

User “Safer Harbor” from Statutory Damages: Remixing the DOC’s IP Task Force White Paper

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ABSTRACT

In Safe Harbor for the Innocent Infringer in the Digital Age (Safe Harbor), I argued that certain classes of direct innocent infringers of copyright—namely, accidental and mea culpa infringers¹—should be afforded safe harbor from liability in light of current accepted online practices of users deemed essential for the proper functioning and progress of the Internet and digital technology. I offered a statutory amendment to Section 512 of the Copyright Act, one that would apply specifically to direct users and protect them in ways similar to the protections currently available to online service providers.

In this Article, I approach the same topic from the damages phase and argue that a user's actual or constructive knowledge of a copyright holder's rights should be a factor in determining whether the holder's damages award should be limited to the currently discretionary minimum award. Knowledge could even serve to create a presumption of culpability during the damages phase after liability has been determined.² However, notice of copyright alone should not serve as a complete bar to a defendant's ability to assert an innocent infringement defense that triggers a minimum

1. I coined the terms “accidental infringer” and “*mea culpa* infringer” in *Safe Harbor*. Tonya M. Evans, “*Safe Harbor*” for the Innocent Infringer in the Digital Age, 50 WILLAMETTE L. REV. 1, 15 (2013). R. Anthony Reese explains the concept underlying the term in his comprehensive coverage of the innocent infringer defenses in *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 133–34 (2007). Reese explains: “[i]nnocent or unknowing copyright infringement occurs when someone engages in infringing activity not knowing that her conduct constitutes infringement—perhaps most commonly when she knowingly copies from another’s work but reasonably believes that her copying is not infringing.” *Id.* at 133.

2. Copyright infringement is a strict liability offense. *See infra* Part II (explaining and critiquing the strict liability nature of copyright). Thereafter, a court assesses a defendant’s culpability to determine, in its discretion, what amount of statutory damages is appropriate: ordinary damages (\$750–\$30,000), increased damages for willful infringement (up to \$150,000) or a minimal damages for innocent infringement (not more than \$250). 17 U.S.C. § 504(1), (2) (2012). The distinction between liability and culpability is important. Nolo.com defines liability as, “the state of being liable—that is, legally accountable for an act or omission.” It defines culpability as being “[s]ufficiently responsible for criminal acts or negligence to be at fault and liable for the conduct.” The latter focuses on the user’s state of mind while engaged in the infringing activity.

statutory damage award. This approach is fairer and more just, especially in light of the fact that copyright infringement is a strict liability offense and exposes even the ordinary, low-level infringer to damage awards that are often questioned by commentators and judges alike as egregious and, in some cases, unconstitutional.³

Accordingly, I argue that in lieu of—or in addition to—my user safe harbor proposal in Safe Harbor, Congress should adopt a more meaningful minimum statutory damage award under Section 504(c) for certain classes of noncommercial infringement and commercial infringement causing little or no economic harm. This proposal would apply in cases where liability is established and the use is not otherwise legally permitted or excused.⁴ It would reduce statutory damage awards for technically infringing uses that support progress because they are socially beneficial, technologically desirable, or both.⁵

In light of the Department of Commerce’s 2016 Internet Policy Task Force report on statutory damages and the Copyright Office Section 512 Roundtables on the same topic, I discuss the report’s findings, as well as Canada’s approach to user rights for illustrative purposes, against the backdrop of my own recommendations.

I. INTRODUCTION

As John Tehranian and countless commentators have so aptly proclaimed, “[i]n the digital age, we are all regular consumers and producers of copyrighted content.”⁶ Without question, we are firmly entrenched in the “Participation Age,” and content consumers are no longer passive in their

3. See *infra* Part II (critiquing excessive statutory damages awards and lack of clear legislative or judicial standards in determining amounts).

4. Essentially, user “safer harbor” would be triggered to reduce the damages award to “innocent infringement” levels for technically infringing but socially and technologically beneficial activities. See *infra* Part III.

5. I use the terms “technically” or “technical” to refer to incidental uses that are not authorized by the copyright holder.

6. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 540. Tehranian articulated three observations:

First, copyright law is increasingly relevant to the daily life of the average American. Second, this growing pertinence has precipitated a heightened public consciousness over copyright issues. Finally, these two facts have magnified the vast disparity between copyright law and copyright norms and, as a result, have highlighted the need for reform.

Id. at 539.

consumption.⁷ However, when someone uses a copyrighted work in ways protected by Section 106 of the Copyright Act⁸ without permission or legal excuse, such use is considered a copyright infringement. Those uses include reproduction, publication, public display, public performance, and adaptation.⁹

Modern copyright consumers have unprecedented access to copyrighted works via the Internet and opportunities to exploit them in digital form. However misguided, these consumers—especially many “digital natives”¹⁰—have an expectation that works accessed online can be adapted, repurposed and remixed without legal consequence.¹¹

Due to the strict liability nature of copyright, innumerable technical copyright infringements occur online every day,¹² even when users are engaging in online practices many would consider acceptable, welcomed, and even essential to the proper functioning of the Internet.¹³ Those technical infringements can cause even the average consumer of copyrighted works to wind up in court to defend their use.¹⁴ And, in light of the vast range

7. See Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 263 (2006) (explaining that users have abandoned the consumptive and passive aspects of the “Information Age,” “to embrace the ‘Participation Age’ of remix culture, blogs, podcasts, wikis, and peer-to-peer files sharing.”) (citations omitted).

8. 17 U.S.C. § 106 (2012).

9. *Id.*

10. See Marc Prensky, *Digital Natives, Digital Immigrants Part 1*, 9 ON HORIZON 1 (2001). In coining the term “digital natives,” Prensky discussed the ubiquitous presence technology has in the lives of the younger generation, stating:

[They] represent the first generations to grow up with this new technology. They have spent their entire lives surrounded by and using computers, videogames, digital music players, video cams, cell phones, and all the other toys and tools of the digital age . . . Computer games, email, the Internet, cell phones, and instant messaging are integral parts of their lives.

Id.; see also JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 4–7 (2008).

11. See *infra* Parts II and III (exploring user expectations, concerns and commonplace and generally accepted online activities).

12. See *infra* Part IV, which details user activities that could trigger a reduced damages award.

13. See Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1841 (2000) (“All of this activity arguably infringes the copyright holder’s exclusive rights of reproduction and distribution. [However, only one case] supports this result.” (first citing 17 U.S.C. § 106; and then citing *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993))).

14. The most common defenses, other than the innocent infringer defense include: copyright invalidity as to originality, whether the work is the proper subject matter of copyright, ownership, *de minimis* use, fair use; and independent creation. Evans, *supra* note 1, at 12 n.39.

of permissible damage awards within the statutory damages¹⁵ framework and almost unfettered judicial discretion in determining a use to be innocent, ordinary, or willful infringement, many users would be surprised to learn that their unauthorized use could lead to civil damage awards ranging from \$750 to \$30,000 for ordinary infringement,¹⁶ and up to \$150,000 for willful infringement.¹⁷

A user who neither knew nor should have known her use was infringing—aka the innocent infringer¹⁸—could, in a court’s discretion, only be required to pay a reduced damages amount of \$200 per work infringed.¹⁹ The Copyright Act provides, however, that where visually perceptible copies²⁰ or phonorecords²¹ of sound recordings are concerned, a defendant will not qualify for minimum damages if the defendant had access to a physical copy of the infringed work bearing a proper copyright notice. In the case of certain digital works that are not visually perceptible, the “access” determination can be problematic.²² If a properly affixed copyright notice appears on a physical copy of the infringed digital work, courts have held that the digital user is precluded from invoking the innocent infringer argument necessary to qualify for the reduced statutory damages award.²³ In that case, the user is deemed to have constructive notice even if she did not have actual notice via access to a physical copy.

15. 17 U.S.C. § 504(a)(2) (2012). Statutory damages and attorney’s fees are available only if the work is timely registered by the plaintiff with the Copyright Office prior to the infringement or within three months of publication. 17 U.S.C. § 412(2) (2012).

16. 17 U.S.C. § 504(c)(1) (2012).

17. 17 U.S.C. § 504(c)(2) (2012). Unfortunately, the term “willful” is not defined in the Act and no examples are offered to provide additional guidance.

18. An innocent infringer “is a defendant who infringes a copyright without intending to do so and without having a reason to suspect that she is doing so.” Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 767, 772–73 (2011) (citing Alan Lautman & William S. Tager, *Liability of Innocent Infringers of Copyrights*, reprinted in 2 COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT (1963)).

19. 17 U.S.C. § 504(c)(2).

20. 17 U.S.C. § 401(d) (2012).

21. 17 U.S.C. § 402(d) (2012).

22. See *BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005). In *Gonzalez*, the court held that the “access” requirement is met when one has literal access to copies with the required copyright notice. *Id.* For digital cases involving works that were not visually perceptible, see *Electra Entm’t Group, Inc. v. McDowell*, 4:06-CV-115 (CDL), 2007 U.S. Dist. LEXIS 82208, at *2 (M.D. Ga. 2007) (applying § 401(d)), and *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010) (applying § 402(d)).

23. Lipton, *supra* note 18, at 781.

In *Safe Harbor*,²⁴ I argued that certain classes of technical online infringers should be classified as innocent infringers and afforded safe harbor from copyright liability in light of current accepted online practices of users deemed essential for the proper functioning and progress of the Internet and digital technology. In that article, I offered a statutory amendment to Section 512 of the Copyright Act, one that would apply specifically to users and protect them as if they were online service providers.²⁵

Even if Congress does not adopt my user safe harbor proposal, it could still address and remedy the aforementioned concerns in Section 504, which contains the statutory damages provisions.²⁶ Congress could extend “innocent infringer”-level damages to a broader class of infringers. The innocent infringer defense currently applies only to users who neither knew nor should have known of the copyright holder’s copyright interests.²⁷ Under my proposal, this broader class of users could qualify for minimal damages even if they have constructive notice of an owner’s copyright claim. Minimal damages would be available for users who engage in accidental or *mea culpa* online infringement behavior considered commonplace and ordinary and who, once notified, take expeditious steps to cease the infringing activity.²⁸ Contemplated activities include noncommercial uses or those that cause little or no economic harm, and users who, once notified, take all reasonable measures to end the infringing activity.²⁹

Accordingly, in this Article I argue that notice of copyright should only be a *factor* to be considered in determining whether the user may qualify as an innocent infringer and, therefore, whether the copyright holder is limited to reduced damages. Notice, however, should not completely bar a defendant from raising the innocent infringer argument under certain circumstances outlined in my proposed amendment.³⁰

To be sure, this amendment would be a significant departure from current law as far as the impact of an infringer’s knowledge of the owner’s copyright interests is concerned. And to be clear, knowledge would certainly

24. Evans, *supra* note 1, at 2.

25. *Id.*

26. See 17 U.S.C. § 504(c) (2012).

27. Lipton, *supra* note 18, at 781.

28. See *infra* Part VI that outlines 504(c)(3) and 512 “reimagined.”

29. This approach to damages is particularly sound given the law’s long history of applying the common law maxim *de minimis non curat lex*; that is, “the law cares not for trifles.” See *Wis. Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (stating the maxim is “part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept”).

