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 1978, publication is the pivotal moment when a work could acquire copyright protection that would give its owner powers to control its use for over a century. But if that owner did not observe required legal formalities, no such powers attach. 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.

Notwithstanding the dispositive importance of “publication,” the copyright meaning of the term is not clear, and can be difficult to pinpoint. For many works, especially non-textual or original documents, the moment of publication is not often apparent. The term has a specific meaning in copyright jurisprudence that can be different from our 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

1 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, and Satish Chintapalli, who provided coding and research assistance.


5 Cotter, Towards a Functional Definition of Publication in Copyright Law, 92 Minn. L. Rev. 1724 (June 2008)(concluding that “the meaning of publication remains, in many circumstances, fuzzy”).
painting displayed in an art gallery may be found to be “published”\textsuperscript{6} while Martin Luther King’s “I Have a Dream Speech” though broadcast internationally and reprinted in news media was found to be “unpublished.”\textsuperscript{7}

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 amassed collections of slides of art they created or purchased 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 and, 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: Can anyone know the state of the law from reading a handful of select cases?”\textsuperscript{8} Based on that call to action and the clear need for clarification

\textsuperscript{6} 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, 58-59 (1st Cir. 1896)(display of the original painting in Munich without a copyright notice resulted in publication).

\textsuperscript{7} 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.

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. 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 precedent. The findings will also provide valuable information to lawyers, librarians, publishers and museums to determine whether the general principles they use in practice conform to an accurate understanding of 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 year, level of court, federal circuit and type of work. The data is used to

---

9 Other excellent articles contribute to our understanding of this issue, but have not used the systematic empirical approach employed in this study. See, e.g., Cotter, Towards a Functional Definition of Publication in Copyright Law, 92 Minn. L. Rev. 1724 (June 2008); Anthony Reese, Public But Private: Copyright’s New Unpublished Public Domain 85 Texas L. Rev. 585 (February 2007); Melville Nimmer, Copyright Publication, 56 Colum L. Rev. 185 (February 1956).
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, whether the distinction between limited and general publication remains a relevant inquiry after Congress defined publication in the 1976 Act, and whether original works placed in public archives are considered published. 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. 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 the United States. Works that pre-date 1989 can enter the public domain in one of two

---

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 of 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 the copyright term began at recordation. 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
This draft is a work in progress and is not yet ready for citation.

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,\textsuperscript{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.\textsuperscript{12} Pinpointing this moment is critical to calculating the 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.\textsuperscript{13}

Works created between 1978 and 1989 also required the observance of formalities for copyright protection to attach to published works.\textsuperscript{14} These requirements 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. For works created before 1989, publication remains dispositive in determining whether a work is protected by copyright. Without knowing if and when a work was published, it is difficult to

\begin{flushleft}

or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail . . . a printed copy of the title . . . [and] two copies of such [work].” Copyright Act of 1891, § 4956 (emphasis provided).

\textsuperscript{11} 17 U.S.C. § 24 (1909)(“The copyright secured by this title shall endure for twenty-eight years from the date of first publication.”)(emphasis provided).

\textsuperscript{12} 17 U.S.C. § 10 (1909) (providing “Any person entitled thereto by this title may secure copyright for his work b publication there of 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 . . . ”).


\textsuperscript{14} 17 U.S.C. § 405.
\end{flushleft}
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.” 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. 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.” Whether a work is considered published or unpublished under this factor is balanced along with other factors in determining whether a use is fair. Sometimes the unpublished nature of a work can have a dispositive impact on the fair use conclusion. For example, in Harper & Row, 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 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

---


17 Id.

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

with respect to unpublished works.”19 In Harper & Row, the unpublished nature of Ford’s manuscript was the critical piece of evidence that defeated the fair use defense.20 The Court articulated the general principle that “the author’s right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.”21

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.22 For some works, such as unpublished pictorial or graphic works, deposit of “identifying material” may be sent instead of an actual copy.23 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 jurisdictional requirement that must be accomplished before filing an infringement claim in federal court.24 Therefore, the publication status and appropriate type of deposit

19 Id. at __.

20 Id. at __.

21 Id. at 555. But see, Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005, 156 U. Penn. L. Rev. 549, 613 (January 2008)(finding that although the unpublished nature can sometimes be dispositive in fair use cases, Barton Beebee’s empirical study of fair use decisions from 1978 - 2005, indicates that 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.”)

22 17 U.S.C. § 408(b); 37 C.F.R. § 202.20(c)(1)-(2). However, one copy may be sufficient if the work was “first published outside the United States.” 17 U.S.C. § 408(b)(3).


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.” Yet, if the work is deemed “unpublished,” an innocent infringement defense may not be available even if no notice appeared on the work.

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.

The timing of a work’s publication can also make a critical difference in the economic feasibility of filing a copyright infringement claim. A copyright owner who registers her work within three months of publication may recover statutory damages.

