work is unpublished is a critical element of its `nature” under the second of the four fair use factors, and that “the scope of fair use is narrower with respect to unpublished works.”²⁵ In *Harper & Row*, the unpublished nature of Ford’s manuscript was the critical piece of evidence that defeated the fair use defense.²⁶ The Court articulated the general principle that “the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.”²⁷

A work’s publication status must be determined in order to properly register it with the United States copyright office. Federal law generally requires the copyright owner to deposit one copy of unpublished works and two copies of published works.²⁸ For some works, such as unpublished pictorial or graphic works, deposit of “identifying material” may be sent instead of an actual copy.²⁹ Therefore, 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.³⁰ Therefore,

²⁵ *Id.* at 564.

²⁶ *Id.* at 595.

²⁷ *Id.* at 590. *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 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.”).

²⁸ 17 U.S.C. § 408(b) (2006); 37 C.F.R. § 202.20(c)(1)-(2) (2009). However, one copy may be sufficient if the work was “first published outside the United States.” 17 U.S.C. § 408(b)(3) (2006).

²⁹ 37 C.F.R. § 202.20(c)(2)(iv) (2009).

³⁰ 17 U.S.C. § 411(b) (2006). *Elsevier v. Muchnick*, 130 S. Ct. 1237 (2010); *PRC Realty, Inv. v. National Ass’n of Realtors, Inc.* 766 F.Supp. 453, 4__ (E.D. Va. 1991)(“The registration is, after

This draft is a work in progress and is not yet ready for citation.

the publication status and appropriate type of deposit must be determined before a copyright owner may obtain the help of a federal court to protect the work.

The remedies available to a copyright owner also may be a direct consequence of whether the work has been 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.”³¹ Yet, if the work is deemed “unpublished,” an innocent infringement defense may not be available even if no notice appeared on the work.³² 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. However, if the architectural plans are deemed “unpublished,” a defense of innocent infringement will not be available to mitigate damages.³³

Copyright protection may only be available 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 1990.³⁴ Because

all, merely the plaintiff’s “ticket” to court; the protection of the copyright arises at the time of the creation of the work.”).

³¹ 17 U.S.C. § 401(d) (2006); *Intown Enters Inc. Barnes*, 721 F. Supp. 1263 (11th Cir. 1989).

³² *Intown Enters.*, 721 F. Supp. at 1266 (11th Cir. 1989) (holding that “no 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.”).

³³ *Id.*

³⁴ 17 U.S.C. § 102(a) (2006).

This draft is a work in progress and is not yet ready for citation.

architectural works were not covered by the copyright act before that date, architectural works published before 1990 are not subject to federal copyright protection.³⁵

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.³⁶ Timing of publication also dramatically affects the amount and type of damages available from a copyright infringement claim. A copyright owner who registers her work within three months of publication may recover statutory damages³⁷ amounting to as much as \$150,000 per work for willful infringement.³⁸ Registration within three months of publication also makes the copyright owner eligible to recover

³⁵ Home Design Services, Inc. v. David Weekley Homes, LLC, 548 F.Supp.2d 1306, (M.D.Fla.,2008) (quoting 37 C.F.R. § 202.11(d)(3)(i) 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 exclude from protection unpublished building designs “that were unconstructed and embodied in unpublished plans or drawings on December 1, 1990, and remained unconstructed on December 31, 2002.” 37 C.F.R. § 202.11(d)(3)(ii) (2009).

³⁶ Siegel v. Warner Bros. Entertainment Inc., 542 F.Supp.2d 1098 (C.D.Cal. 2008) (finding that filing a termination notice 11 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).

³⁷ 17 U.S.C. § 412 (2006). The statute provides: “no 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.”

³⁸ 17 U.S.C. § 504(c)(2) (2006).

This draft is a work in progress and is not yet ready for citation.

attorney's fees.³⁹ It is necessary to identify the moment of first publication in order to be eligible for these remedies or to defend against them.

The place where a work is first published may also affect its copyright status.⁴⁰ An unpublished work may be protected by United States copyright law regardless of the author's nationality or residence.⁴¹ 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.⁴² However, publication in the United States within thirty days of first publication in a non-treaty nation will result in US copyright protection.⁴³ Place of publication is also important in determining how many copies of a work should be placed on deposit when a work is registered.⁴⁴ 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.⁴⁵

Despite the significant legal consequences of publication, determining whether the moment occurred is often difficult to identify. The Second Circuit described the

³⁹ 17 U.S.C. § 412.

⁴⁰ 17 U.S.C. § 104 (2006).

⁴¹ 17 U.S.C. § 104(a) (2006).

⁴² 17 U.S.C. § 104(c) (2006).

⁴³ 17 U.S.C. § 104(b)(6) (2006).

⁴⁴ 17 U.S.C. § 408(b) (2006); 17 U.S.C. § 104 (2006).

⁴⁵ For some hypothetical scenarios illustrating the potential importance of this issue, *see* Cotter, *supra* note 2 at 1746-51.

This draft is a work in progress and is not yet ready for citation.

concept of publication as “clouded by semantic confusion.”⁴⁶ The 1909 copyright statute did not define publication.⁴⁷ 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.”⁴⁸ In 1997, Congress retroactively indicated that selling phonorecords was not publication under the 1909 Act.⁴⁹ However, the 1909 Act itself provided no general definition to help in sorting out the issue of publication in many contexts.⁵⁰ This omission was intentional.⁵¹ Congress apparently found it too difficult to draft a general definition.⁵² As a result, “publication” became a complicated term of art that has generated a host of problems in applying copyright law to specific works. Congress took a step in fixing this problem by including the following definition of publication in the 1976 Copyright Act:

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

⁴⁶ *American Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956).

⁴⁷ Unfortunately, “Congress declined to define ‘publication’ in the 1909 Act, and courts have split over how to define the term for copyright purposes.” *La Cienega Music Corp. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995); PATRY, *supra* note 8 at § 6:30; NIMMER & NIMMER, *supra* note 8, at 186.

⁴⁸ PATRY, *supra* note 8, at § 6:30 (citing 17 U.S.C. Section 62 (1909 renumbered § 26 in 1947, repealed 1978)).

⁴⁹ 17 U.S.C. § 303 (2006).

⁵⁰ *See supra* note 37 and accompanying text.

⁵¹ *Hearings on S. 6330 and H.R. 198553 Before the Joint Committees on Patents*, 59th Congress, 1st Session 71 (1976).

⁵² *Id.*

This draft is a work in progress and is not yet ready for citation.

publication. A public performance or display of a work does not of itself constitute a publication.⁵³

Still, many ambiguities remain.

One source of confusion surrounding “publication” is that the copyright meaning of the term is different from our lay understanding. 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. to communicate (a defamatory statement) to some person or persons other than the person defamed.⁵⁴

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 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.” However, a poem circulated in this way may be considered “published” for copyright purposes because “by consent of the copyright owner, the original or tangible copies of a work [were] . . .

⁵³ 17 U.S.C. § 101 (2006).

⁵⁴ *To publish Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/published> (last visited July 29, 2010).

This draft is a work in progress and is not yet ready for citation.

given away, or otherwise made available to the general public.”⁵⁵ 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. However, a work broadcast on television may be considered “unpublished” as a matter of copyright law.⁵⁶ Releasing a work through public performance or display does not (without the triggering of additional variables) constitute “publication” as a matter of law.⁵⁷

The legal definition of “publication” is dependent on the context in which it is used. “Publication” in copyright law differs from how the term is defined in defamation law and in other areas of intellectual property law.⁵⁸ Even in copyright doctrine, the term does not have a singular meaning.⁵⁹ Professor Cotter observed that “publication has been

⁵⁵ See *Bell v. Combined Registry Co.*, 397 F.Supp. 1241 (N.D. Ill. 1975) (quoting *Nimmer*) (circulation of poem in letters to servicemen deemed a publication).

⁵⁶ *Estate of Martin Luther King, Jr. Inc., v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999).

⁵⁷ See 17 U.S.C. § 101 (2006).

⁵⁸ *American Visuals Corp. v. Holland*, 239 F.2d 740 (2d Cir. 1956); Publication is an element of state law defamation claims. 50 Am. Jur. 2d Libel and Slander § 228 (citations omitted). “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. *Michael Wroten v. Vulcan Chemicals, L.L.C.*, 2005 WL 2318149 (M.D. Louisiana 2005 (quoting *Wisner v. Harvey*, 694 So.2d 348, 350 (1st Cir. 1996)) (“The ‘publication’ element of a defamation action ‘requires the publication or communication of defamatory words to someone other than the person defamed.’”); *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1552 (10th Cir., 1995) (quoting *Magnolia Petroleum Co. v. Davidson*, 148 P.2d 468 (Okla. 1944) (“publication is the communication of defamatory matter to a third person or persons.”). 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. 50 Am. Jur. 2d Libel and Slander § 228 (citations omitted). This footnote will be expanded to include definitions of publication in the patent context.

⁵⁹ See generally, *NIMMER & NIMMER*, *supra* note 8 (separately analyzing the meaning of publication in the contexts of sound recordings, public performance, film, art and deposits of works in public collections).

This draft is a work in progress and is not yet ready for citation.

pressed into service for too many disparate purposes” to have a singular meaning.⁶⁰

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 term is often analyzed differently depending on the legal issue being decided.

Even for purposes of analyzing a single issue, different factual contexts may affect the way publication is defined. Professor Nimmer suggests that the copyright meaning of “publication” depends on the degree to which the copyright owner gave up control of physical copies to the public.⁶¹ His definition embraces the understanding that “the work is published when the reproductions are publicly distributed or offered to a group for further distribution or public display.”⁶² Yet Nimmer qualifies this definition in certain contexts, asserting for example, that “[p]lacing a work in a public file on or after January 1, 1978 clearly does not constitute an act of publication. Some pre-1978 cases held that filing in a governmental office constitutes a publication. However, the better view was that such filing did not constitute a publication.”⁶³ In this qualifying passage, Nimmer was concerned particularly with architectural works on file because of legal requirements, not an author’s desire to disperse the work. In an analogous context, such

⁶⁰ Cotter, *supra* note 4, at 1788.

⁶¹ NIMMER & NIMMER, *supra* note 1, § 404.

⁶² U.S. Copyright Office, *Circular 40, Copyright Registration for Works of the Visual Arts* (2006), available at <http://www.copyright.gov/circs/circ40.html#publication> (last visited July 24, 2007).

⁶³ NIMMER & NIMMER, *supra* note 1, § 1: 4.10.

This draft is a work in progress and is not yet ready for citation.

as the art slides mentioned earlier or a collection of original photographs in a public library, deciding which definition to apply can be difficult to determine.