30. See *infra* Part VI.

have probative value in the damages calculation—as currently assessed under 504(c).³¹ I argue, however, that notice alone should not serve as a complete bar to a minimum statutory damage award. This result seems both reasonable and just given that (1) notice is not required for rights to exist; and (2) copyright is a strict liability offense that exposes even the ordinary, low-level infringer to damage awards questioned by commentators and judges alike as sometimes egregious and, in some cases, unconstitutional.

Accordingly, in this Article, I offer a statutory amendment to Section 504 to resolve the copyright liability and remedy proportionality concerns. Specifically, I argue that in lieu of—or in addition to—a user safe harbor proposal, Congress could also adopt a more robust and meaningful minimum statutory damage award under 504(c) beyond innocent infringers for certain classes of noncommercial infringement and commercial infringement that results in negligible economic harm. This “safer harbor” proposal could apply when the proposed user safe harbor is not applied to technically infringing activity deemed socially beneficial or technologically desirable to support progress, or both. To be sure, limits on statutory damages are desirable even outside of the innocent infringement context.

I believe the entire statutory damage scheme should be reformed and brought more in line with fair and just results required by the Act, as is typical and necessary in strict liability offenses across legal disciplines.³² To this end, my proposal seeks to: (1) create a mandatory, rather than discretionary, reduced damage award for a certain class of infringers; and (2) expand the types of activities that might trigger innocent infringement-like protection of defendants during the remedies phase of the infringement lawsuit.

In Part II, I examine copyright’s failure in form and application in both the copyright liability and damages phases of an infringement suit. I critique the strict liability nature of copyright, excessive discretionary damage awards, the lack of clear judicial standards in determining the type of infringement—innocent, ordinary, or willful—and amount of damages due, the role of the copyright notice on physical copies as a complete bar to innocent infringement in digital copyright cases, and the lack of a viable innocent infringement defense in practice.³³

31. 17 U.S.C. § 504(c)(2).

32. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009), for a discussion of this principle.

33. See *infra* Part II.

In Part III, I explore user concerns in making ex ante determinations about what qualifies as a public domain work, substantial similarity, fair use, and “grey areas” of copyright law where the laws are unclear in form, in application, or in both—especially tolerated uses.³⁴ The main concerns in this area are: the absence of copyright formalities intended to give users adequate notice of plaintiff’s rights, the need for dramatically increased access for average users, the considerable risk of liability in the online environment, and the stiff penalties awaiting users who guess incorrectly.

In Part IV, I explore the types of modern-day, commonplace, and generally accepted uses—both commercial and noncommercial—that should trigger only minimal damages. I also examine Canada’s Copyright Modernization Act (CMA),³⁵ which creates new personal use and fair dealing exceptions for creation of non-commercial user-generated content (the UGC-mashup exception),³⁶ reproduction of protected works for a private purpose (the format-shifting exception),³⁷ and fixation of signals and recording programs for later listening or viewing (the “time-shifting” exception).³⁸

In Part V, I explore the 2016 Department of Commerce’s Internet Policy Task Force report on statutory damages and unpack the report’s findings against the backdrop of my own recommendations to amend Section 504. A re-imagined Section 504 provides mandatory “safer harbor” protection for accidental and mea culpa infringers from the more onerous and excessive statutory damages awards currently being applied.

Finally, in Part VI, I propose language that Congress could adopt to amend Section 504. Ultimately, my goal is to ensure that minimum statutory damages awards are more real than theoretical in the digital age for accidental and mea culpa infringers, and to expand the types of activities that might trigger innocent infringement-style protection during the remedies phase of the infringement suit.

II. FAILURES IN COPYRIGHT’S FORM AND APPLICATION

The constitutional justification for the copyright monopoly is that, by providing authors with an economic incentive to create and disseminate creative works, the public will reap the benefits of progress from creative

34. YouTube content ID is an excellent example of the option copyright owners have to monetize infringing activity rather than issuing a takedown request to remove the material from YouTube. For a full explanation of Content ID, visit <https://www.youtube.com/yt/copyright/> [<https://perma.cc/E54P-3NXH>].

35. Copyright Modernization Act, S.C. 2012, c.20 (Can.).

36. Copyright Act of Canada, R.S.C. 1985, c.C-42 § 29.21.

37. *Id.* § 29.22.

38. *Id.* § 29.23.

and inventive endeavors.³⁹ Limitations on copyright, like excepting certain users—libraries and non-profit organizations, for example—from liability and the fair use doctrine, inject balance into the constitutional equation and prevent exclusive rights from stifling creativity.⁴⁰

A. *Strict Liability*

On its face, the Copyright Act's standard for copyright infringement appears relatively straightforward: "[a]nyone who violates any of the exclusive rights of the copyright owner" is liable for copyright infringement.⁴¹ Accordingly, anyone who uses a copyrighted work in ways reserved by Section 106 to the work's author without legal permission or excuse is strictly liable for copyright infringement. From a liability perspective, the Act treats all infringers alike—from the most unwitting to the most egregious. In copyright's strict liability scheme, the infringer's intent is irrelevant in determining liability.

Many commentators have criticized the strict liability framework, with some wholly rejecting the assertion that copyright is a strict liability rule at all.⁴² Critics suggest that a better approach to copyright liability would be a conditional cause of action more akin to negligence.⁴³ I tend to agree

39. U.S. CONST. art. I, § 8; *see also* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1571 (2009) (stating that "[c]opyright law's principal justification today is the economic theory of creator incentives."); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1539 (2005) (explaining that "[t]he primary justification for U.S. copyright law is encouraging the creation of expressive works that benefit the public.>").

40. *See* Van Houweling, *supra* note 39, at 1539. Professor Van Houweling explains: "the ultimate aim is, by this [economic] incentive, to stimulate artistic creativity for the general public good." *Id.* (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

41. 17 U.S.C. § 501(a) (2012).

42. *See, e.g.*, Patrick R. Goold, *Is Copyright a Strict Liability Tort*, 30 BERKELEY TECH. L.J. 305 (2015) (arguing that copyright infringement is not a strict liability tort, but rather a fault-based tort); Steven Hetcher, *The Kids Are Alright: Applying a Fault-Liability Standard to Amateur Digital Remix*, 62 FLA. L. REV. 1275 (2010) (arguing for a fault liability regime for user-generated content); Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. REV. 767 (2011) (offering ways in which the innocent infringement standard for damages could, instead, result in no liability).

43. *See* Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative, the 36th Annual Donald C. Brace Lecture*, 54 J. COPYRIGHT SOC'Y U.S.A. 139, 147 n.22 (2006) (outlining three weaknesses of the analogy to real/personal property); Christina Bohannon,

with the latter school of thought. Nonetheless, I assert that even under the current strict liability approach, Congress should add additional exceptions to liability findings (as I argued in *Safe Harbor*) or require that judges always award minimum damages for the least culpable who qualify as accidental and mea culpa infringers. Clearly, this would remove a certain level of judicial discretion.⁴⁴ On balance, however, I argue that this change is technologically necessary, constitutionally just, objectively reasonable to both users and owners, and therefore, ultimately beneficial to society.⁴⁵

B. Inconsistent Statutory Damages Determinations

Copyright owners are entitled to compensation for economic harm to their Section 106 rights.⁴⁶ For owners who timely register their copyright, statutory

Copyright Harm, Foreseeability, and Fair Use, 85 WASH. U. L. REV. 969, 974–76, 983–85 (2007) (criticizing the use of trespass-to-land models in copyright).

44. See e.g., *Jobete Music Co., Inc. v. Johnson Communications, Inc.*, 285 F. Supp. 2d 1077, 1086 (S.D. Ohio 2003) (explaining “[i]t is well-established that trial courts have wide discretion in awarding damages within the statutory range provided in § 504(c)(1).”); *Broad. Music, Inc. v. DeGallo, Inc.*, 872 F. Supp. 167, 169 (D.N.J. 1995) (noting “[t]he district court has wide discretion as to the damages actually awarded” (citing *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984))).

45. One considerable benefit to society not often asserted is the value of social and semiotic production. See Sunder, *supra* note 7, at 307–08 (noting that an economic incentive rationale of copyright “fails to appreciate the value of semiotic democracy, a society in which everyone may participate in the processes of cultural production and dialogue.”); Tehranian, *supra* note 6, at 540 (2007). Tehranian explains that:

[c]opyright law is playing a profound role in shaping our very identities. Copyright’s regulation, propertization, and monopolization of cultural content determine who can draw upon such content in the discursive process of identity formation. Thus, the contours of our intellectual property regime privilege certain individuals and groups over others and intricately affect notions of belonging, political and social organization, expressive rights, and semiotic structures.

Id.

46. Section 106 provides:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

damages are available in lieu of actual damages.⁴⁷ In fact, statutory damages are available to a plaintiff regardless of the plaintiff's ability to establish actual damages, even for "uninjurious and unprofitable invasions of copyright."⁴⁸ Statutory damages can compensate an aggrieved copyright owner when actual damages are difficult or impossible to determine.⁴⁹ And at the upper end of the range, statutory damages may certainly have a deterrent effect.⁵⁰ However, judges regularly forego a substantive exercise of discretion and instead rely, without much explanation, on statutory maximums for either ordinary or willful infringement.⁵¹ Online infringement cases are hardly immune from inconsistent results and may lead to even more wildly varied decisions.⁵²

A court's process of determining the amount of damages—without much discussion or explanation—and the inconsistent results such cases bring about, is well illustrated by the case of *Macklin v. Mueck*.⁵³ In *Macklin*, the plaintiff sued two individuals who displayed Macklin's copyrighted work on their poetry website.⁵⁴ The defendants failed to respond to the complaint and Macklin, in turn, moved for an award of the statutory maximum for willful infringement.⁵⁵ Despite the magistrate's recommendation of \$750 in damages per poem, the court found the unauthorized use to be willful, and awarded the maximum statutory amount of \$300,000—\$150,000 per

17 U.S.C. § 106 (2012); *see also* Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1220 (2010) (explaining that "[c]opyright owners have long been entitled to be compensated for pecuniary harms that infringement inflicts on them.").