---


26 Intown Enterprises Inc. Barnes, 721 F. Supp. 1263, ___ (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.”).

27 Id.

28 17 U.S.C. § 412. 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.”
amounting to as much as $150,000 per work for willful infringement.\(^{29}\) Registration within three months of publication also makes the copyright owner eligible to recover of attorney’s fees.\(^{30}\) 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.\(^{31}\) An unpublished work may be protected by United States copyright law regardless of the Author’s nationality or residence.\(^{32}\) 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.\(^{33}\) However, publication in the United States within thirty days of first publication in a non-treaty nation will result in US copyright protection.\(^{34}\) Place of publication is also important in determining how many copies of a work should be placed on deposit when a work is registered.\(^{35}\) 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.\(^{36}\)

\(^{29}\) 17 U.S.C. § 504(c)(2).


\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) 17 U.S.C. § 408(b).

\(^{36}\) For some hypothetical scenarios illustrating the potential importance of this issue, see Cotter, Toward a Functional Definition of Publication in Copyright Law, 92 Minnesota Law Review 1724, 1746-1751 (2008).
Despite the significant legal consequences of publication, determining whether the moment occurred is often difficult to identify. The Second Circuit described the concept of publication as “clouded by semantic confusion.”\(^{37}\) The 1909 copyright statute did not define it,\(^{38}\) and as a result, “publication” became a complicated term of art that has generated a host of problems in applying copyright law to specific works.

Another 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.\(^ {39}\)

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.

---

\(^{37}\) American Visuals Corp. v. Holland, 239 F.2d 740 (2nd Cir. 1956).

\(^{38}\) 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, 53 F.3d at 952.

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

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.\(^{40}\)

Similarly, according to the common understanding of the term publication, a speech published in a newspaper or broadcast on television would be considered published because the public had access to it. However, a work published in a newspaper or broadcast on television may be considered “unpublished” as a matter of copyright law.\(^{41}\)

Releasing a work through public performance or display does not (without the triggering of additional variables) constitute “publication” as a matter of law.\(^{42}\)

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 tort and privacy law.\(^{43}\) Even in copyright doctrine, the term does not have a singular meaning.\(^{44}\) 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.\(^{45}\) It 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.”\(^{46}\) Yet


\(^{41}\) Estate of Martin Luther King, Jr. Inc., v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999).


\(^{43}\) American Visuals Corp. v. Holland, 239 F.2d 740 (2nd Cir. 1956).

\(^{44}\) See generally, Melville Nimmer, Copyright Publication, 56 Colum L. Rev. 185 (February 1956) (separately analyzing the meaning of publication in the contexts of sound recordings, public performance, film, art and deposits of works in public collections).

\(^{45}\) MELVIN B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT, Vol. __

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

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.” 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 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,48 and (3) that no defense, such as fair use, protects the defendant’s conduct.49 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.

47 Nimmer § 1: 4.10.

48 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).

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 offer establish that one of the exclusive rights belonging to the author was infringed. A copyright gives its owner the exclusive rights to:

1. reproduce the work,
2. create derivative works,
3. distribute it,
4. publicly display it, and
5. publicly perform it.\(^{50}\)

The third exclusive right is the distribution right.\(^{51}\) Under this provision, only the 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.”\(^{52}\) This distribution right is sometimes referred to as “the right of first publication.”\(^{53}\) This right is violated when an unauthorized person actually disseminates the work. Making it available to the public is generally not sufficient to amount to a violation of the distribution right.\(^{54}\) In attempting to determine whether the work was the subject of an unauthorized distribution, courts often question whether the defendant “published” the

\(^{50}\) 17 U.S.C. § 106.

\(^{51}\) Id.

\(^{52}\) 17 U.S.C. § 106(3).


\(^{54}\) 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 Syst. v. Computer Assocs. International, 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).
work. However, in this context, “publication” has a different and narrower meaning than in the first context. The use of the term is different because it targets a potential defendant’s conduct and not the nature of the author’s work. Confusion may arise when the court explains this second step by using “publication” as a synonym for distribution.\(^{55}\)

The definition of publication in the distribution right context is often described as narrower in scope than the definition of publication concerning the nature of a particular work. 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.”\(^{56}\) Therefore, actual dissemination is not necessary for a work to be “published” under the definition in the first element. However, if a defendant offer to publish a work, but did not actually do so, a court will generally find that he has not violated the distribution right.\(^{57}\) Therefore the meaning of “publication” under the second copyright infringement element is different and narrower than 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.\(^{58}\) However, making songs available over the Internet


\(^{57}\) Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 987 (D. Ariz. 2008); (holding that defendant’s acts of making music available on the file sharing site Kazaa did not amount to “publication”).