Another challenge is that the definition may change, not just based on the factual context of the work itself, but on the copyright issue being analyzed. In copyright infringement cases, authors must prove (1) that a work is protected by copyright (2) that another party violated one of the exclusive rights granted by copyright laws,⁶⁴ and (3) that no defense, such as fair use, protects the defendant's conduct.⁶⁵ The definition of "publication" that should be applied may depend on which step in the analysis is under consideration. In analyzing the first element, whether a work was "published" may have a dispositive effect on whether it is protected by copyright. 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 focus of this research. Specifically, the project is designed to clarify whether a particular work is considered published.

When moving on to the second element of copyright infringement analysis, 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 generally gives its owner the exclusive rights to: "(1) reproduce the copyrighted work," . . . (2) prepare derivative works . . . (3) distribute copies or phonorecords . . . ; (4) [and] to perform and [(5) display] the copyrighted work publicly."⁶⁶ Because of the distribution right, only the

⁶⁴ 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) (2006).

⁶⁵ *See*, *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1013 (9th Cir. 2001).

⁶⁶ 17 U.S.C. § 106 (2006).

This draft is a work in progress and is not yet ready for citation.

copyright owner has the “exclusive right to distribute copies of the copyrighted work to the public by sale or transfer of ownership, or by rental, lease or lending.”⁶⁷ The

distribution right is sometimes referred to as “the right of first publication.”⁶⁸ It is violated when an unauthorized person actually disseminates the work. Making a work available to the public is sometimes not deemed sufficient to violate the distribution right.⁶⁹ In attempting to determine whether the work was the subject of an unauthorized distribution, courts often question whether the defendant “published” the work.

However, 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.⁷⁰ The use of the term is different in the context of the distribution right because it targets a potential defendant’s conduct and not the nature of

⁶⁷ 17 U.S.C. § 106(3) (2006).

⁶⁸ *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

⁶⁹ *Perfect 10 v. Amazon.com, Inc.* 487 F.3d 701, 718 (9th Cir. 2007) (Requiring actual dissemination “is consistent with the language of the Copyright Act.”); *National Car Rental Sys. 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.”); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Az. 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 (4th Cir. 1997).

⁷⁰ *Cf.* *Ford Motor Co. v. Summit Motor Prods, Inc.*, 930 F.2d 300, 300 (3d Cir. 1991) (explaining that “because ‘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.”).

This draft is a work in progress and is not yet ready for citation.

the author's work. Confusion may arise when the court explains this second step by using "publication" as a synonym for distribution.⁷¹

The meaning of "publish" as an act that may violate a copyright owner's distribution right under Section 106 is sometimes described as narrower in scope than the definition of publication regarding the status (published or unpublished) of a particular work under Section 101. The definition of "publication" under Section 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."⁷² Because either dissemination or offering to distribute copies amount to publication under Section 101, actual dissemination is not necessary for a work to be considered "published". However, 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.⁷³ Therefore, the meaning of "publication" under the second copyright infringement element may be different and narrower than it is under the first.

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.⁷⁴ However, making songs available over the Internet through an on-line file-sharing network has been found to be insufficient to constitute a

⁷¹ See, e.g., *Atl. Recording Corp.* 554 F. Supp. at 984; *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 241 (D.N.Y. 2008).

⁷² 17 U.S.C. § 101 (2006).

⁷³ See *Atl. Recording Corp.*, 554 F. Supp. at 987 (holding that defendant's acts of making music available on the file sharing site Kazaa did not amount to "publication").

⁷⁴ 17 U.S.C. § 101 (2006).

This draft is a work in progress and is not yet ready for citation.

violation of the distribution right if no evidence of actual distribution was presented.⁷⁵

Because the definitions are different, both could not be included in the analysis. The focus of this research is the definition of whether the author's original work was published. Therefore, cases were included in the "publication" 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.⁷⁶

II. The Creation of the Dataset

The primary goal of this project is to explore the landscape of the federal judicial precedent on copyright publication, and describe what the data reflects. 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 everyday and never result in conflict.⁷⁷ Of those that do lead to differences of opinion, many are resolved prior to litigation, and many litigated decisions are settled or resolved

⁷⁵ See *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 982-5 (D. Ariz. 2008).

⁷⁶ See, e.g., *Jackson v. MPI Home Video*, 694 F. Supp. 483, 490 (N.D.Ill. 1988) (in 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. Beebe's empirical study of fair use included cases that used rough synonyms for publication. See, Beebe, *supra* note 24 at 623 "Appendix: The Collection and Coding of the Opinions" (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. *Id.* at 138 (addressing whether a book was still in print in analyzing the second fair use factor). However, cases such as this one, do not expressly refer to "publication," and therefore, they were excluded from this dataset.

⁷⁷ See generally, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

This draft is a work in progress and is not yet ready for citation.

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.

However, federal judicial precedent remains important. “Even 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.”⁷⁸ Common understandings about precedent affect practical decision-making. “Published 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.”⁷⁹ 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.”⁸⁰ 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.⁸¹ Empirical analysis can be especially valuable if – like an airplane flying above a large maze -- it can

⁷⁸ Mark A. Hall and Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 92 (2008).

⁷⁹ Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases*, 53 UCLA L. REV. 357, 364-5 (2005).

⁸⁰ Hall & Wright, *supra* note 76, at 65.

⁸¹ *Id.* at 66.

This draft is a work in progress and is not yet ready for citation.

disclose a path out of a difficult problem. The dataset was created to capture this aerial view of copyright publication precedent.

In order to facilitate further study of this issue, the case selection process was not bounded by date or jurisdiction. The dataset was limited to federal authority. Before 1976, state courts did sometimes decide whether a work was published to determine whether federal statutory or state common law copyright rules were applicable.⁸² Since 1978, federal law has preempted virtually all questions of copyright law, including the issue of publication.⁸³ Consequently, practitioners and the federal courts are no longer likely to look to state precedent on any copyright issue. Therefore, state court opinions were not included in the dataset. Other than this exclusion, the dataset was not bounded by time or jurisdiction. We attempted to find and include all federal opinions that decided the issue of copyright publication regarding the nature of a particular work.⁸⁴

The first challenge was to identify the relevant cases. Because publication was not defined by statute until 1976,⁸⁵ there was no convenient statutory citation to use as a search tool. 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

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

⁸³ *Id.*

⁸⁴ Cases that “assumed” a publication issue without deciding it were omitted. *See, e. g.*, *P. Kaufman, Inc. v. Rex Curtain Corp., LLC*, 1978 WL 986 (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 (S.D.N.Y. 2009).

⁸⁵ 17 U.S.C. § 101 (2006).

This draft is a work in progress and is not yet ready for citation.

“publish” or “publication.” Far fewer cases use “publication” as a copyright term of art. Therefore, the initial task was to isolate cases using the term for its copyright law significance. We selected cases by reviewing (1) USCA 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.⁸⁶ Each relevant case was reviewed. Once a case was identified for inclusion, the publication cases it cited for a publication principle were checked, and when appropriate, selected for inclusion in the case list. The cases were all double checked by the primary investigator after inclusion and some were removed from consideration if they used the lay definition of publication or were otherwise irrelevant to the goals of the project.⁸⁷ As a result of this careful selection process, 460 cases were selected for inclusion in the dataset.

The codebook was created to measure different variables that would provide additional information about publication precedent. Unlike other copyright principles such as fair use, “publication” does not have a finite set of factors to check. Therefore, each case was coded for a wide variety of procedural and factual data that might have affected the court’s publication analysis. The codebook identifies and explains over one hundred variables for which each case would be evaluated. Some of the variables were designed to capture the factual context in which the publication decision was made such

⁸⁶ 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 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.

⁸⁷ 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.

This draft is a work in progress and is not yet ready for citation.

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. The independent variables also capture certain legal conclusions, such as whether the work complied with required copyright formalities. Other independent variables 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.

In any empirical study it is important to keep the coding as objective as possible so that the findings can be independently verified. Coder reliability was tested at three points. Initially, the researchers reviewed the codebook. 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.

Some of the opinions addressed the issue of publication for more than one work. If material differences appeared in the publication analysis for each work, each factual situation was coded separately. Therefore, 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. 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.

This draft is a work in progress and is not yet ready for citation.

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. For example, in *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*,⁸⁸ the district court made publication decisions on 56 different choreographic works. If the decisions on each of these dances were accorded equal weight in the dataset, this district court judge's decision would be accorded 56 times more weight than another district court case that decided a publication issue with respect to only one work.

Mark Hall and Ron Wright observe that empirical scholarship reflects better results when "each decision" is given "equal weight."⁸⁹ One method for adhering to this principle would have been to disregard information about all but one work discussed in each decision. However, following this method would have resulted in the loss of valuable information about other works decided in these multiple work opinions. Therefore, a compromise approach was adopted. If the court's examination of two works resulted in coding that was identical for each variable, the two works would be counted only once. If the court's examination of two works resulted in different variables, the separate coding was preserved.⁹⁰ Using this method, the *Martha Graham* district court and appellate decisions demonstrated four clear patterns, each of which was retained in

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

⁸⁹ Hall & Wright, *supra* note 76, at 83.

⁹⁰ Additionally, in one case, if the 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, 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.

This draft is a work in progress and is not yet ready for citation.

the data.⁹¹ When appropriate (such as in counting the number of cases), the patterns may be collapsed into one data point so that neither this case nor any other is accorded disproportionate weight. Using this method, the final dataset reflects only twenty-five decisions that were coded more than once.