47. 17 U.S.C. § 504 (2012); *see also* Samuelson, *supra* note 46, at 1221.

48. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 507 (1st Cir. 2011) (citing F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952)).

49. *See* Samuelson, *supra* note 46, at 1221.

50. *See id.* ("[a]t the higher end of the scale, statutory damages are thought to provide extra deterrence or punishment for egregious infringement.").

51. *See* WILLIAM F. PATRY, 6 PATRY ON COPYRIGHT § 22:155, Westlaw (database updated Sept. 2016); *see also* Samuelson & Wheatland, *supra* note 32, at 441 (explaining that "those who merely should have known their conduct was infringing are often treated as willful infringers.") (citation omitted).

52. *See* Religious Tech. Ctr. v. Lerma, No. 95-1107-A, 1996 WL 633131, at *15 (E.D. Va. Oct. 4, 1996) (holding that defendant must pay the statutory minimum of \$2,500 for posting considerable portions of five Scientology books to the internet). *But see* L.A. Times v. Free Republic, No. 98-7840, 2000 U.S. Dist. LEXIS 20484, at *7 (C.D. Cal. Nov. 14, 2000) (awarding plaintiff \$1 million in statutory damages because defendant posted an unspecified number of newspaper articles on its nonprofit website).

53. *Macklin v. Mueck*, No. 00-14092, 2005 U.S. Dist. LEXIS 18026 (S.D. Fla. Jan. 28, 2005).

54. *Id.* at *3.

55. *Id.* at *2.

work infringed.⁵⁶ The court in *Macklin* seemingly chose to forego entirely the subjective analysis and discretion that Congress intended a judge to exercise. Additionally, the court failed to articulate a reason for its decision to impose the maximum penalty. This result is just one example of many and it reflects a troubling trend in need of reform.⁵⁷

The history of statutory damages in the United States is as long as the history of copyright itself. The first statutory damages provision was the Statute of Anne, enacted by the Parliament of Great Britain in 1710.⁵⁸ From the initial enactment in 1790 through the current iteration of the 1976 Act, statutory damages in the United States have existed as an alternate compensatory remedy to actual damages, with the purpose of deterring future infringements.⁵⁹ The limits of statutory damage awards have changed over the years since 1909, with the limits consistently increasing.⁶⁰ Congress gave

56. *Id.* at *1.

57. It is not uncommon for courts to punt a substantive analysis of statutory damages assessments due to a fundamental lack of understanding of copyright. For example, in one case, the plaintiff was awarded \$31,000 per infringed work after the defendant was found to be willful in the unauthorized production of karaoke disks of the plaintiff's music. *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 580 (6th Cir. 2007). The trial court determined that once liability was established to be willful, the statutory damages for non-willful infringement were insufficient. *Id.* at 580, 586. Professor Samuelson criticized the decision because there was no apparent explanation to assess "the unusual figure of \$31,000 per work." See Samuelson & Wheatland, *supra* note 32, at 483–84. Professors Samuelson and Wheatland provide numerous examples of widely inconsistent statutory damages awards in their essential work on the topic. *Id.* at 442–43 (first citing *UMG Recordings, Inc. v. MP3.com*, No. 00 Civ. 472 (JSR), 2000 WL 1262568, at *1, *6 (S.D.N.Y. Sept. 6, 2000) (involving a \$118 million award (\$25,000 per CD) "despite the absence of any evidence of actual harm to the plaintiffs or profits to the defendant"); then citing *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 288 (9th Cir. 1997), *rev'd sub nom.* *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (involving a jury award (court-awarded damages \$20,000 per work, for a total award of \$8.8 million was increased by a jury on appeal to \$72,000 per work "for exactly the same acts of infringement, resulting in a total award of over \$31 million"); and then citing *Capitol Records v. Thomas-Rasset*, 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008) (jury award of \$80,000 per work infringed against a file-sharer, for a total award of over \$1.92 million, finding that actual damages were approximately \$50.")).

58. See Statute of Anne, 1710, 8 Ann., c.19 (Eng.), <http://www.copyrighthistory.com/anne.html> [<https://perma.cc/VP8L-39YZ>] (last visited Jan. 22, 2017). The Act required an infringer to pay one penny per infringing sheet, half of which went to the author and the other half to the Crown. *Id.* § 1; see also Priscilla Ferch, Note, *Statutory Damages Under the Copyright Act of 1976*, 15 LOY. U. CHI. L.J. 485, 487 (1984).

59. See Colin Morrissey, Note, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059, 3066 (2010).

60. Alois Valerian Gross, Annotation, *Measure of Statutory Damages to Which Copyright Owner is Entitled Under 17 USCS § 504(c)*, 105 A.L.R. Fed. 345, § 2[a] (1991). Statutory damages are also referred to as "in lieu" damages. *Id.*

judges wide discretion to determine the appropriate damages to reach more “just” results.

Congress affords judges “wide and almost exclusive discretion” to determine the amount of statutory damages—within the ranges set forth in the Act—for innocent, ordinary, and willful infringement.⁶¹ In cases of ordinary or willful infringement, however, due process concerns and the opportunity for appellate review contemplate that a district court provide at least *some* cursory explanation of the district court’s findings and reasoning in support of its exercise of discretion.”⁶² As noted earlier, not all courts choose to follow this sound expectation.

Congress chose to subject statutory remedies in copyright infringement cases to judicial discretion as a means of furthering various policy considerations.⁶³ These policy considerations include just compensation, unjust enrichment, inter-party fairness, and generally serving the public interest. Congress deemed judicial discretion essential to ensure that adequate deterrents were in place to discourage future infringing behaviors.⁶⁴ In addition to the deterrent effect, Congress sought to ensure that infringement cases ended in a just result.⁶⁵

61. *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1017 (7th Cir. 1991) (citing *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935)); *see also* Samuelson & Wheatland, *supra* note 32, at 441. Professors Samuelson and Wheatland explain: “. . . copyright law provides scant guidance about where in that range awards should be made, other than to say that the award should be in an amount the court ‘considers just,’ and that the upper end of the spectrum . . . is reserved for ‘willful’ infringers.” *Id.* (internal citations omitted).

62. *Id.*

63. *See* Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 3–4 (2011).

64. *See* *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). The Court noted the following:

[A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. . . . The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.

Id.

65. *See* 17 U.S.C. § 504(c)(2) (2012); *see also* H.R. REP. NO. 94-1476, at 161–63 (1976) (detailing the two basic aims of Section 504 as follows: “(1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the

Wide deviations in judicial determinations of statutory damages occur for a number of reasons. First, copyright law is woefully complex and counterintuitive.⁶⁶ Because of this complexity, court outcomes are hard to predict.⁶⁷ Second, the legal framework consists of open standards “whose purpose is to permit the development, on a case-by-case basis, of finely-tuned norms.”⁶⁸ Facts-and-circumstances determinations to set the amount of statutory damages, given this statutorily prescribed discretion, also lead to varied and inconsistent results. Finally, the “all-or-nothing” approach to liability, coupled with a lack of guidance about how to set statutory damage awards, forces parties to a “settling result” rather than testing the bounds of the law enacted to protect certain legally excused unauthorized uses.”⁶⁹

When damages far exceed liability and bear no reasonable proportionality to the copyright owner’s actual harm, such an unjust result can have unintended negative consequences on otherwise beneficial activities, most notably a chilling effect on copyright use.⁷⁰

When legal outcomes are uncertain, rational parties gravitate toward the least-risky or least-costly option.⁷¹ This tendency leads such parties to avoid the copyrighted material altogether, creating a chilling effect on creativity and fair use, which is contrary to the constitutional justification of the copyright monopoly to spur progress.⁷² Therefore, Congress must reform the statutory

case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.”).

66. See Afori, *supra* note 63, at 2 (noting that such wide deviations lead to a chilling effect on copyright users who engage in “risk-adverse” behavior and, as a result, either avoid use altogether or seek to license works that may not actually necessitate a license); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 19 (1996) (alluding to the “complex body of counterintuitive, bewildering rules[.]”); Pamela Samuelson, Symposium, *Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium*, 87 CALIF. L. REV. 1, 3 (1999) (discussing the difficulty in finding common threads and establishing uniform rules in the copyright context).

67. Afori, *supra* note 63, at 2.

68. *Id.* at 5–6.

69. *Id.* at 3.

70. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) (explaining that “if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken . . . and risky but socially beneficial activities may be undesirably curtailed”).

71. See Afori, *supra* note 63, at 11.

72. See *id.* Afori explains that parties prefer settlements, despite their chilling effects on creativity, because of, “the certainty they provide, in contrast to the uncertainty as to the outcome of a trial verdict: since both parties are evaluating their legal chances under the veil of ignorance, they rationally prefer the lesser potential harm of compromise.” *Id.* (citing George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984)); see also Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L.J. 1537, 1539 (2013) (explaining that works of unknown authorship are underused because of “uncertainty about whether they are protected by copyright or not, which creates a chilling effect”).

damages provisions or *at least* give judges greater clarity to render fairer, more consistent, and more just statutory damage award determinations.⁷³

Congress intended judicial discretion in damages award determinations to provide greater certainty and protection for those users who engaged in non-injurious and beneficial but unauthorized uses of copyrighted material.⁷⁴ Congress believed that by granting wide latitude in damages determinations, it would better ensure that the “grey areas” of copyright could be addressed on an as-needed basis, after considering the facts and circumstances of each case.⁷⁵ In practice, however, the wide deviations in interpretation and application across the circuits have been anything *but* certain.⁷⁶

*C. Innocent Infringement & the Role of Access to Copies Bearing
“Notice” in Determining Statutory Damages in
Digital Cases*

The innocent infringer defense finds its origins in England’s Statute of Anne.⁷⁷ The statute prohibited the unauthorized sale of copyrighted materials and applied its penalty provisions to anyone who did so.⁷⁸ The drafters of the statute were concerned with the unintended but foreseeable consequences of parties unknowingly violating the law due to ignorance of the law.⁷⁹ Historically, then, copyright law shielded individuals who were unaware that their actions infringed from the more onerous penalties that stem from a strict liability offense.

73. Samuelson, *supra* note 46, at 1221. Professor Samuelson explains: “[i]f copyright law is to retain the right to elect to recover statutory damages in lieu of actual damages, guidelines for awarding statutory damages in a consistent, reasonable, and just manner should be developed.” *Id.* at 1220.

74. H.R. REP. NO. 90-83, at 30–31 (1967) (discussing teachers, librarians, and other non-profit users of copyrighted material).

75. *See supra* note 59.