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

through an on-line file-sharing network has been found to be insufficient to constitute a violation of the distribution right if no evidence of actual distribution was presented.59 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.60

II. The Creation of the Dataset

The goal of this project is to explore the landscape of the federal judicial precedent on copyright publication, and describe what we see. The nature of this work has inherent limitations. One of the most important is that precedent does not necessarily reflect the nature of the many practical decisions regarding publication that are made everyday and never result in conflict.61 Of those that do lead to differences of opinion, many are resolved prior to litigation, and many litigated decisions are settled or resolved without


60 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.” Therefore, some cases were included in Beebee’s empirical study of fair use, but were not included in this dataset because they did not expressly address the issue of “publication.” Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005, 156 U. Penn. L. Rev. 549, ___ (January 2008). For example, Beebee includes cases that discuss “public availability” of a work as part of the second fair use factor. Id. at __. However, because these cases do not expressly address “publication,” they were excluded here. See, e.g., Penelope v. Brown, 792 F. Supp. 132, 138 (D.Mass. 1992)(addressing whether a book was still in print in analyzing the second fair use factor).

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

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.” 62 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.” 63 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.” 64 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. 65 Empirical analysis can be especially valuable if – like an airplane flying above a large maze -- it can


64 Hall and Wright, Systematic Content Analysis of Judicial Opinions, 96 Cal. L. Rev. at 65.

65 Hall and Wright, 96 Cal. L. Rev. at 66.
disclose a path out of a difficult problem. The dataset was created to capture this aerial view of copyright publication precedent.

One primary goal of the project is to create a dataset of federal copyright publication cases that would be of value to anyone interested in further study of this issue. Therefore, 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.66 Since 1978, federal law has preempted virtually all questions of copyright law, including the issue of publication.67 Consequently, 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 addressed the issue of copyright publication regarding the nature of a particular work.

The first challenge was to identify the relevant cases. Because publication was not defined by statute until 1976,68 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 “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. 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. As a result of this careful selection process, 383 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 as the type of work, whether the work was unique or existed in multiple copies (such as a

---

69 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.

70 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.

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.71 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.

71 Fifteen federal decisions made multiple publication decisions based on different factual variables, and therefore were coded more than once.
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.*, the district court made publication decisions on 56 different choreographic works. If each decision were accorded equal weight in the dataset, this decision would be accorded 56 times more weight than any case that decided only one work.

Mark Hall and Ron Wright observe that empirical scholarship reflects better results when “each decision” is given “equal weight.” 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 would be preserved. Using this method, the *Martha Graham* district court and appellate decisions demonstrated four clear patterns, each of which was retained in the data. When appropriate (such as in counting the number of cases), the

---


73 Hall and Wright, *Systematic Content Analysis of Judicial Opinions*, 96 Cal. L. Rev. at 83.

74 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.
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 five decisions that were coded more than once. 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.”

III. Summary Statistics

Applying the methods set forth above, this study reflects 383 judicial opinions on copyright publication. The following chart demonstrates the percentage of publication opinions decided by district courts, appellate courts and the Supreme Court.

---

75 Hall and Wright, Systematic Content Analysis of Judicial Opinions, 96 Cal. L. Rev. at 76.
The Supreme Court has decided nine cases involving the copyright meaning of publication.\textsuperscript{76}

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),\textsuperscript{77} ribbon flowers,\textsuperscript{78} the Oscar statuette,\textsuperscript{79} and Danon yogurt recipes.\textsuperscript{80} The following chart reflects the percentage of general categories for several types of works.

\textsuperscript{76} 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) (finding publication of 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, not 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 without a copyright notice, the chapters fell into the public domain); Holmes v. Hurst, 174 U.S. 82 (U.S. 1899) (finding that serial printing of “The Autocrat of the breakfast Table” 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 copyright); Callaghan v. Myers, 128 U.S. 617 (1888) (holding that delivery of copies of a work to the secretary of state constitutes publication).


\textsuperscript{78} Norma Ribbon & Trimming, Inc. v. John D. Little, 51 F.3d 45 (5th Cir. 1995).

\textsuperscript{79} 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”).

\textsuperscript{80} Publications International Limited v. Meredith Corporation, 88 F.3d 473 (7th Cir. 1996)
Some prominent scholars have suggested that the concept of copyright publication is “less significant today than it once was” prior to passage of the 1976 Act and 1989 Amendments.\footnote{Cotter, Towards a Functional Definition of Publication in Copyright Law, 92 Minn. L. Rev. 1724, 1770 (June 2008).} The data demonstrates that the issue may be more significant. Litigation over the meaning of publication has increased dramatically since passage of the 1976 Copyright Act.\footnote{Nimmer § ____}. The following chart illustrates the numbers of publication cases decided by federal courts from 1849 through the beginning of 2009.
Publication issues still arise to determine whether works created under the 1909 Act are now in the public domain. Although the 1976 Act and later amendments are commonly thought to have reduced the importance of publication, revisions to the federal copyright statutes also created new situations in which the question of publication became relevant. Some of these newer amendments account for the increase in litigation related to the issue of publication. One increase resulted from the codification of the fair use doctrine in the 1976 Act has affected the amount of litigation regarding publication. Of the 68 cases that adjudicated the question of publication in the fair use context, only two were decided before 1978. Another factor that may contribute to this increase is the Supreme Court’s decision in *Harper & Row*, in which the publication issue had a dispositive impact on the fair use decision.

---