For this Article, only one decision-making pattern was analyzed. As a result, some of the data from cases involving multiple works is not reflected in all the graphical material. The information lost from equalizing the value of each opinion will be 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.”⁹²

III. Summary Statistics

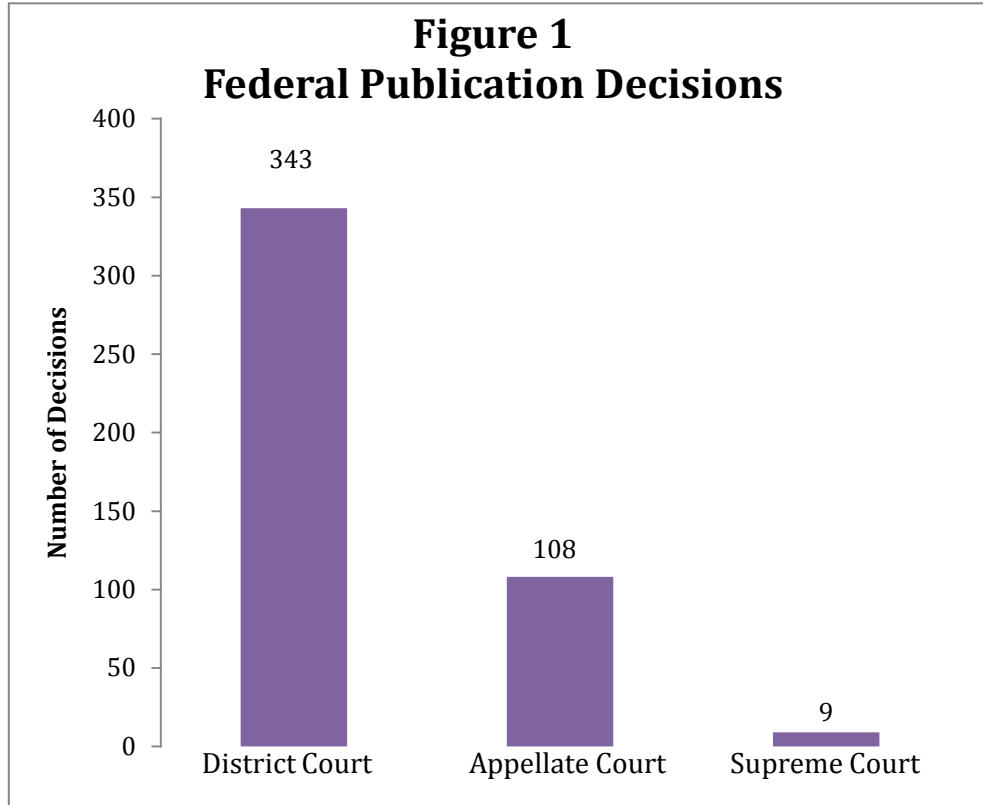
A. Overview of All Federal Publication Cases

Applying the methods set forth above, this study reflects the data from 460 judicial opinions on copyright publication. Figure 1 demonstrates the percentage of publication opinions decided by district courts, appellate courts and the Supreme Court.

⁹¹ Therefore, future research may be predicated on each publication pattern reflected in cases involving multiple works.

⁹² Hall & Wright, *supra* note 76, at 76.

This draft is a work in progress and is not yet ready for citation.



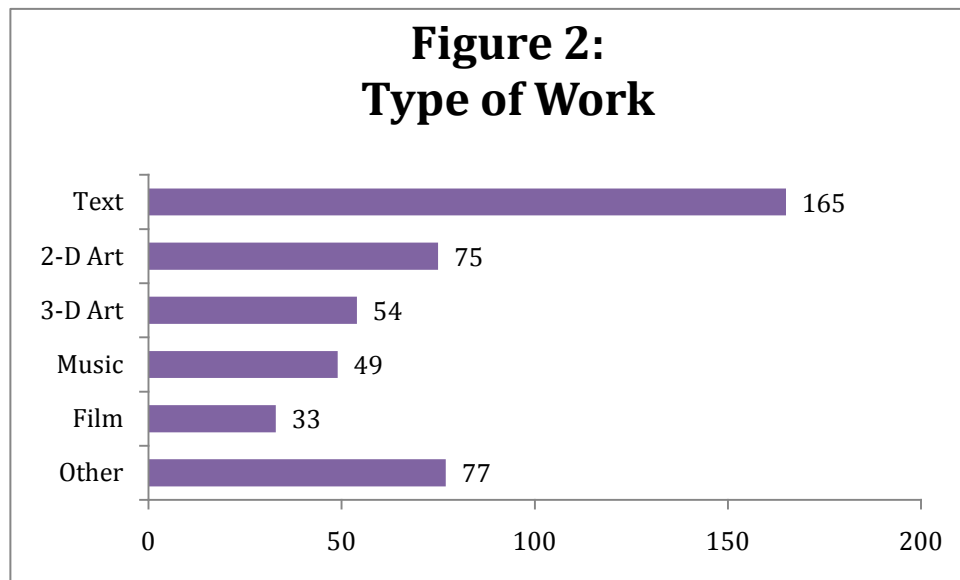
Even from this general overview, it is easy to see how risky it would be to draw any detailed conclusions about publication precedent just from looking at nine United States Supreme Court cases. Therefore, to get a more complete understanding of the publication landscape, this Article will rely also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

The idea of publication as a copyright term of art developed historically in the context of text, and therefore seems particularly suited to questions involving textual works.⁹³ However, courts more often confront publication questions on non-textual

⁹³ NIMMER & NIMMER, *supra* note 1, § 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 of the 1909 Act, books remained of primary importance.”); SUSAN M. BIELSTEIN, *PERMISSIONS, A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY* 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

This draft is a work in progress and is not yet ready for citation.

works. In fact, cases involving two or three dimensional art alone amount to approximately the same number of cases as those involving text. The variety of works at issue in publication cases is quite broad. Subjects of these decisions include works as diverse as Chicago’s Picasso sculpture (measuring 50 feet tall),⁹⁴ ribbon flowers,⁹⁵ the Oscar statuette,⁹⁶ and Danon yogurt recipes.⁹⁷ The following chart illustrates the types of works at issue in all federal copyright publication cases.



framers of the Constitution built this writers’ bias into the copyright and patent protection clause.”)

⁹⁴ *Letter Edged in Black Press, Inc. v. Public Building Comm’n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970).

⁹⁵ *Norma Ribbon & Trimming, Inc. v. John D. Little*, 51 F.3d 45 (5th Cir. 1995).

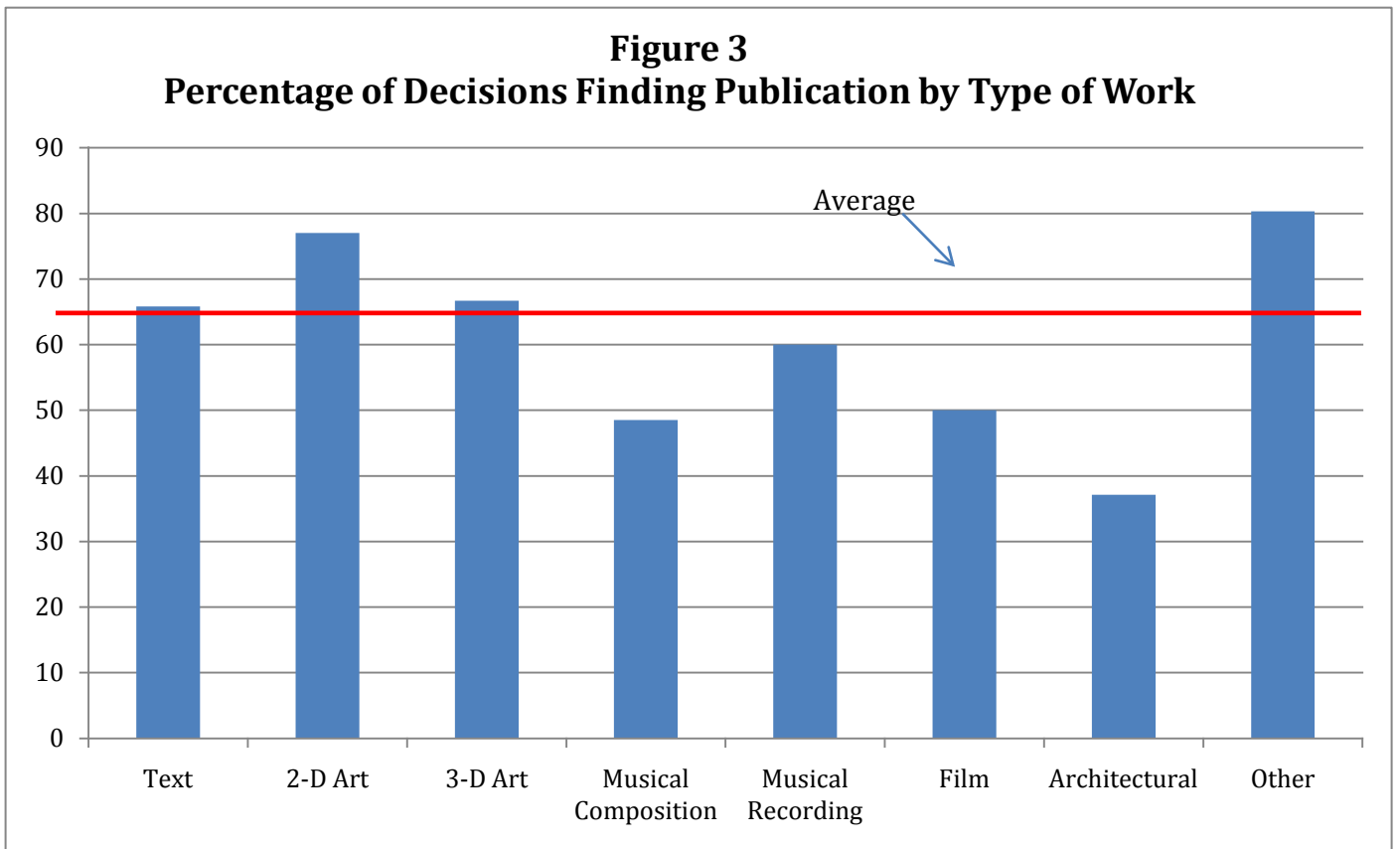
⁹⁶ *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446 (9th Cir. 1991) (finding that distribution of Oscars to awards recipients was merely a “limited publication”).

⁹⁷ *Publ’ns Int’l Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996).

This draft is a work in progress and is not yet ready for citation.

Although textual works outnumber all other categories, they account for only 36% of the cases involve textual works such as books, articles and other written works. More than one third of the cases (34%) involve works of art.

Over time, courts have had to confront publication issues on a variety of works, and the probability that a court will decide whether a work is published varies on depending on the type of work at issue. Overall, courts find works to be published 65% percent of the time. Figure 3 illustrates the percentage of decisions finding publication for various types of works and provides an opportunity to compare these percentages to the average of all publication decisions.