76. *See* Samuelson & Wheatland, *supra* note 32, at 485–86 (inviting the reader to compare *Peer International Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 569 (S.D.N.Y. 1995), with *Peer International Corp. v. Max Music & Entertainment, Inc.*, No. 03 Civ. 0996, 2004 U.S. Dist. LEXIS 12760, at *13 (S.D.N.Y. July 9, 2004), and *Peer International Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990)). In these cases, the same copyright holder sued three different parties for essentially the same thing—continuing to make and sell records after a compulsory license was terminated—and obtained statutory damages in the three cases totaling \$10,000, \$30,000, and \$50,000, respectively. *Id.* at 486.

77. Statute of Anne, 1710, 8 Ann., c.19 (Eng.), <http://www.copyrighthistory.com/anne.html> [<https://perma.cc/VP8L-39YZ>] (last visited Jan. 22, 2017).

78. *Id.* § 1.

79. Reese, *supra* note 1, at 145.

It was the English drafters' intent to minimize liability for copyright infringement suffered by those without the intent to do so.⁸⁰ Although not absolving 'innocents' from liability, drafters minimized the impact by imposing 'copyright formalities' that required notice to appear on copies, a copy of the work to be deposited with the relevant entity, and registration of the work in a centralized repository.⁸¹ The goal was to lower the risk of innocent infringement.⁸² Drafters had made the legislative intent clear: because copyright protection presented serious risk of imposing liability on those who had infringed unknowingly, potential infringers needed some simple way to determine whether the book they sought to reprint was protected by copyright.⁸³

1. 1790-1976

Congress enacted the first version of United States Copyright Act in 1790.⁸⁴ Like England's Statute of Anne, the United States' first Copyright Act was similarly intended to safeguard innocent infringers.⁸⁵ The drafters were concerned that the intangible nature of intellectual property made inadvertent infringement a greater risk than existed in the tangible goods context.⁸⁶ The breadth of exclusive rights and scope of copyright subject matter at the time was significantly narrower than copyright in its current form.⁸⁷ Early copyright law made it easier for users to determine, *ex ante*, whether a work was protected—which at that time meant registered and published—and also whether its use might constitute an infringement.⁸⁸ Still, the concern about the attendant liability risks to end users was significant enough for Congress to protect unwitting users from the dangers of infringing

80. *Id.* at 145–46.

81. H. Tomás Gómez-Arostegui, Symposium, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1257–58 (2010); see also Reese, *supra* note 1, at 137 (citations omitted).

82. Reese, *supra* note 1, at 147.

83. *Id.*

84. Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831). The 1790 Act protected books, maps, and charts and provided for an initial term of fourteen years with privilege of renewal for a term of fourteen years. *Id.* § 1.

85. Reese, *supra* note 1, at 149.

86. *Id.* at 135.

87. *Id.* at 136 (“Copyright protected a fairly limited universe of authorial works for most of its early history.”). Accordingly, in the early development of U.S. copyright, “infringement was likely to be somewhat infrequent, because few works were protected by copyright.” *Id.* at 140.

88. *Id.* at 135.

inadvertently since the inception of copyright protection in the United States.⁸⁹

In 1802, Congress adopted an additional provision that required owners to provide notice directly on printed copies of the work.⁹⁰ Although the precise nature of notice evolved over time, it remained an essential formality until 1989, when Congress made it permissive rather than mandatory in order to comply with the Berne Convention.⁹¹ Notice, being much more immediate, proved more effective than registration in ensuring that “none could offend ignorantly.”⁹² Although recordation of ownership interests could give constructive notice to would-be users, copyright information printed directly on copies sold served as actual notice of the same. Therefore, one could be reasonably certain that a user received actual notice, which rendered moot an innocent infringement claim.

Under the 1909 Act, the remedies available to a copyright owner were limited against a person who exploited a work believing it to be in the public domain and who unknowingly infringed the copyright.⁹³ The innocent infringer was liable for profits from the infringement, but they would not have to pay a copyright owner who accidentally or mistakenly omitted copyright notice from their work where the infringer was misled by the omission.⁹⁴

Congress amended the 1909 Act in 1912 to extend copyright protection to motion pictures.⁹⁵ In that same amendment, Congress limited a copyright owner to statutory damages—in lieu of actual damages—against an infringer who made a motion picture of the copyrighted work in cases “where the infringer can show that *he was not aware that he was infringing*, and that such infringement *could not have been reasonably foreseen* [.]”⁹⁶ The maximum damages allowed for innocent infringement of motion pictures of undramatized or nondramatic works was set at \$100.⁹⁷

89. *Id.* at 159 (“Despite the lack of attention to the issue in the few reported cases that involved it, the statutory language is clear in requiring knowledge on the [infringer’s] part from 1790 to 1909.”).

90. Act of Apr. 29, 1802, ch. 36 § 1, 2 Stat. 171, 171 (repealed 1831).

91. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857 (1988).

92. *See* Act of Apr. 29, 1802.

93. *See* Copyright Act of 1909, ch. 320, § 28, 35 Stat. 1075 (1909).

94. Copyright Act of 1909 § 20.

95. *See* Act of Aug. 24, 1912, ch. 356, 37 Stat. 488 (1912) (repealed 1976).

96. Act of Aug. 24, 1912 §§ 5(1), 5(m), 25(b) (emphasis added).

97. *Id.* § 25(b).

The total effect of pre-1976 copyright registration and notice formalities made it far easier for a potential user of a copyrighted work to determine, with a greater likelihood of success, whether a work was protected. And, assuming the work was protected, these formalities also made it easier to determine whether an anticipated unauthorized use might be fair. This led to, at least, constructive notice of copyright protection in the vast majority of cases when a plaintiff satisfied the formalities.

In cases where a potential user may have had difficulty determining whether a use was lawful, courts often looked to a defendant's knowledge or intent to avoid imposing liability on someone who did not know their use was infringing and who would not have discovered their misperception by reasonable investigation.⁹⁸ From the very inception of American copyright jurisprudence, then, the framework included various mechanisms to avoid holding users liable for infringement when they were not aware of the rights or, assuming they knew rights existed, did not know or have reason to know their use constituted an infringement.

2. *The 1976 Act*

With an eye toward substantive reform of copyright law, Congress engaged in a series of studies beginning in 1955.⁹⁹ These studies led to enactment of the Copyright Act of 1976.¹⁰⁰ Prior to passage of the 1976 Act, the Register of Copyright issued a report that contained numerous recommendations, including a recommendation to give courts discretion to impose fines for innocent infringement.¹⁰¹ The report stated in pertinent part:

The basic principle that an innocent infringer is liable, except where he has been misled through some act or omission of the copyright owner, is firmly established in the copyright law. As between an innocent copyright owner and an innocent infringer, it has generally been agreed that the loss caused by the infringement should be borne by the latter. The question is not whether innocent infringers should be liable; it is whether they should be subject to some minimum amount of damages and, if so, what the minimum should be.¹⁰²

98. See, e.g., *Ins. Press v. Ford Motor Co.*, 255 F. 896 (2d Cir. 1918); *Altman v. New Haven Union Co.*, 254 F. 113 (D. Conn. 1918).

99. See, e.g., U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (July 1961), http://www.copyright.gov/history/1961_registers_report.pdf [<https://perma.cc/9JQC-Y6DV>].

100. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (1976) (codified in scattered sections of 17 U.S.C.).

101. See U.S. COPYRIGHT OFFICE, *supra* note 99, at 104 (“[W]here an infringer establishes his innocence, the statutory minimum is not mandatory but the court, in its discretion, may award statutory damages in any amount it deems just.”).

102. *Id.*

Generally, courts award statutory damages to deter infringement and to compensate the copyright owner for the economic harm.¹⁰³ Nevertheless, deterrence is not at issue where a user neither knew nor should have known that their use was infringing.¹⁰⁴ Accordingly, the sole purpose of copyright damages awards in innocent infringement cases is to compensate the copyright owner.¹⁰⁵

The innocent infringer defense, as codified in Section 504 of the Copyright Act, is not actually a defense to liability; rather, copyright defendants assert it to mitigate damages in infringement actions after liability has already been established.¹⁰⁶ More specifically, the defendant claims ignorance of the law or a good faith belief that defendant's use was fair in order to appeal to the court's discretion to award minimal damages.¹⁰⁷ Defendants have the burden of establishing that they were "not aware and had no reason to believe that . . . [their acts] constituted an infringement of copyright[.]"¹⁰⁸ Courts have noted that this burden is a heavy one requiring more than mere proof that the defendant's actions were not a willful disregard of the law.¹⁰⁹

Infringers can establish their "innocence" and therefore demonstrate that they qualify for the discretionary minimum by meeting a two-pronged test: (1) a subjective good-faith belief that their use was permissible, which; (2) was objectively reasonable under the circumstances.¹¹⁰ A court looks to various factors to assess whether a defendant's infringement may

103. See *Broad. Music, Inc. v. George Moore Enter., Inc.*, 184 F. Supp. 3d 166 (W.D. Pa. 2016) ("Statutory damages serve the dual purposes of compensation and deterrence: they compensate the plaintiff for the infringement of its copyrights; and they deter future infringements by punishing the defendant for its actions." (citing *Broad. Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd.*, 555 F. Supp. 2d 537, 544 (E.D. Pa. 2008) (internal quotations omitted))).

104. *Id.* ("[W]e would provide that where an infringer establishes his innocence, the statutory minimum is not mandatory but the court, in its discretion, may award statutory damages in any amount it deems just.").

105. U.S. COPYRIGHT OFFICE, *supra* note 99, at 104.

106. See 17 U.S.C. § 504(c)(2) (2012).

107. *Id.*

108. *D.C. Comics, Inc. v. Mini Gift Shop*, 912 F.2d 29, 35–36 (2d Cir. 1990).

109. *Id.* at 35.