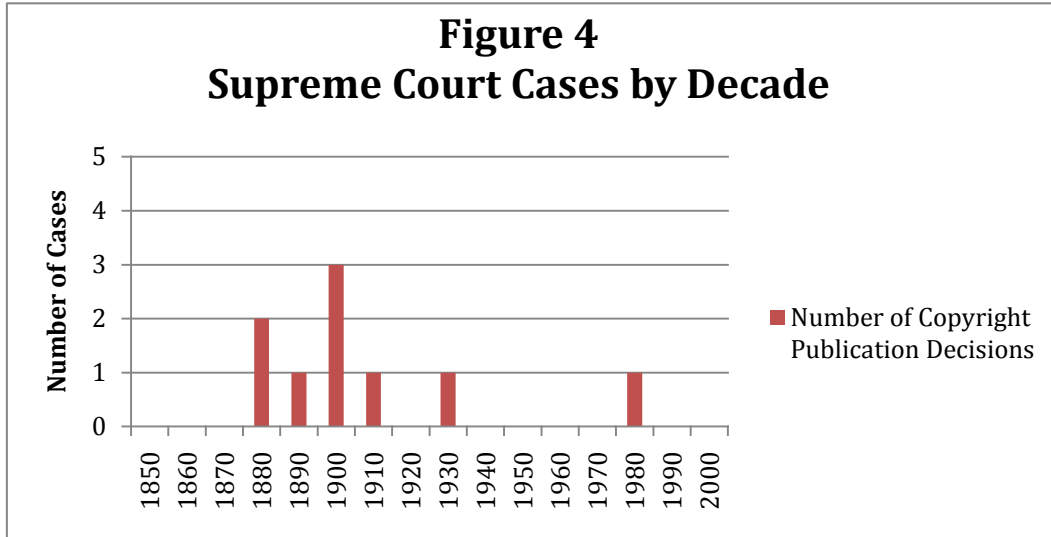
B. Examining Trends in Federal Publication Cases over Time

This draft is a work in progress and is not yet ready for citation.

Since publication is no longer the pivot point determining whether a work will have copyright protection at all, 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. One may draw such a conclusion by looking at how often the Supreme Court has decided copyright cases involving a question of publication.⁹⁸ Figure 4 illustrates when each such case was decided.

⁹⁸ See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985) (holding that 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 Pub. Co., Inc. v. Pearson*, 306 U.S. 668, 59 S. Ct. 588 (1939) (finding that publication occurred on the date when the work was published in a monthly magazine and that copyright was valid despite 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); *American Tobacco Company v. Werckmeister*, 207 U.S. 284 (1907) (holding that display of a painting is not a publication if "care was taken to prevent copying"); *Mifflin v. R.H. White Co.*, 190 U.S. 260 (1903) (concluding that Oliver Wendell Holmes' 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); *Mifflin v. Dutton*, 190 U.S. 265 (S. Ct. 1903) (finding that when twenty-nine chapters of "The Minister's Wooing" by Harriet Beecher Stowe appeared in the *Atlantic Monthly*, they were "published" without a copyright notice, and therefore, the chapters fell into the public domain); *Holmes v. Hurst*, 174 U.S. 82 (U.S. 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 (U.S. 1889) (holding that failure of copyright assignee to observe formalities in all works he published resulted in forfeiture of the copyright); *Callaghan v. Myers*, 128 U.S. 617 (1888) (holding that delivery of copies of a work to the secretary of state constitutes publication).

This draft is a work in progress and is not yet ready for citation.



Of the nine decisions in which the Supreme addressed copyright publication, only one (Harper & Row Publishers v. Nation Enters., 471 U.S. 539 (1985)) was decided since 1939, and in that case, the question of publication addressed as part of the fair use analysis, not to determine whether the work had entered the public domain. From the Supreme Court data alone, one may be tempted to conclude that publication (especially in the public domain context) is a dying issue. A number of commentators have begun to talk of the importance of copyright publication in the past tense. For example, a 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.”⁹⁹ Legal scholars have also made general statements indicating that the importance of copyright publication has diminished since passage of the 1976 Copyright Act. For example, one commentator wrote that “[t]he 1976 Act . . . affords the concept of

⁹⁹ John W. Hazard, Jr., 1 *Copyright Law in Business and Practice* § 1: 4 (rev. ed. 2009).

This draft is a work in progress and is not yet ready for citation.

publication less importance than the 1909 Act does.”¹⁰⁰ Another wrote 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.”¹⁰¹ This typical commentary may lead one to believe that the concept of publication has diminished in significance so much that it is no longer worthy of academic or practical attention. Other commentators are more careful. They note that publication is less important because works created after are no longer injected into the public domain upon publication without observance of formalities but add that publication remains important for other issues.¹⁰² However, the general theme remains the same: publication is less important now than it used to be.

¹⁰⁰ Taber, W. Russell, *Copyright Deja Vu: A New Definition of “Publication” Under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 860 (2005) (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.04 (2004)).

¹⁰¹ 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 (2005) (emphasis added).

¹⁰² See, e.g., NIMMER & NIMMER, *supra* note 1, § 4.01 (2010) (citations omitted) (“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.”); Cotter, *supra* note 4, at 1770 (“while 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 . . .”); Bruce P. Keller and Jeffrey P. Cunard, *Copyright Law: A Practitioner’s Guide*, § 6.1 (Practicing Law Institute 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 . . .”).

This draft is a work in progress and is not yet ready for citation.

One of the goals of this project was to test that assumption as a quantitative question. Copyright practitioners grapple with publication issues frequently, so it seemed worth testing the theory that publication continues to be just as significant under the 1976 Act as it was before. The data shows, that as a quantitative matter, it is in fact more significant. The following two charts illustrate the numbers of publication cases decided by federal district courts and circuit courts from 1849 through 2009. Both charts illustrate that litigation over the meaning of publication has increased dramatically since passage of the 1976 Copyright Act.

Figure 5

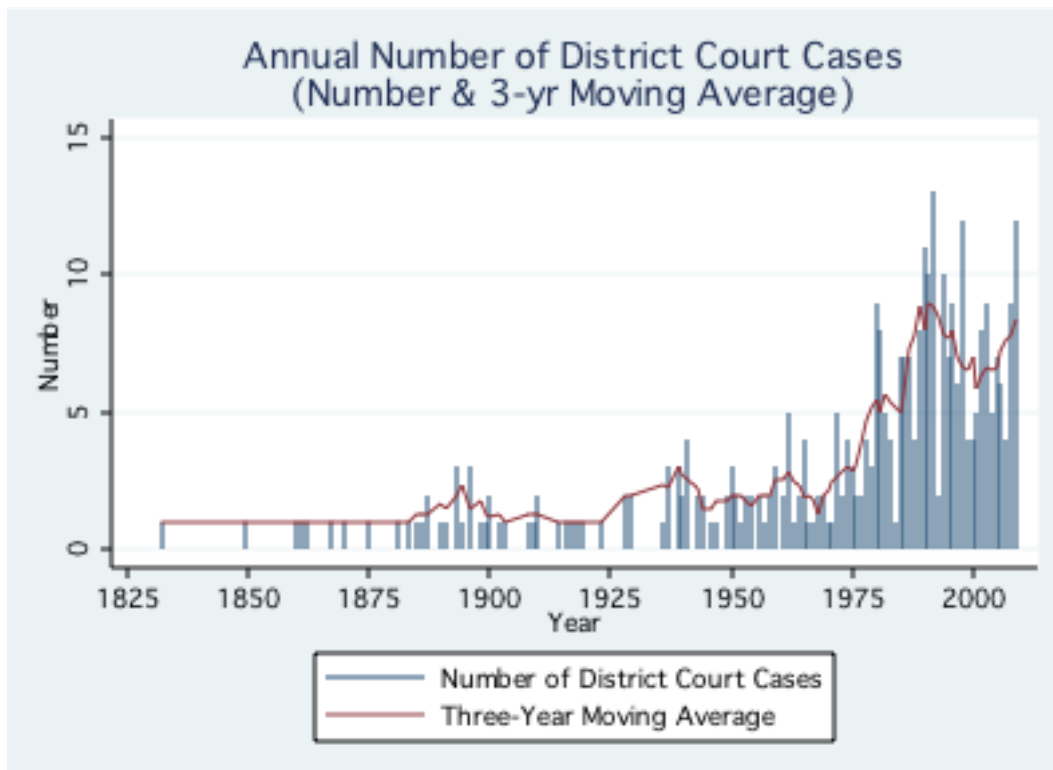
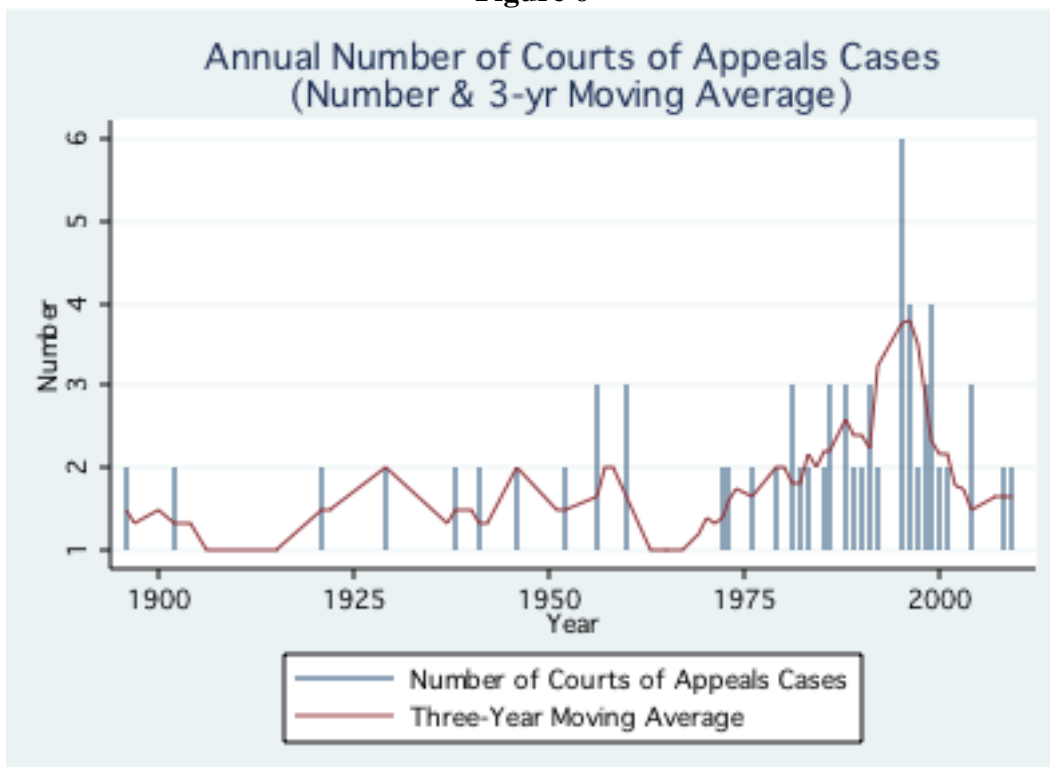