110. *Childress v. Taylor*, 798 F. Supp. 981, 993 (S.D.N.Y. 1992) ("[A] defendant is entitled to such reduced minimum only if he proves not only that his infringing conduct was made in a good faith belief of the innocence of his conduct, but also that he was reasonable in holding such good faith belief.") (citation omitted).

be deemed innocent for purposes of Section 504(c), including whether the infringed work contained a copyright notice.¹¹¹

The absence of notice without more is generally not sufficient to establish innocent infringement in cases where the reasonable person should know the goods were protected by copyright—constructive notice.¹¹² Judges also consider the business sophistication of the defendants.¹¹³ In those cases, courts have found innocent infringement where the defendants were deemed to lack sufficient business acumen to trigger an inquiry into the source of infringing goods.¹¹⁴ Ultimately, then, courts are required to assess a defendant's state of mind to determine what the defendant knew or should have known, and then decide whether the action was reasonable on a case-by-case basis.¹¹⁵

III. USER CONCERNS: ACCESS, RESPONSIBILITY & RISK

A. Access Fences Dramatically Reduced

The Internet and digital technology have dramatically reduced the traditional barriers to large-scale access that once stood between copyright users and creators.¹¹⁶ Technological advancements have also lowered production and distribution costs of copyrighted content and made it far easier for users

111. See, e.g., *Jobete Music Co. v. Johnson Comm'ns, Inc.*, 285 F. Supp. 2d 1077, 1086 (S.D. Ohio 2003) ("In determining the amount of [statutory] damages to be awarded, courts generally consider (1) the infringer's blameworthiness, *i.e.*, whether the infringement was willful, knowing, or innocent, (2) the expenses saved and the profits reaped by the defendants in connection with the infringement, and (3) the revenues lost by the plaintiffs due to the defendants' conduct."); *Odegard, Inc. v. Classic Carpets, Inc.*, 963 F. Supp. 1328, 1340 (S.D.N.Y. 1997) ("Relevant factors in determining the amount of statutory damages include the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendant's conduct and the infringers' state of mind.") (citation omitted).

112. *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998) (affirming the district court's finding that infringement was not innocent based on the fact that the presence of logo on a video "indicate[d] that the portion of the tape belonged to someone . . . and 'could . . . lead a reasonable person to inquire whether copying the feed would infringe a copyright . . .'" (citation omitted).

113. *D.C. Comics*, 912 F.2d at 35–36 (citing *Warner Bros. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989)).

114. *Id.* at 35.

115. *Id.*

116. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6 (2004) ("The digital age provides a technological infrastructure that greatly expands the possibilities for individual participation in the growth and spread of culture and thus greatly expands the possibilities for the realization of a truly democratic culture.").

to access protected materials and to innovate further by repurposing or remixing existing content to create something new.¹¹⁷

The data on past, present, and future use is telling. Internet traffic, users, and numbers of smart devices have and will continue to grow exponentially.¹¹⁸ A recent white paper from Cisco Visual Networking Index made the following observations and predictions:

- Global IP¹¹⁹ traffic “will increase nearly threefold over the next five years, and will have increased nearly a hundredfold from 2005 to 2020.”¹²⁰
- “IP traffic will grow at a compound annual growth rate of [twenty-two percent] from 2015 to 2020.”¹²¹
- Global Internet traffic in 2020 will equal ninety-five times the volume of the entire global Internet in 2005.¹²²
- “Globally, Internet traffic will reach 21 gigabytes per capita by 2020, up from 7 gigabytes per capita in 2015.”¹²³

Cisco also predicts that broadband technology will necessarily continue to develop at astronomical rates to account for and accommodate consumer demand and use.¹²⁴

117. *Id.* at 13 (explaining that digital technology “makes it possible for more and more people to participate in the creation and distribution of new forms of public discourse, new forms of art, and new expressions of creativity.”). Of course, these advances benefit businesses as well by creating new markets for media products produced and/or distributed in digital formats. *Id.* The other side of this proverbial coin is that users can also now infringe on a massive scale with relatively little effort too.

118. See *infra* notes 98–101 and accompanying text.

119. IP, short for Internet Protocol, is defined as “the principal set (or communications protocol) of digital message formats and rules for exchanging messages between computers across a single network or a series of interconnected networks[.]” *Internet Protocol (IP)*, TECHOPEDIA, <https://www.techopedia.com/definition/5366/internet-protocol-ip> [https://perma.cc/FY4T-NR5H] (last visited Jan. 22, 2017).

120. CISCO, CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2015–2020, at 2 (June 1, 2016), <http://www.cisco.com/c/dam/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.pdf> [https://perma.cc/2YAP-DTZE].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (“Broadband speeds will nearly double by 2020. By 2020, global fixed broadband speeds will reach 47.7 Mbps, up from 24.7 Mbps in 2015.”).

Wi-Fi¹²⁵ connectivity is already ubiquitous, and the predicted hyper-connectivity of the future will forever change the methods of access as well. For example, Cisco predicts that “Smartphone traffic will exceed PC traffic by 2020.”¹²⁶ As PC-originated traffic growth slows considerably in the coming years, Cisco forecasts that connected devices—namely “TVs, tablets, smartphones, and machine-to-machine (M2M) modules—will have traffic growth rates of seventeen percent, thirty-nine percent, fifty-eight percent, and forty-four percent, respectively.”¹²⁷ A final staggering prediction? In just a few short years, the “number of devices connected to IP networks is forecasted to be three times as high as the global population in 2020.”¹²⁸ To be sure, a curious, tense, and tenuous relationship exists at the nexus of copyright, creative expression, and the economy.¹²⁹

B. Responsibility: Ex Ante Determinations Prove Precarious

Other than the technological advances discussed above, the greatest transformational influence on copyright law in the late twentieth and twenty-first centuries “has come from the unorganized, informal practices of various, unrelated users of copyrighted works, many of whom probably know next to nothing about copyright law.”¹³⁰ Uncertainties in the law, especially in the online context, lead users to create their own informal norms and practices.¹³¹ Therefore, two worlds of copyright exist: one with

125. Wi-Fi is a short-hand descriptor of “. . . wireless networking technology that uses radio waves to provide high-speed network and Internet connections.” *Wi-Fi Definition: What is Wi-Fi*, WEBOPEDIA (July 14, 2010), http://www.webopedia.com/DidYouKnow/Computer_Science/wifi_explained.asp [<https://perma.cc/QE5P-UWWU>].

126. CISCO, *supra* note 120, at 2. The Cisco White Paper notes further that “[i]n 2015, PCs accounted for 53 percent of total IP traffic, but by 2020 PCs will account for only 29 percent of traffic. Smartphones will account for 30 percent of total IP traffic in 2020, up from 8 percent in 2015.” *Id.*

127. *Id.*

128. *Id.* at 2. Note that, as of October 16, 2016, the Global population was estimated at 7,456,883,642. *Current World Population (ranked)*, GEOHIVE, http://www.geohive.com/earth/population_now.aspx [<https://perma.cc/DQE2-7D8J>] (last visited Feb. 21, 2017); *see also U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/world> [<https://perma.cc/6VCH-9DHN>] (last visited Feb. 21, 2017) (providing a running estimate of the global population).

129. *See* Houweling, *supra* note 39, at 1537. Professor Van Houweling explores the increased costs to users who incorporate existing copyrighted works into their own, such as documentary filmmakers. She explains: “[t]he expense of building on the works of others is justified in copyright theory by the hope that the burden copyright imposes on creativity is outweighed by its benefits.” *Id.*

130. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460 (referring to the impact of “Web 2.0” and the remix culture of user-generated content, also known as UGC).

131. *See id.* at 1468 (noting that “the systemic uncertainties in formal copyright law do produce their own kind of informal practices.”). Professor Lee explains further that

formal laws and licensing regimes, and another with informal norms, customs, and practices.¹³² Despite the hundreds of pages and dozens of amendments to the Act since 1976, formal copyright law has many gaps.¹³³ Professor Edward Lee suggests various reasons for these gaps, including the reality that so few copyright cases are ever fully litigated to judgment,¹³⁴ and the fact that copyright has many grey areas.¹³⁵

C. Risk

The average user has virtually unfettered access to copyrighted works online.¹³⁶ With access comes great responsibility. Users are responsible for deciding—before saving a blog post, creating and sharing a meme or gif, creating a mashup or remix, or downloading and disseminating a copyrighted work for an educational purpose—whether the unauthorized use is nonetheless fair. The risk of infringement in the twenty-first century is high.¹³⁷ Moreover, the financial and other consequences of infringement can be staggering.¹³⁸

Absent copyright formalities, and with users' misguided but firmly entrenched expectations about permissible uses of copyrighted works, it

“[g]iven the lack of clear rules for fair use and misappropriation, knowledge of copyright law is often no better than ignorance of copyright law.” *Id.* The strict liability nature of copyright supports this observation wholeheartedly.

132. *Id.* at 1470. Professor Lee describes formal practices as those either authorized by the copyright holder or legally permitted or excused. *Id.* To the contrary, informal practices involve uses that are not expressly affirmed by either the copyright holder or the court of law. Professor Lee considers implied licenses as an informal practice. *Id.* at 1472. He goes on to explain:

[i]nformal copyright practices occur routinely every day. Indeed, it is probably fair to surmise that the total number of informal copyright practices dwarfs the total number of formal copyright practices in the United States. In other words, far more people make far more *unlicensed* uses of copyrighted works than licensed or formally authorized uses.

Id.

133. *Id.* at 1476.

134. *Id.*

135. *Id.* at 1479 (explaining that copyright's grey areas apply to uncertainties regarding how a court would treat a particular use).

136. See *Copyright Facts*, UNIV. OF COLO. BOULDER, <http://www.colorado.edu/libraries/copyright-information/copyright-facts> [https://perma.cc/RA9L-NRTS] (last visited Feb. 21, 2017).

137. See *Ten Common Misconceptions About Copyright and Fair Use*, VORYS (Oct. 28, 2013), <http://www.vorys.com/publications-1143.html> [https://perma.cc/X6AF-D6TV].

138. See *supra* Part II.

is now easier than ever to make an accidental or *mea culpa* use of a copyrighted work. Moreover, because fair use determinations are highly fact-specific—to the extent cases are even litigated—the good-faith but mistaken user is often lulled into a false sense of security about the legal status of the use.¹³⁹

The consequence of an incorrect determination is to be held strictly liable for copyright infringement.¹⁴⁰ And if a physical copy exists of the work at issue, then the unwitting user is subject to ordinary damages ranging from \$750 to \$30,000.¹⁴¹ That user would not qualify for reduced innocent infringer damages of \$200 because they are deemed to have at least constructive notice of the copyright holder’s claim of rights.¹⁴² For these reasons, I argue that even with notice, accidental and *mea culpa* users should only be liable for minimal damages.

IV. USER ACTIVITIES THAT COULD TRIGGER A REDUCED DAMAGES AWARD

On any given day, even the most well-intentioned Internet user commits innumerable technical copyright infringements.¹⁴³ Professor John Tehranian proffers an example in the form of a hypothetical user, a law professor who easily racks up millions in potential liability with every day, well-intentioned activities on the Internet.¹⁴⁴

For example, it is common practice to choose an e-mail setting that automatically reproduces the text of a sender’s email in a reply or to

139. See Lee, *supra* note 130, at 1480 (explaining that “fair use can act almost as a trap, dangling the lure of protection from lawsuits if one makes a more ‘transformative’ use—which is exactly the same kind of use that can also constitute an infringing derivative work.” (citing *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997)).

140. See *supra* Part II.A.

141. 17 U.S.C. § 504(c)(1) (2012).

142. 17 U.S.C. § 504(c)(2) (2012).

143. Tehranian, *supra* note 6, at 543 (noting that “[w]e are, technically speaking, a nation of constant infringers.”); see also JOE KARAGANIS & LENNART RENKEMA, COPY CULTURE IN THE US AND GERMANY 3 (2013), http://americanassembly.org/sites/default/files/download/publication/copy_culture.pdf [<https://perma.cc/77GF-RG29>]. The study notes that unauthorized copying is widely practiced and “tracks strongly with youth” but rarely involves large scale pirates. *Id.* at 5. Further, it documents how legal streaming services “displace some informal copying and downloading,” differences in support for penalties for unauthorized use—narrow majority support in the US, but mixed support in Germany—and differences in the digital media market and legal frameworks. *Id.* at 6–7, 11, 25. The study’s findings were cited by several scholars from 2011 to 2012, during debates over the Stop Online Piracy Act. See, e.g., YOCHAI BENKLER ET AL., SOCIAL MOBILIZATION AND THE NETWORKED PUBLIC SPHERE: MAPPING THE SOPA-PIPA DEBATE 29 (2013).

144. Tehranian, *supra* note 6, at 543–47.

simply to forward someone's e-mail.¹⁴⁵ Yet, both of these practices violate the drafter's reproduction or distribution right in the original e-mail.¹⁴⁶ And if twenty recipients of the forwarded e-mail then reply to the e-mail, forward it, or both, the original copyist could be, due to the strict liability nature of copyright, liable for infringement and responsible for anywhere from \$15,000 to \$600,000 for merely ordinary infringement.¹⁴⁷

Another common activity is downloading, printing, and sharing copies of a copyrighted work available online. Tehranian's hypothetical professor does just that by distributing copies to his students.¹⁴⁸ Such activity would likely exceed the bounds of fair use exceptions for education; this use would trigger copyright liability as well.¹⁴⁹

Users could also be liable for violating public performance and distribution rights if they record their performance of someone else's poem or song and post it online via YouTube or Soundcloud,¹⁵⁰ or liable if they copy an online image, add text to create a meme¹⁵¹ or gif,¹⁵² and post it to Twitter,¹⁵³

145. *Id.* at 543 (noting that, "[e]ach unauthorized reproduction of someone else's copyrighted text—their email—represents a separate act of brazen infringement.").

146. 17 U.S.C. § 106 (1)–(2) (2012).

147. 17 U.S.C. § 504(c)(1) (2012). This range of damages assumes that the actor would be considered an "ordinary" infringer and not a willful infringer. In the latter case, statutory damages could total three million dollars. 17 U.S.C. § 504(c)(2).

148. Tehranian, *supra* note 6, at 544.

149. *See* 17 U.S.C. § 106; 17 U.S.C. § 504(c)(1)–(2).

150. *See* 17 U.S.C. § 106(4).

151. The term "meme" is defined as, "an idea, behavior, style, or usage that spreads from person to person within a culture." *Meme*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/meme> [<https://perma.cc/MW2A-KDGL>] (last visited Feb. 22, 2017).

152. The term "GIF" is defined as, "a computer file format for the compression and storage of digital video images; *also*: such an image itself." *GIF*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/GIF> [<https://perma.cc/43C5-V2H4>] (last visited Feb. 22, 2017).

153. Twitter, as stated on their webpage, is best described as follows:

Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages. People post Tweets, which may contain photos, videos, links and up to 140 characters of text. These messages are posted to your profile, sent to your followers[], and are searchable on Twitter search.

New User FAQs, TWITTER, <https://support.twitter.com/articles/13920> [<https://perma.cc/F578-F3PR>] (last visited Feb. 22, 2017).

Instagram,¹⁵⁴ or Snapchat.¹⁵⁵ All of these activities are commonplace user activities conducted generally in a noncommercial way. Yet, all are technical copyright infringements of either the accidental or mea culpa variety.

Absent a fair use defense, and assuming the copyright owners preserved the right to avail themselves of statutory damages and decide to enforce their copyrights, the user would be liable for infringement and subject to at least ordinary and perhaps even willful statutory damages.¹⁵⁶ In no case would any of these described users qualify for reduced innocent infringer damages under current law.

In *Safe Harbor*, I described the types of uses and users I think can and should benefit from a mandatory reduced damages minimum provision.¹⁵⁷ I explained that the Internet and digital technology provide countless new and novel ways to create and disseminate information and creative endeavors that, when original and fixed in a tangible medium of expression, are protected by copyright.¹⁵⁸ Many are digital creations involving collaborative and cumulative methods of transforming what already exists into something new.¹⁵⁹ Today's user is not merely a consumer, but often a republisher or even an add-on—aka second-generation—creator of UGC.¹⁶⁰ From copying and pasting, to sharing, to creating and disseminating memes or gifs created from preexisting copyrighted works, to blog posts that may incorporate pre-existing work and also include new material in the form of commentary or critique, users often turn their consumption into a creative endeavor. Much of social networking encourages and depends on this behavior for

154. Instagram, as stated on their webpage, is best described as follows:

Instagram is a fun and quirky way to share your life with friends through a series of pictures. Snap a photo with your mobile phone, then choose a filter to transform the image into a memory to keep around forever. We're building Instagram to allow you to experience moments in your friends' lives through pictures as they happen. We imagine a world more connected through photos.

FAQ, INSTAGRAM, <https://www.instagram.com/about/faq/> [<https://perma.cc/E2CE-S2SB>] (last visited Feb. 22, 2017).

155. Snapchat, on their website, briefly describes their app as being “about sharing moments and having fun.” *Snapchat Support*, SNAPCHAT, <https://support.snapchat.com/en-US/a/guidelines> (last visited Feb. 22, 2017). Further definition may be found on the webpage of Verizon Wireless, which describes the app as one that “lets you share images or video clips to your friends. But there’s a twist: [t]hey can only be viewed for a matter of seconds.” *Snapchat 101: What It Is and How To Use It*, VERIZON WIRELESS, <http://www.verizonwireless.com/archive/mobile-living/tech-smarts/what-is-snapchat-how-to-use-new-features/> [<https://perma.cc/F96M-3YTR>] (last visited Feb. 22, 2017).

156. 17 U.S.C. § 504(c)(1)–(2) (2012).

157. See Evans, *supra* note 1, at 32.

158. *Id.* at 9.

159. *Id.*

160. *Id.* at 15.

the network to thrive.¹⁶¹ In fact, most websites invite their visitors to republish and comment on content hosted on their sites with the all-too-familiar social plug-in invitation to share.¹⁶²

Madhavi Sunder describes the impact of the proliferation of noncommercial UGC, which includes mashups,¹⁶³ fan fiction,¹⁶⁴ and machinima,¹⁶⁵ as “. . . explosive creativity shared among millions on the Internet.”¹⁶⁶ Professor Sunder notes that such noncommercial UGC challenges the economic incentive rationale of the copyright monopoly.¹⁶⁷ Consumer-creators create and distribute “hordes” of content not only without the promise of copyright protections, but in defiance of them.¹⁶⁸ Digital natives, in particular, grew up in a time of ubiquitous sharing, where every child in little league and pee wee soccer got a trophy—thus further solidifying a profound sense of community.¹⁶⁹

But what happens when a user accesses, repurposes, or republishes a copyrighted work online when the website owner does not actually have the right to grant permission to use it? For example, a site owner may

161. See, e.g., Molly Schuetz, *Facebook Explores Revenue Share Models in Content Push*, BLOOMBERG (June 1, 2016, 6:24 AM), <http://www.bloomberg.com/news/articles/2016-06-01/instagram-is-exploring-revenue-sharing-models-in-content-push> [https://perma.cc/3WK2-EJD9].

162. See *Evans*, *supra* note 1, at 9 (citation omitted). Although one might argue that implied licenses apply in the social networking environment, such is not the case when the infringing sharer did not have the authority to copy, adapt, publicly display, or disseminate a protected work.

163. The term “mashup” is defined as “something created by combining elements from two or more sources,” and the definition goes on to specifically reference online sources in subpart (c). *Mash-up*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/mash-up> [https://perma.cc/59WF-VMUV] (last visited Feb. 22, 2017).

164. The term “fan fiction” is defined as, “stories involving popular fictional characters that are written by fans and often posted on the Internet.” *Fan Fiction*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/fan%20fiction> [https://perma.cc/U6WT-29A7] (last visited Feb. 22, 2017).

165. The Urban Dictionary defines machinima as, “[t]he art of using a pre-rendered gaming engine and making it into a film. The word is derived from: Machine and Cinema.” *Machinima*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=machinima> [https://perma.cc/WA9A-RUSY] (last visited Feb. 22, 2017).

166. Sunder, *supra* note 7, at 303.

167. See *id.* at 307–09.

168. *Id.* at 303.

169. See Ashley Merryman, *Losing Is Good for You*, N.Y. TIMES (Sept. 24, 2013), http://www.nytimes.com/2013/09/25/opinion/losing-is-good-for-you.html?_r=0 (stating that “participation trophies and prizes are almost a given, as children are constantly assured that they are winners.”).

have the legal right to make use of a copy but not to create additional copies, electronically or otherwise, or to adapt, publicly display or distribute copies to others—rights that the copyright owner holds. Therefore, each time a user clicks share, reposts a status or image via Facebook or via a Web site, or retweets a tweet via Twitter, for example, the potential for copyright infringement exists.¹⁷⁰

A. User Rights

Users of copyrighted works are not a homogenous group.¹⁷¹ Some users are purely consumers.¹⁷² Others are intermediate users, and still others are second-generation creators. And, because copyright law is not a total prohibition on all use or access, and applies only to the exclusive Section 106 rights, users have rights too.¹⁷³ However, user rights are neither expressly proclaimed nor staunchly protected in the text of the Act or its interpretation.¹⁷⁴

David Vaver notes that if user rights were truly on par with owner rights, the latter would be enforced only in certain “special cases” that appreciably encourage creative production and that do so in a way that does *not* “unreasonably prejudice the legitimate interests of users.”¹⁷⁵ The WIPO Copyright Treaty,¹⁷⁶ for example, describes creators’ benefits as

170. See The Copyright Act of 1976, Pub. L. No. 940533, § 106, 90 Stat. 2541 (1976).

171. Jane C. Ginsburg, *Essay: Copyright and Intermediate Users’ Rights*, 23 COLUM. - VLA J.L. & ARTS 67, 67 (1999) (explaining that user rights are present in several different guises).