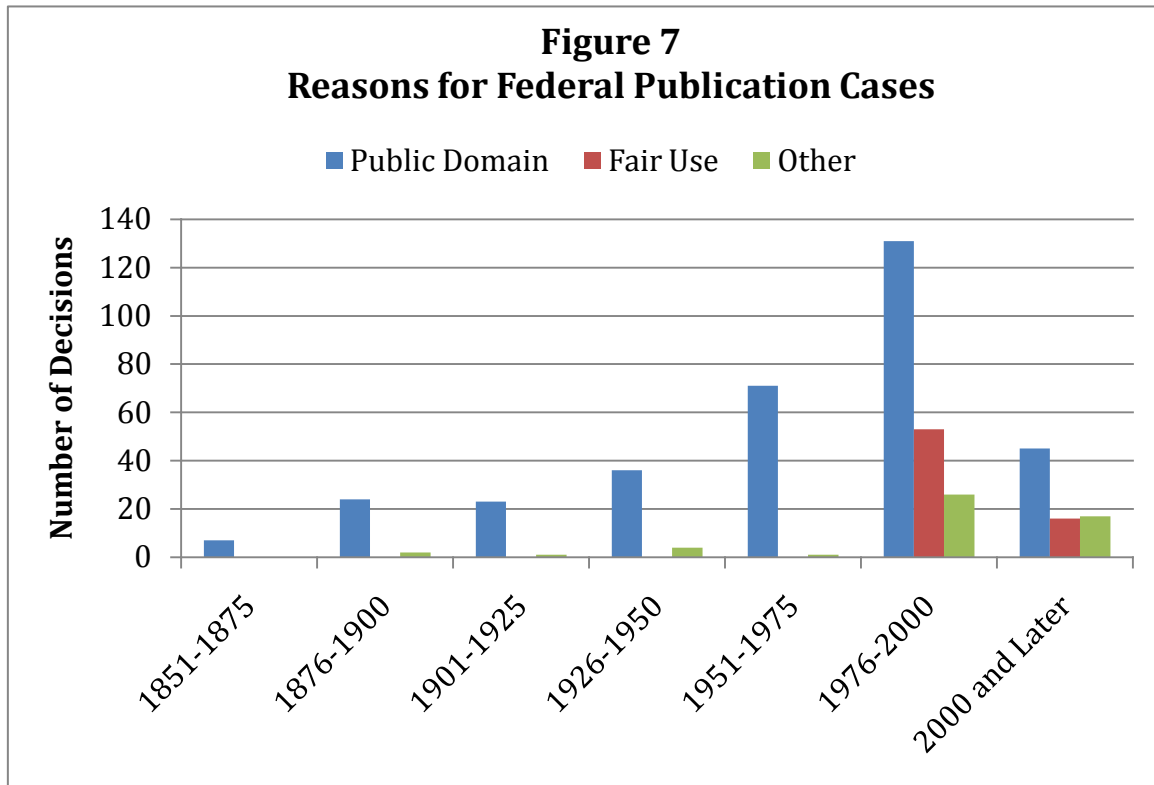
Figure 6



This draft is a work in progress and is not yet ready for citation.

The reason for this increase may be attributed, in part to 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. Compared to the 1909 Act, the 1976 Act references the concept of publication much more frequently. The text of the 1909 Act mentioned “unpublished” 3 times, “published” 11 times and “publication” 19 times, for a total of 33 references. The text of the 1976 Act incorporates “unpublished” 13 times, “published” 96 times and “publication” 71 times, which result in a total of 179 references. Some of these newer amendments account for the increase in litigation related to the issue of publication.

Figures 7 and 8 reflect the reasons for which publication cases have been decided.



This draft is a work in progress and is not yet ready for citation.

Figure 7 illustrates that over the past century, courts have decided more and more publication issues to determine whether a particular work was protected by copyright or in the public domain. As the numbers of publication decisions have increased over time, the issue is more frequently being litigated in each of the illustrated sub-categories as well. After passage of the 1976 Act, there is significant increase in publication issues being decided for determining whether a work is in the public domain, in fair use cases and in a variety of other contexts.

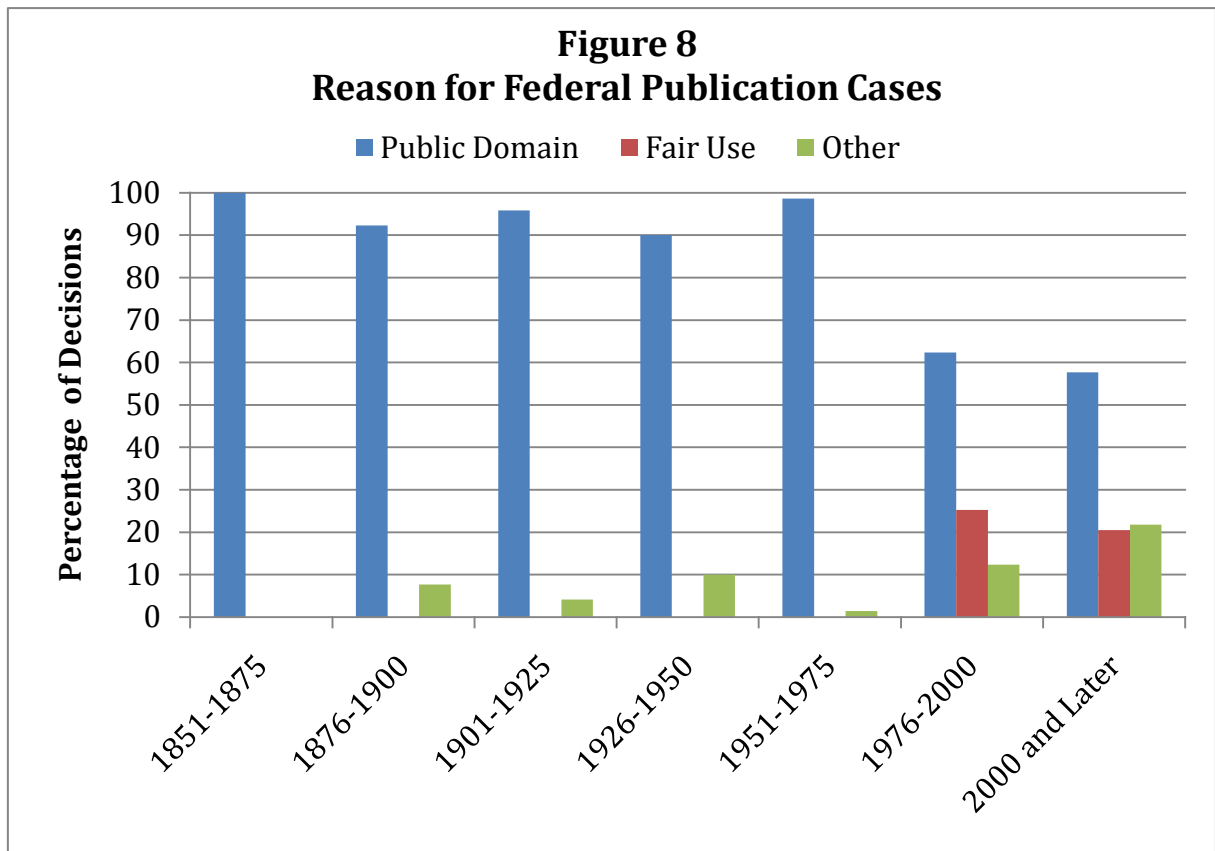


Figure 8 indicates the changing landscape of publication jurisprudence.

Although, as noted above, the number of publication decisions generally has been increasing over time, and the number of cases that decide whether a work has fallen into

This draft is a work in progress and is not yet ready for citation.

the public domain continues to increase, the percentage of such cases are decreasing 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 are becoming a smaller percentage but still constitute between 55% and 65% of all publication cases. The the red bar appearing after 1975 shows the emergence of fair use publication cases after passage of the 1976 Act. Since 1975, 20% or more 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,¹⁰³ the many new areas of publication relevance appear to have spawned litigation that has caused both the raw numbers and percentage of publication cases not involving a public domain question to increase geometrically.

One specific reason for the increase can be attributed to the relatively recent use of publication determinations in the context of the fair use doctrine. After the Supreme

¹⁰³ Callaghan v. Myers, 128 U.S. 617 (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); Tribune Co. v. Associated Press, 116 F. 126 (C.C.D. Ill. 1900) (holding that publication in London terminated common law copyright and therefore federal statutory law govern the dispute.); Bentley v. Tibbals, 223 F. 247 (2d Cir. 1915) (explaining how a work that was originally published in England, is imported to the US and is then sold in the US, is published in the US and would require a copyright notice); Hoyt v. Daily Mirror, Inc. 31 F.Supp. 89 (S.D.N.Y. 1939) (finding that four copies of a print mailed to one person and four more copies of that same print distributed, two each, to two other people were enough to satisfy the publication requirement); Shilkret v. Musicraft Records 43 F.Supp. 184 (D.C.N.Y. 1941) (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).); U.S. v. Backer, 134 F.2d 533 (2d Cir. 1943) (determining the date of publication to determine the date's effect on the validity of the copyright registration.); Dieckhaus v. Twentieth Century-Fox Film Corp., 153 F.2d 893 (8th Cir. 1946) (indicating that the since the plaintiff's work was determined to be unpublished that there can be no assumption that the defendant's servants were familiar with or had unconsciously copied from the work.)

This draft is a work in progress and is not yet ready for citation.

Court addressed the issue of publication in *Harper & Row Publishers v. Nation Enters.*,¹⁰⁴ more and more courts began to consider whether a work was “published” in analyzing the second fair use factor.¹⁰⁵ All of the cases that adjudicated the question of publication in the fair use context were decided after 1978.¹⁰⁶

C. The Continued Relevance of Limited and General Publication

The 1909 Act did not provide a general definition of publication.¹⁰⁷ Because practical applications require definitions, courts crafted a publication definition on a case-by-case basis. In doing so, the federal judiciary developed the concept of “limited” publication as a vehicle to preserve copyrights even if works were distributed to some extent without observation of formalities.¹⁰⁸ The Ninth Circuit defined limited

¹⁰⁴ 471 U.S. 539 (1985).

¹⁰⁵ See Figure 6.

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* note 47 and accompanying text.

¹⁰⁸ *Ladd v. Oxnard*, 75 F. 703 (C.C.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 (C.C.Pa. 1861) (“A limited 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.”); Jane Ginsberg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311 (2010) (citations omitted) (“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.”).

This draft is a work in progress and is not yet ready for citation.

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.”¹⁰⁹ 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.¹¹⁰ 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 whom they are or what they propose to do with it.”¹¹¹ The Supreme Court has only made the distinction once, in the 1907 decision, *American Tobacco Co. v. Werckmeister*.¹¹² In this case, the Court found that

¹⁰⁹ *White v. Kimmel*, 193 F. 2d 744, 746 (9th Cir. 1952).

¹¹⁰ *See Aerospace Services Int'l v. LPA Group*, 57 F.3d 1002 (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”); *Allen v. Walt Disney Productions*, 41 F.Supp. 134 (D.C.N.Y.1941) (holding that distribution of copies of a song to orchestra leaders, along with playing of song in restaurants and broadcasting over the radio, did not constitute dedication divesting plaintiff of his common law rights.); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984) (holding that copyright owner's distribution of roughly 200 business cards in seeking employment amounted to a limited publication.); *Burnett v. Lambino*, 204 F. Supp. 327, 329 (S.D.N.Y. 1962) (stating that a “[r]estricted 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.”); *Hirshon v. United Arts Co.*, 243 F.2d 640 (D.C.Cir.1957) (finding that the distribution of roughly 2,000 copies of a song to various people in the music business was not a general publication); *McCarthy & Fischer, Inc., v. White*, 259 F. 364, 365 (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.); *National Broadcasting 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); *RPM Management, Inc. v. Apple*, 943 F.Supp. 837 (S.D. Ohio 1996) (holding that distribution of building plans to a bank and an individual was a limited publication).

¹¹¹ *Burke v. Nat'l Broad. Co., Inc.*, 598 F.2d 688, 691 (1st Cir. 1979).

¹¹² 207 U.S. 284 (1907).

This draft is a work in progress and is not yet ready for citation.

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.¹¹³

The distinction between limited and general publication was not mentioned in either the 1909 Act or the 1976 Act.¹¹⁴ However, the 1976 Act codifies the same basic principle by defining publication as a “distribution . . . to the public.”¹¹⁵ Through this definition, Congress created a space for private sharing that would not have the same legal significance as a “publication.”¹¹⁶ Therefore, the definition appears to track the same general distinction between limited and general publications.

Now that we have a definition of “publication” in 17 USC § 101, one may question whether the distinction between limited and general publication has been usurped by the statutory definition in the 1976 Act. The question of whether a distribution was limited or general had huge consequences before passage of the Berne amendments because before 1989, whether a publication was limited or general could determine whether a work was protected by copyright at all.¹¹⁷ Now that both published and unpublished works are eligible for copyright protection, some copyright scholars,

¹¹³ See *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907).

¹¹⁴ PATRY, *supra* note 9, at §§ 6:30, 6:49; Cotter, *supra* note 4, at 1771 – 85.

¹¹⁵ 17 U.S.C. § 101 (2006).

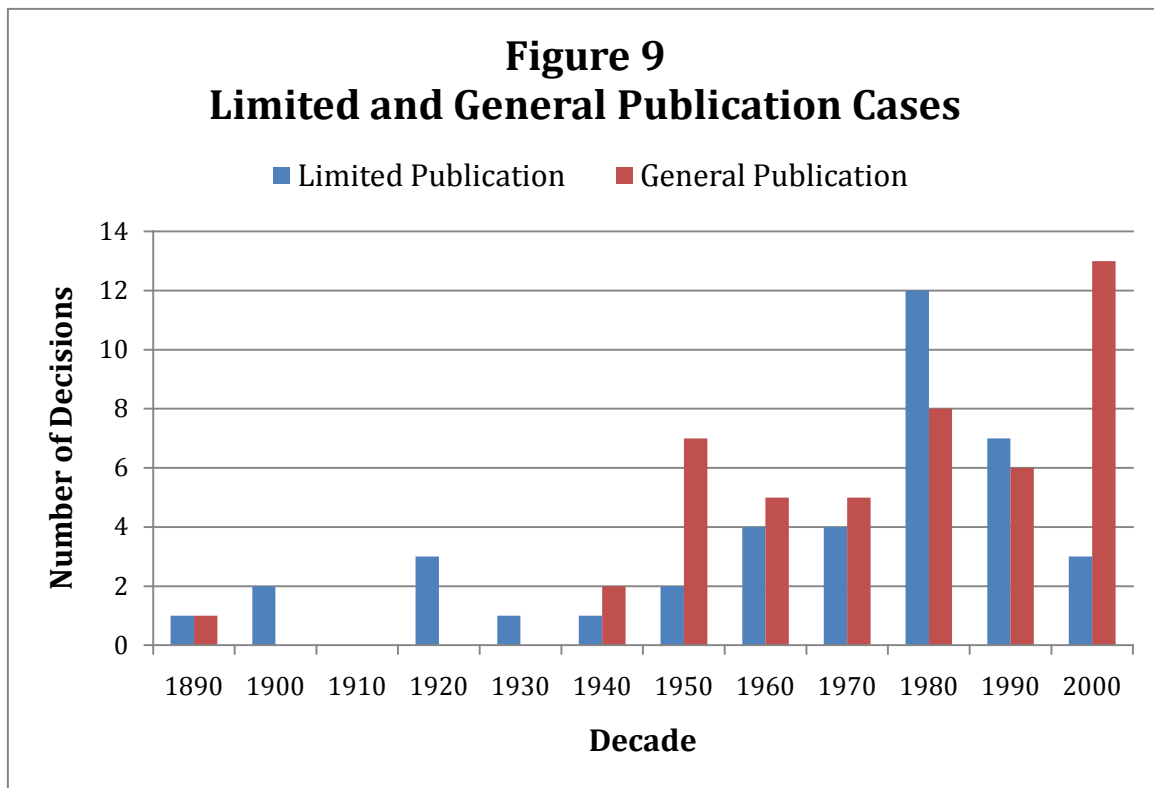
¹¹⁶ PATRY, *supra* note 9, at §§ 6:30 FN 11, 6:49; Cotter, *supra* note 4, at 1771 – 85.

¹¹⁷ See *supra* note 16 and accompanying text.

This draft is a work in progress and is not yet ready for citation.

including *Nimmer*, have raised the question of whether the distinction between “limited” and “general” publication remains relevant after passage of the 1976 Act.¹¹⁸

The publication data provides interesting insights regarding the continued relevance of limited and general publication. Figures 9 and 10 illustrate how often federal courts expressly use the terms “limited” or “general” in making a publication decision.¹¹⁹



¹¹⁸ 17 U.S.C. § 4.13(b) (2006).

¹¹⁹ 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 8 and 9. *See, e.g.*, *Open Source Yoga Unity v. Choudhury*, 74 U.S.P.Q.2d 1434 (N.D. Cal. 2005) (discussing limited and general publication but denying summary judgment motions due to questions of fact); *Bull Publ'g Co. v. Sandoz Nutrition Corp.*, 13 U.S.P.Q.2d 1678 (N.D. Cal. 1989) (discussing limited and general publication but denying summary judgment motions due to questions of fact).

This draft is a work in progress and is not yet ready for citation.

Figure 9 demonstrates that the number of decisions incorporating the limited/general distinction has increased since passage of the 1976 Act. Comparing the findings of limited and general publication reveals some interesting differences. The data reflects that before 1940, the court used the distinction as reasoning along the way to finding limited publication. Although a few cases made a finding of “general publication”¹²⁰ before 1940, it was not until then that this holding was articulated with some regularity. Since then, the data shows steady attention to the distinction over time.

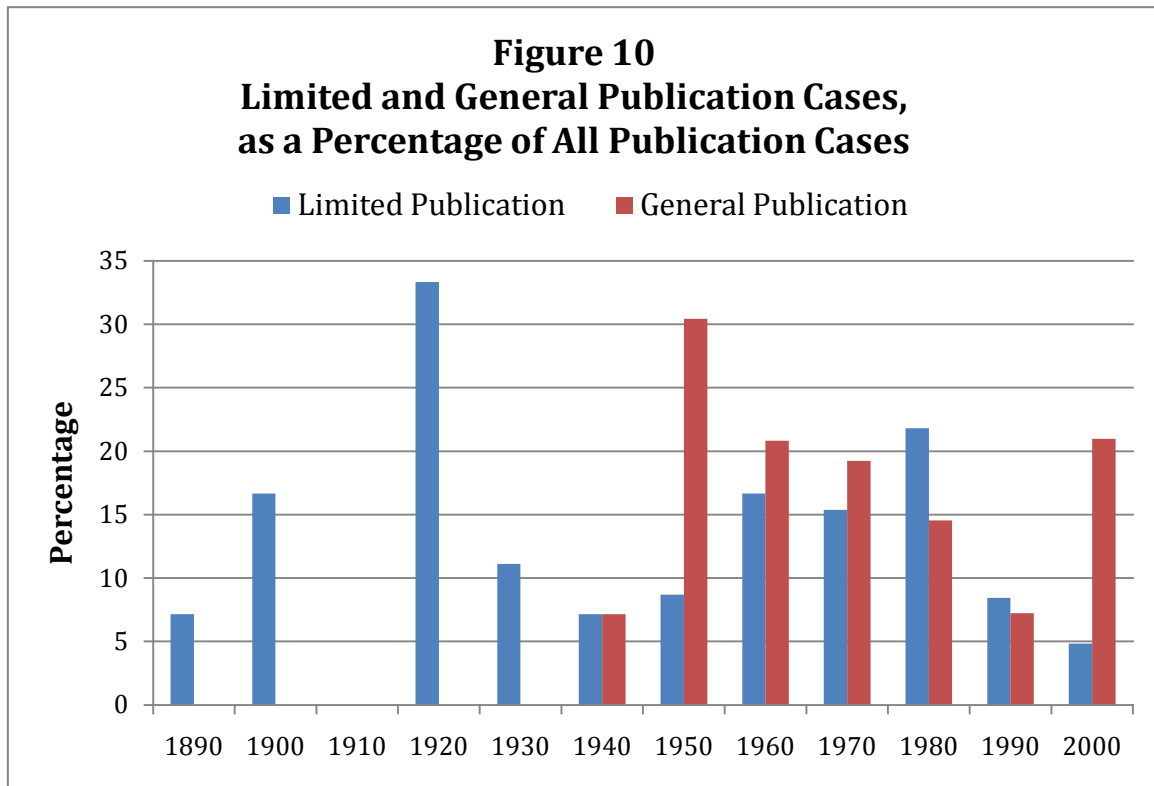


Figure 10 demonstrates the same data set forth in Figure 9 but in terms of percentages instead of the number of cases. Before the 1950’s the distinction between

¹²⁰ See, e.g., *Keene v. Wheatley*, 14 F. Cas. 180 (E.D. Penn 1861); *Pierce & Bushnell MufG Co. v. Werckmeister*, 72 F. 54 (1st Cir. 1896); *Kraft v. Cohen*, 117 F.2d 579 (3d Cir. 1941).