172. *Id.* (describing “consumptive” users who focus on personal enjoyment and convenience through private copying).

173. See The Copyright Act of 1976, Pub. L. No. 940533, § 106, 90 Stat. 2541 (1976).

174. See *id.* Some recent fair use cases, however, have pushed fair use analysis in a positive direction for users, especially second-generation creators. See e.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (the “Dancing Baby” case in which the court held that copyright holders must consider whether the potentially infringing material is a fair use of a copyright under before issuing a takedown notice); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (holding that making of a digital copy to provide a search function is a transformative use); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (finding that most of artist’s paintings were sufficiently transformative to constitute a fair use).

175. See David Vaver, *Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?*, 57 CASE WESTERN RES. L. REV. 731, 736 (2007) (examining and critiquing international treaties and conventions to note they portend to inject balance in the law but, in fact, fail to adequately articulate or protect user rights).

176. The WIPO Copyright Treaty is “a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment.” *WIPO Copyright Treaty*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/treaties/en/ip/wct/> [<https://perma.cc/BG67-KNSE>] (last visited Feb. 22, 2017).

rights and describes user activities as limitations or exceptions to those rights rather than countervailing rights in and to themselves.¹⁷⁷

However, Canada's highest court has held that users hold actual rights, not just limitations on the rights of copyright holders.¹⁷⁸ Any rights not exclusively granted to owners are deemed user rights.¹⁷⁹ The Supreme Court of Canada refused to read fair dealing as an exception to an owner's copyright and, instead, read it as a user right.¹⁸⁰ Writing for a unanimous court, the Chief Justice explained:

[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.¹⁸¹

Canada's approach to, and interpretation of, uses of copyrighted works deemed "fair" as a user right proves illustrative of United States' copyright jurisprudence. The approach to uses deemed "fair" in the United States is, however, treated as an affirmative defense after liability has been established due to the strict liability nature of copyright.¹⁸² If fair use remains an affirmative defense in the United States, as first articulated in *Folsom v. Marsh*¹⁸³ and, ultimately, as codified in 1976, it is unlikely that Congress would categorize fair use as a user right. But it should.

In *Campbell v. Acuff-Rose*, the Supreme Court referred back to *Harper & Row* in noting that Congress had previously resisted attempts to create presumptive categories of fair use.¹⁸⁴ Congress had encouraged courts to

177. See *Vaver*, *supra* note 175, at 747.

178. See *id.* at 748 (citing *Law Soc'y of Upper Can. v. CCH Canadian Ltd.*, [2004] 1 S.C.R. 339, 364–65 (Can.)).

179. See *Law Soc'y of Upper Can.*, 1 S.C.R. at 364.

180. See *Vaver*, *supra* note 175, at 748 (citing *Law Soc'y of Upper Can.*, 1 S.C.R. at 364).

181. *Law Soc'y of Upper Can.*, 1 S.C.R. at 364.

182. See 17 U.S.C. § 107 (2012); see also 17 U.S.C. § 501 (2012). But see *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016) (holding that "[f]air use is not just excused by the law, it is wholly authorized by the law.").

183. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

184. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994). The Supreme Court, in rejecting a rigid view of separate categories of copyright infringement, stated the following:

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms

maintain a broad, ample view of the “universe of relevant evidence.”¹⁸⁵ Given the overall intent of Congress in enacting the 1976 Act to broadly and liberally construe copyright law, it makes sense that the fair use defense should be read and interpreted in that light. However, as society’s view of preferred and beneficial uses changes with the times, so too must the law if it is to have any weight and meaning.¹⁸⁶

Historically, the fair use doctrine served as the primary means to protect copyright user rights.¹⁸⁷ Congress contemplated that, in exchange for exclusive rights, owners granted an implied license to make certain unauthorized but socially beneficial uses. This “quid pro quo” exchange is intended to balance an owner’s copyright monopoly with a user’s First Amendment or other rights.¹⁸⁸

Fair use should, in theory, protect the vital space provided by the First Amendment as well as other socially beneficial uses.¹⁸⁹ In practice, however, it has generally been inadequate, at best, and difficult for courts to apply consistently.¹⁹⁰ This rings true particularly in the digital landscape when judges must master not only the dense complexities of copyright but also the nuances of technology. Because the form and substance of copyright

“including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

Id. at 577–78 (internal citations omitted); *see also* Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

185. *Acuff-Rose*, 510 U.S. at 584.

186. *See generally* Lee, *supra* note 130, at 1464 (noting that because copyright law is profoundly ambiguous, “informal copyright practices are vital to the functioning of the entire copyright system.”).

187. Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 91 (2010) (explaining that “[i]n the current digital media environment . . . the uncertainty that shrouds fair use and the proliferation of technological protection measures undermine the doctrine and its role in copyright policy.”). The Fair Use Doctrine is codified at Section 107 of the Copyright Act.

188. Amanda Reid, *Claiming the Copyright*, 34 YALE L. & POL’Y REV. 425, 428 (2016).

189. *See Acuff-Rose*, 510 U.S. at 577. The Court in *Acuff-Rose* explained further: “[t]he fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

190. *See* John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1215–16. *See also* Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y 513, 514 (1999). *But see* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (arguing that “copyright fair use case law is more coherent and more predictable than many commentators seem to believe”).

laws have, until recently,¹⁹¹ been defined by the lobbying efforts of powerful corporations in the business of acquiring and disseminating copyrighted material, the law has developed to vociferously protect those stakeholders.¹⁹² I assert that this hyper-protectionism has occurred at the expense of protecting uses deemed fair and the public domain at-large.

Users also have the right to be protected against copyright misuse. Misuse is best understood as a doctrine based on the theory of unclean hands and prevents a copyright holder from asserting a copyright claim as a result.¹⁹³

B. Canadian Copyright Modernization Act

On June 29, 2012, the Canadian Parliament passed Canada's Copyright Modernization Act (Bill C11) and the bill received Royal Assent on the same day.¹⁹⁴ Bill C11 was Parliament's first successful attempt to reconcile legislatively the competing policy interests of user rights and creator rights in the digital age and to bring its laws in line with international standards.¹⁹⁵ Prior to its enactment, some were concerned about the potential countervailing

191. What was eventually deemed the largest online protest in history occurred on January 18, 2012, and involved SOPA (Stop Online Piracy Act) in the House of Representatives and PIPA (Protect Intellectual Property Act) in the Senate; opponents of the bills and user rights advocates with deep pockets joined forces to defeat what they referred to as the "internet censorship" bills. Two days later on January 20, Congress pulled the bills indefinitely. *See SOPA Petition Gets Millions of Signatures as Internet Piracy Legislation Protests Continue*, WASH. POST (Jan. 20, 2012), https://www.washingtonpost.com/business/economy/sopa-petition-gets-millions-of-signatures-as-internet-piracy-legislation-protests-continue/2012/01/19/gIQAHaAyBQ_story.html [<https://perma.cc/JC9F-N62V>]; *see also Victory!*, SOPASTRIKE, <http://www.sopastrike.com/> [<https://perma.cc/6ABT-FGX6>] (last visited Feb. 22, 2017).

192. *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2006); Lee, *supra* note 131, at 1466 (explaining that "[m]any of the provisions of the Copyright Act were drafted by interested (primarily industry) stakeholders, who were in some sense creating new customs or incorporating existing customs; indeed, many of the exemptions to copyright in Sections 108 to 122 of the Copyright Act have the look and feel of a market practice or custom." (citing Litman, *supra* note 66, at 23)).

193. *See* Lee, *supra* note 131, at 1466–67 (first citing Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 520 (9th Cir. 1997); then citing DSC Commc'ns Corp. v. DGI Techs., Inc., 81 F.3d 597, 601 (5th Cir. 1996); and then citing Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 977–79 (4th Cir. 1990)).

194. Copyright Modernization Act, S.C. 2012, c.20 (Can.).

195. *See* Margot E. Patterson & Emma Williamson, *Canada: The Copyright Modernization Act: Canada's New Rights and Rules*, MONDAQ, <http://www.mondaq.com/canada/x/187084/Copyright/The+Copyright+Modernization+Act+Canadas+New+Rights+And+Rules> [<https://perma.cc/UU5P-BLCQ>] (last updated July 18, 2012).

and nullifying impact of the technological protections measures (TPMs)¹⁹⁶ also proposed in C11.¹⁹⁷

The amendment involves TPMs, user-generated content (UGC),¹⁹⁸ private copying by for purposes of time-shifting and medium-shifting, expanded fair dealing provisions,¹⁹⁹ and reduced statutory damages awards in the case of infringement claims involving private, non-TPM related uses.²⁰⁰

The provisions and legislative intent are summarized as follows:

This enactment amends the *Copyright Act* to (a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards; (b) clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright; (c) permit businesses, educators and libraries to make greater use of copyright material in digital form; (d) allow educators and students to make greater use of copyright material; (e) permit certain uses of copyright material by consumers; (f) give photographers the same rights as other creators; (g) ensure that it remains technologically neutral; and (h) mandate its review by Parliament every five years.²⁰¹

196. TPMs, also referred to as digital locks, are used to prevent both unauthorized access to and unauthorized copying of copyrighted works. See Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 635 (2004).

197. See Dwayne Winseck, *Take Notice of the Slippery Slopes in the Copyright Modernization Act*, GLOBE & MAIL (Oct. 25, 2011, 12:04 PM), <http://www.theglobeandmail.com/technology/digital-culture/take-notice-of-the-slippery-slopes-in-the-copyright-modernization-act/article542674/> [https://perma.cc/HU78-UTD9] (noting that the biggest issues with C-11 may be that the new user rights might be trumped by the digital locks provisions, which prevent access and copying, and draws attention to the notice rules that require ISPs to notify copyright holders of alleged violations and to maintain records of allegedly infringing activities); see also Althia Raj, *Bill C-11: Copyright Legislation and Digital Lock Provisions Face Opposition In Canada*, HUFFINGTON POST CAN. (June 17, 2012, 12:19 PM), http://www.huffingtonpost.ca/2012/06/17/bill-c-11-copyright-modernization-act-canada_n_1603837.html [https://perma.cc/AGL9-N57W]; Daniel Tencer, *'Notice and Notice' System Will Mean ISPs Tracking Subscribers*, HUFFINGTON POST CAN. (Oct. 15, 2:05 PM), http://www.huffingtonpost.ca/2013/10/15/copyright-law-canada-track-users_n_4101406.html [https://perma.cc/C8PA-DVJ2] (discussing the requirement in the CMA for ISPs to retain information on the accused subscriber for a minimum of six months).