This draft is a work in progress and is not yet ready for citation.

limited and general publication did not show a regular pattern in the form of a consistent contribution to the federal docket. By looking at Figure 9, it becomes clear that the numbers of cases were too small to demonstrate much of a meaningful trend. When viewed together, these charts confirm that since 1950, even as the number of publication cases has increased over time, the percentage of cases distinguishing between limited and general publication has retained its presence in the federal copyright litigation.

D. A Contextual Difference in the Application of Publication in the Fair Use and Public Domain Contexts

The dataset provides the opportunity to explore whether publication means different things in different contexts. Professor Thomas Cotter says it should.¹²¹ The data supports the idea that it does. By showing whether certain variables are present in different types of publication cases, the data reflects some interesting patterns.

One contextual difference lies in the use of the limited/general publication distinction. The limited and general publication distinction has been used 80 times in publication decisions generally. However, it has not been used 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. The limited/general distinction has a much longer history, dating back to the 1860's.¹²² One may theorize that the limited/general distinction has fallen into disfavor after passage of the 1976 Act, which by articulating a

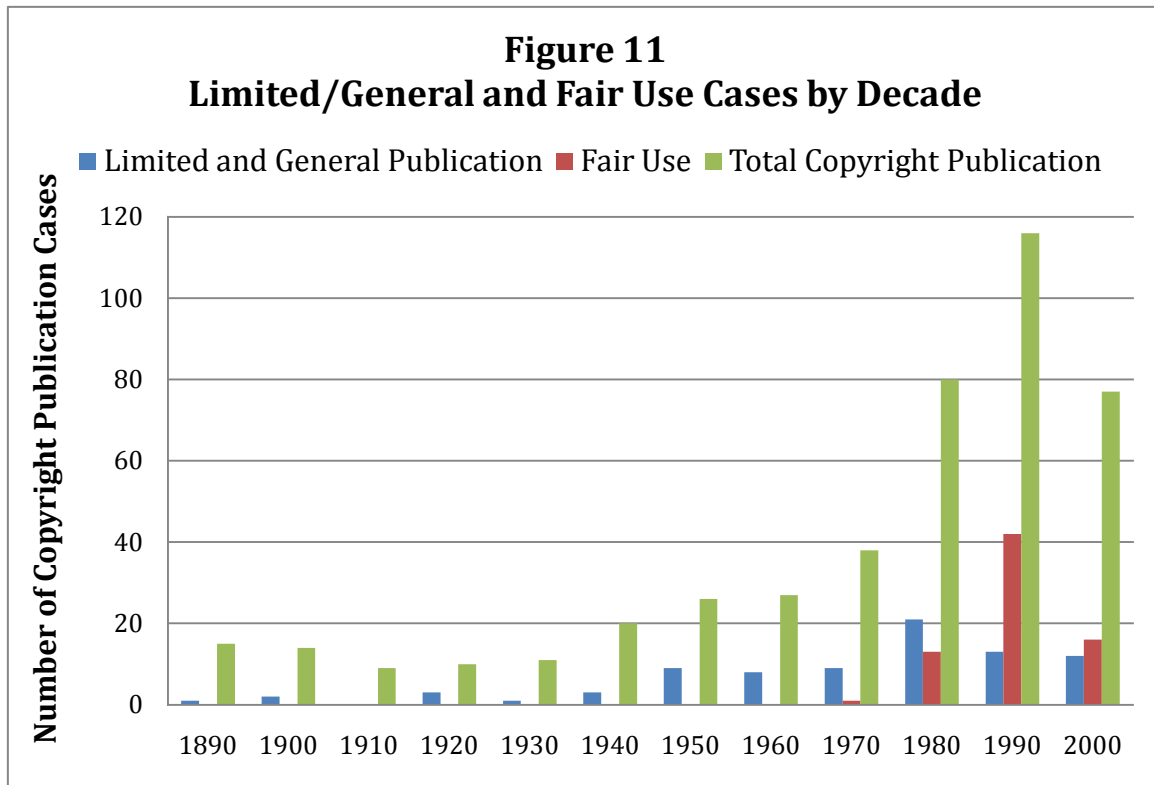
¹²¹ Cotter, *supra* note 9, at 1728 (“Part III develops my thesis that publication can and should mean different things in different contexts . . .”).

¹²² *Keene v. Wheatley*, 14 F. Cas. 180 (E.D. Penn 1861); *Pierce & Bushnell Muf’G Co. v. Werckmeister*, 72 F. 54 (1st Cir. 1896).

This draft is a work in progress and is not yet ready for citation.

definition of publication, diminished the need for courts to use the limited/general distinction. However, as noted above, the data refutes this theory.

Figure 10 demonstrates the reason why passage of the 1976 Act alone cannot explain this contextual difference. The green bar represents all publication cases, and again demonstrates that litigation over publication issues has increased since passage of the 1976 Act. The red bar demonstrates that beginning in the 1980's 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, approximately 10% to 25% of the docket continue to include cases in which a court is making the distinction between limited and general publication. Yet the data indicates that these two sets of cases do not overlap.



This draft is a work in progress and is not yet ready for citation.

One possible reason for this difference is that courts find the limited/general distinction to be more useful in the public domain context because the issue has a dispositive impact on the legal conclusion. For example, if a United States work was published before 1989 without formalities,¹²³ it is in the public domain.¹²⁴ If it remained unpublished it may still be protected by copyright.¹²⁵ Therefore, in the public domain context, judicial wiggle room in the form of the limited/general publication doctrine provided the courts with equitable discretion to provide a safety net and prevent a work that had been distributed from losing copyright protection.

Federal courts may not feel 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 factors¹²⁶ in light of the purpose of copyright law.¹²⁷

¹²³ However, if the work was published without notice between 1978 and 1989, a copyright owner may be able to save its work from falling into the public domain if it attempted to cure the defect. 17 U. S. C. § 405 (2006).

¹²⁴ See *supra* note __ and accompanying text.

¹²⁵ *Id.*

¹²⁶ 17 U.S.C. § 107 (2006). 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.

This draft is a work in progress and is not yet ready for citation.

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 up on consideration of all the above factors.”¹²⁸

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 would be a subset of the considerations relevant under the second factor that addresses the nature of the copyrighted work.¹²⁹ Because other fair use factors also involve analysis of multiple subfactors,¹³⁰ the publication issue will have less impact on the outcome. For this reason, the courts may have not felt the need to resort to the limited/general distinction, because in a multi-factor test, there are many other opportunities to tip the balance in favor of the appropriate conclusion.

Another possible explanation of 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

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

¹²⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (explaining that the four section 107 factors “are to be explored, and the results weighed together, in light of the purposes of copyright.”).

¹²⁸ *See supra* note 128.

¹²⁹ 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, 1153–4 (9th Cir. 1986) (“The scope of fair use is greater when ‘informational’ as opposed to more ‘creative’ works are involved.”). *See, Gerhardt and Wessel, Fairness and Fair Use on Campus*, 11 N.C. J. L. & TECH (forthcoming 2010).

¹³⁰ 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, education, and commercial, as well as the different situations stated in the preamble to 17 U.S.C. § 107. *Id.*

This draft is a work in progress and is not yet ready for citation.

work has fallen into the public domain. For example, public display or performance, according to the 1976 definition, do not amount to “publication.” published in cases determining whether a work is in the public domain.¹³¹ Under the 1909 Act as well, many publicly available works were treated as unpublished.¹³² However, in the fair use contexts, courts sometimes treat publication as roughly equivalent to “publicly available.”¹³³ This reading of the fair use statute appears to conform to the Congressional intent.¹³⁴ 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 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 arrive at that conclusion.

Further reflections on these possibilities and additional reasons for the contextual difference are both fertile ground for further exploration. In light of the contextual difference that has been identified, one should exercise caution before relying on

¹³¹ 17 U.S.C. § 101 (2006) (“A public performance or display of a work does not of itself constitute publication.”).

¹³² Jane Ginsberg, *supra* note 106, at 328 (2010) (“The concept of publication . . . was not always coterminous with the general notion of ‘making public.’”).

¹³³ *Los Angeles News Serv. v. Reuters TV Int'l*, 942 F.Supp. 1275,1283 (C.D.Cal. 2006) (“the 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.”)

¹³⁴ 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).

This draft is a work in progress and is not yet ready for citation.

publication precedent in the public domain context that originates from a potentially different understanding of the term from the fair use context.¹³⁵

E. Testing the Relevance of Publication Variables

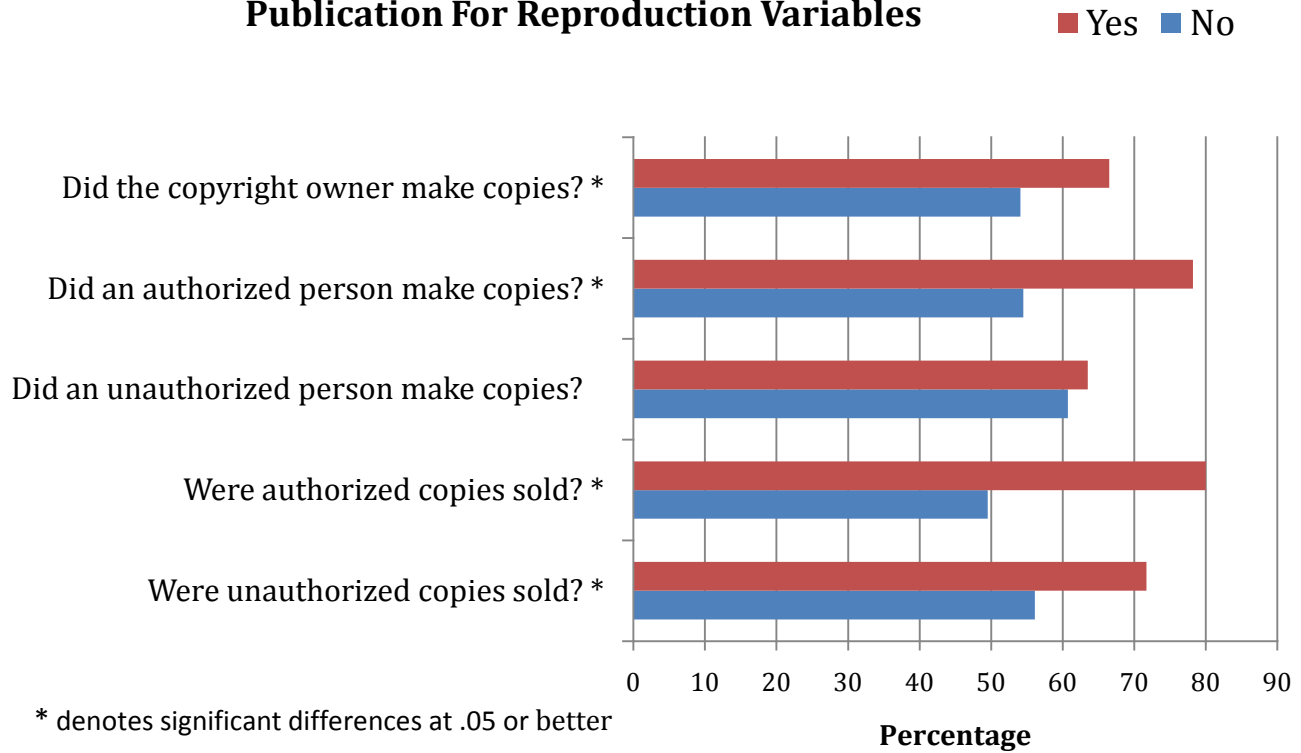
The following three charts show how federal district courts have ruled in publication cases when a variety of different variables are present or absent. Each bar shows the percentage of federal district courts that found publication in two sets of cases: (1) when the particular variable was present and (2) when the variable was absent. This data was created from a variable that summarized publication findings in the following way. The judicial conclusion was treated as an affirmative finding for publication if the court found that a work was “published” or that there had been a “general publication.” A negative finding of publication was assigned 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 finding on publication (e.g. finding that a question of fact was raised and denying summary judgment). The difference between the two groups was calculated using a difference of means test.¹³⁶ Figures 12 through 14 show whether the data reflects a statistical significance for an array of variables.¹³⁷

¹³⁵ Cf. Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, COPYRIGHT AND CULTURAL INSTITUTIONS: GUIDELINES FOR U.S. LIBRARIES, ARCHIVES, AND MUSEUMS, 31-2 (2009).

¹³⁶ This test calculates whether the means of the two groups are different enough to have statistical significance. GEORGE BORHRNSTEDT & DAVID KNOKE, STATISTICS FOR SOCIAL DATA ANALYSIS, 187 (1988)

¹³⁷ For example, in Figure 14, the first question under the permission for use variables asks whether permission was give for the distribution. The red bar shows cases where the court found that the copyright owner gave permission for the distribution. The length of that bar indicates that in approximately 70% of those cases, the court found that the work in question was published. The blue bar reflects all cases in which there is no judicial finding that the copyright owner permitted the distribution. Less than 30% of those cases found the work to be published. The

Figure 12
Percentage of District Court Findings of
Publication For Reproduction Variables



presence of the asterisk next to the question means that the variable has statistical significance, and therefore, the difference between the red and blue bars is most likely not due to chance.

Figure 13
Additional Distribution Variables

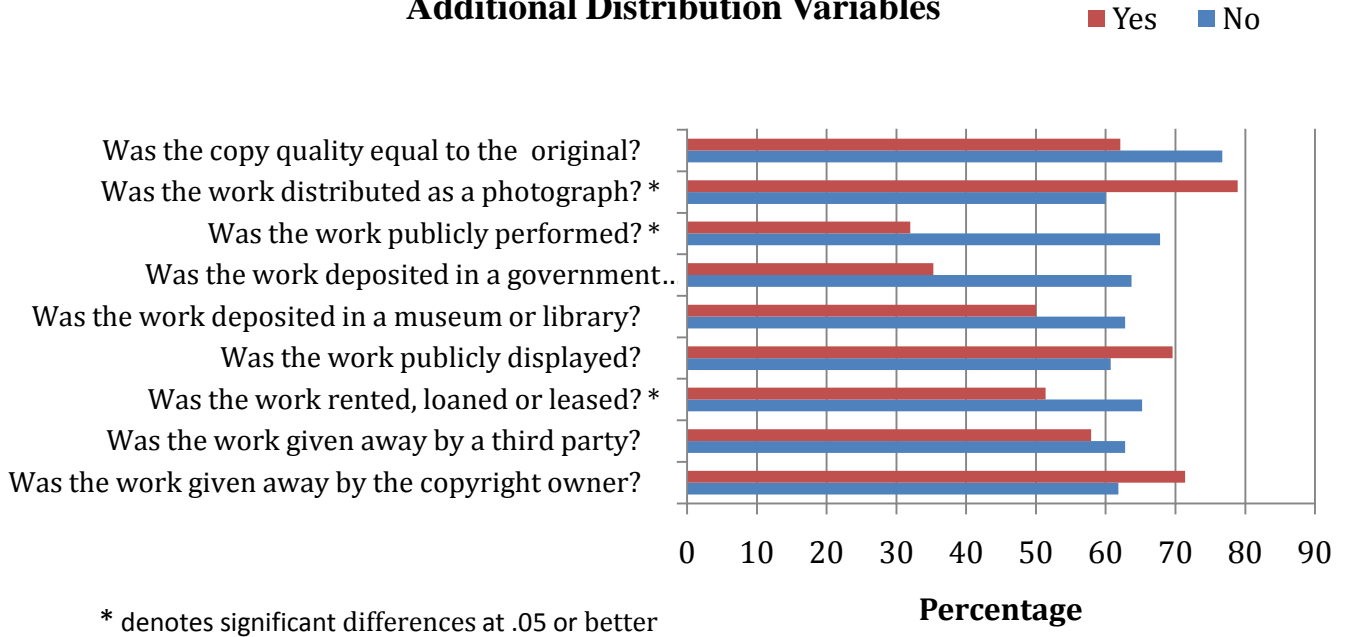
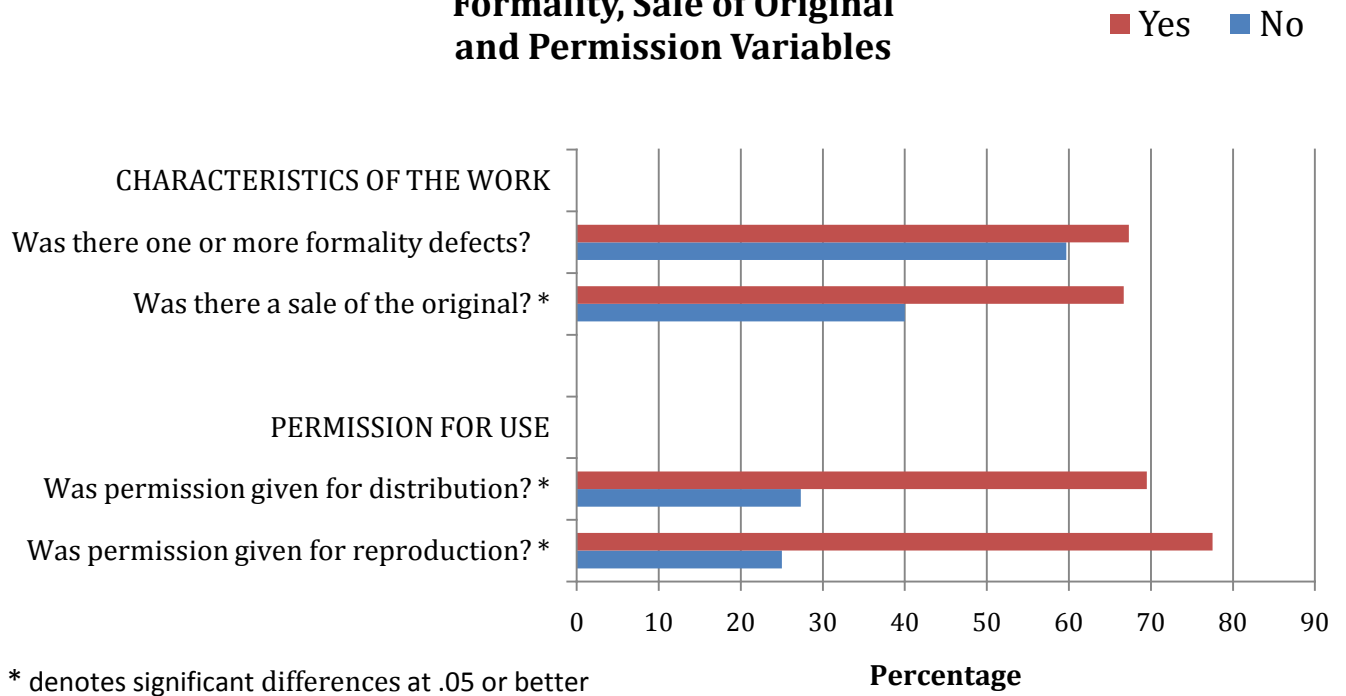


Figure 14
Formality, Sale of Original and Permission Variables



This draft is a work in progress and is not yet ready for citation.

Figure 12 indicates that four of the five variable tested appear to make a difference to district courts in deciding publication matters. For example, approximately 80% of the time, courts that stated that authorized copies of the work had been sold, also found that the work was published. The absence of this variable does not mean that a court would not find a work to be published. However, district courts found a work to be published less than 50% of the time when this variable was not present.

Figure 13 presents an anomaly between public performance and display. Neither constitute “publication” according to the definition in the 1976 Act.¹³⁸ The data with respect to public performance are consistent with the statutory definition. When a work has been publicly performed, only 32% of courts find it to be published. However, when a work has been publicly displayed, nearly 70% of courts conclude that such works were published.

In Figure 14, the strong impact of copyright owner permission is apparent. When permission is given for reproduction, more than 75% of district courts find a work to be published. When permission is given for distribution nearly 70% of courts find publication. Less than 30% of courts find publication when such permissions are absent. For both variables, the data do not differ significantly depending on whether the permission was express or implied from the circumstances.

IV. Conclusion

The data set forth above provide an overview that substantially advances our understanding of copyright publication precedent. Some of the general principles include

¹³⁸ See, *supra*, note __ and accompanying text.

This draft is a work in progress and is not yet ready for citation.

the following. When confronted with a publication issue, two thirds of the time, courts conclude that a work is published. The theory that publication is of diminished importance since passage of the 1976 Copyright Act, as a quantitative matter, is refuted by this study. Instead the data demonstrates the opposite trend. Since 1976, federal courts are seeing more 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 recently confronting publication issues in the other contexts, especially fair use. The data supports the idea proposed by some commentators that courts treat the meaning of “publication” differently depending on the context. One illustration of this contextual difference is that the distinction between limited and general publication remains present in copyright jurisprudence but does not appear in fair use cases.

The dataset is not a crystal ball. But if we accept that courts do rely on precedent and are likely to rule on certain variables as other courts have in the past, we may use the data to examine a variety of different variables, and from that data, become informed of the probability that a court will rule a particular way given the same variable in the future. 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.