198. See Patterson & Williamson, *supra* note 195.

199. Canada's fair dealing provisions are analogous to the fair use provisions in the United States codified at 17 U.S.C. §107. See Copyright Act, R.S.C., 1985, c C-42 (Can.).

200. This is analogous to the innocent infringer damage reductions codified at 504(c) and consistent with the intention of my proposed amendment to that section. Under the CMA, if a judge is convinced the defendant "had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award . . . to less than \$500, but not less than \$200." Copyright Modernization Act, S.C. 2012, c.20 (Can.), <http://www.wipo.int/edocs/lexdocs/laws/en/ca/ca148en.pdf> [https://perma.cc/JD4J-RWVT]. Further, "[t]he court must take proportionality into account in awarding damages for commercial purposes." *Id.*

201. *Id.*

Immediately after Bill C11's passage, stakeholders and commentators surmised its practical impact.²⁰² Although many parts of the amendment stirred significant controversy, commentators recognized the bill as a step in the right direction to reconcile inconsistencies and to provide much-needed clarity for both user rights and creator rights that are more reflective of twenty-first century technological realities.²⁰³

V. THE DOC'S INTERNET POLICY TASK FORCE FINDINGS

In 2010, the United States Department of Commerce (DOC) formed its Internet Policy Task Force (Task Force) to critically examine privacy policy, the global-wide flow of information on the Internet, cybersecurity, and the state of copyright law in the context of technological innovation and the Internet economy.²⁰⁴ DOC Secretary Penny Pritzker stated that the goal of the green paper was to ensure "copyright policy provides strong incentives for creativity, while promoting innovation in the digital economy[.]"²⁰⁵ The Task Force released its findings in a green paper on July 31, 2013 titled *Copyright Policy, Creativity, and Innovation in the Digital Economy* (Green Paper) and touted it as "the most thorough and comprehensive analysis of digital copyright policy issued by any United States administration since 1995."²⁰⁶

The Green Paper identified three general areas requiring further investigation.²⁰⁷ First, the report noted that the Task Force should explore

202. See Patterson & Williamson, *supra* note 195.

203. *Id.*; see also Daniel Tencer, *Massive Drop in Canadian Online Piracy Under New Law, Copyright Firm Says*, HUFFINGTON POST CAN. (May 21, 2015, 1:05 PM), http://www.huffingtonpost.ca/2015/05/21/online-piracy-canada-ceg-tek_n_7372626.html [<https://perma.cc/MZ2B-ZJM8>] ("When Canada enacted its "notice-and-notice" system to combat unauthorized downloading, many of Hollywood's biggest copyright holders argued the new law wasn't strong enough to stop piracy. But only a few months after the law took effect, copyright holders are changing their minds—and some are urging the U.S. to adopt the Canadian system.").

204. U.S. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES 1 (Jan. 2016), <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf> [<https://perma.cc/2L5A-6YFU>] [hereinafter WHITE PAPER].

205. *Id.* at 3 (quoting U.S. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY ii (July 2013), <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> [<https://perma.cc/E5LW-ABJ8>]).

206. *Id.* at 1.

207. *Id.*

and proffer recommendations regarding the legal framework for the creation of remixes,²⁰⁸ the relevance and scope of the first sale doctrine in the online context, and the best way to calibrate unwieldy statutory damages for direct liability of individual users and secondary liability of mass online service providers.²⁰⁹ The other findings involved the establishment of a multi-stakeholder forum to assess ways to improve the DMCA’s notice and takedown system, and a determination of the government’s ideal role in improving online licensing of copyrighted works.²¹⁰

Thereafter, the Task Force solicited comments from the relevant stakeholders—owners, users, and intermediaries—regarding the Green Paper findings and focus areas.²¹¹ It also held four roundtables in different cities led by over sixty panelists across the country to discuss the policy issues raised therein.²¹² Over 750 stakeholders participated in the forums either in person or online.²¹³

Acknowledging the reality that digital technology and the Internet have changed exponentially the way creators produce and distribute copyrighted works online, and how consumers access, use, and otherwise interact with copyrighted content, the Task Force concluded that any effective and balanced change to copyright law must necessarily work in tandem with the free flow of information.²¹⁴ The comments, forums, and assessments culminated in the Task Force’s 2016 White Paper on Remixes, First Sale, and Statutory Damages.²¹⁵ The Task Force asserted its confidence that the assertions and commendations would, if implemented, “advance copyright policy and ensure that . . . creative and innovative industries can continue to strengthen [the] nation’s culture and economy.”²¹⁶

Congress included the statutory damages framework in the Act because the economic impact of copyright infringement is often difficult, if not impossible, to ascertain precisely.²¹⁷ This is especially true early in the

208. “Remixing” is the process of re-ordering, repurposing, or otherwise incorporating new material with preexisting copyrighted materials. See Carmit Soliman, *Remix Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing*, 22 ALB. L.J. SCI. & TECH 279, 281 (2012).

209. WHITE PAPER, *supra* note 204, at 1.

210. *Id.*

211. *Id.*

212. *Id.* at 1–2. For a complete listing of the participants, see Appendix II of the White Paper. *Id.* at 104–07.

213. *Id.* at 2.

214. *Id.* at 3.

215. *Id.*

216. *Id.* at iii.

217. See Damias A. Wilson, *Copyright Compilation Conundrum: Modernizing Statutory Damages Awards for the Digital Marketplace*, 85 ST. JOHN’S L. REV. 1189, 1204–05 (2011). Incidentally, this is also the reason Congress opted to make copyright infringement a strict liability offense. Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 360 (2002) (citing Alan Latman & William S. Tager, *Liability*

work's life cycle when it has not yet been tested in the relevant marketplace. The Task Force noted that statutory damages have become increasingly important in cases of online infringement, where the scope of infringing use may not be ascertainable.²¹⁸ Thereafter, users expressed strong concern with the level of statutory damages, inconsistencies in application of the statutory damages framework, and litigation abuse in the forms of copyright misuse²¹⁹ and copyright trolls.²²⁰

In response to these user concerns, the Internet Policy Task Force made three recommendations to address the concerns presented and to better balance needs of copyright owners, users, and intermediaries.²²¹ Two of the recommendations are directly relevant to this Article. First, the IPTF recommended that Congress: (1) incorporate into the Act a list of factors for courts and juries to consider when determining the amount of a statutory damages award,²²² and (2) implement changes to notice provisions that would expand eligibility for the lower "innocent infringement" statutory damages awards.²²³

of *Innocent Infringers of Copyright*, Study No. 25, in 2 STUDIES ON COPYRIGHT 140 (Copyright Soc'y U.S.A. eds., 1963)).

218. WHITE PAPER, *supra*, note 204, at 5.

219. "Copyright misuse" is defined as a "defense arising from judicial creation, [that] allows copyright infringers to escape liability when the copyright owner has "misused" the rights granted under copyright." Ilan Charnelle, *The Justification and Scope of the Copyright Misuse Doctrine and Its Independence of the Antitrust Laws*, 9 UCLA ENT. L. REV. 167, 167 (2002).

220. See Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53 (2014). Greenberg notes that term may have different meanings to different people, but defined it as a copyright owner who does one of the following:

- (1) acquires a copyright—either through purchase or act of authorship—for the primary purpose of pursuing past, present, or future infringement actions; (2) compensates authors or creates works with an eye to the litigation value of a work, not the commercial value; (3) lacks a good faith licensing program; and (4) uses the prospect of statutory damages and litigation expenses to extract quick settlements of often weak claims.

Id. at 59.

221. WHITE PAPER, *supra*, note 204, at 5.

222. *Id.*

223. *Id.* The white paper also supports creating a streamlined procedure for adjudicating small claims. Recently, Representatives Hakeem Jeffries and Tom Marino introduced a bill entitled the Copyright Alternative in Small-Claims Enforcement Act of 2016 (the CASE Act). The CASE Act would establish a copyright small claims program—also called the Copyright Claims Board (CCB)—at the U.S. Copyright Office, consisting of three appointed claims officers, to serve as an alternative forum in which parties in a copyright infringement controversy can voluntarily seek to resolve certain copyright claims regarding any

VI. SECTIONS 504(C)(3) AND 512 RE-IMAGINED

A. Section 504

In 2013, the Register of Copyrights, Maria A. Pallante, delivered the Horace S. Manges lecture at Columbia Law School.²²⁴ In that lecture, she challenged and encouraged us all—Congress, stakeholders, and commentators alike—to not just think about copyright and its inevitable evolution in light of its tension with technology and innovation, but to *think big*.²²⁵ To that end, we cannot continue to lumber along applying a law that was outdated almost before it was even enacted. It is now time for Congress to shed the 1976 Act and engage in a total and substantial overhaul of the Act.²²⁶ Congress should adopt my proposed amendment to the statutory damages provisions in Section 504. Even with a substantive overhaul of the Act, Congress would not need to start from scratch; rather, the existing bricks simply need new mortar.²²⁷

In light of the concerns I raised in *Safe Harbor*, Parts II and III of this Article, and the shared concerns of OSPs and end-users about unintentional

category of copyrighted work. The Copyright Office would also hire no fewer than two Copyright Claims Attorneys to assist in the administration of the program. CCB officers would, after the initial staggered-term appointments, serve for six years, with renewal by the Librarian of Congress upon recommendation of the Register of Copyrights. See H.R. 5757, 114th Cong. (2016).

224. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 344 (2013). On October 21, 2016, Librarian of Congress Dr. Carla Hayden named Karyn Temple Claggett Acting Register of Copyrights and commended a national search is conducted for a new permanent Register of Copyrights. *U.S. Copyright Office Leadership*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/leadership/bio-claggett.pdf> [<https://perma.cc/HKS9-LF4B>] (last revised Nov. 17, 2016).

225. *Id.* at 344.

226. *Id.* at 319 (citing Thorvald Solberg, *Copyright Law Reform*, 35 YALE L.J. 48, 62 (1926)). Solberg’s words are as true today as they were in 1926 when he expounded, “subject ought to be dealt with as a whole, and not by further merely partial or temporizing amendments.” Thorvald Solberg, *supra*, at 62.

227. Pallante, *supra* note 224, at 320 (noting that “[t]he next great copyright act would not require Congress to start from scratch, because it has put in motion a steady stream of preparatory work on core issues since 1998.”). Congress, through numerous requests from the Copyright Act, has done a lot of the work necessary to understand the current landscape and stakeholder concerns in relation to the needs of the future. For example,

Congress has requested that the Copyright Office prepare a number of formal studies and analyses and conduct public inquiries and roundtables on important issues. Although none of these were undertaken for the purpose of a comprehensive revision, they provide Congress with a fair amount of background on issues that would be relevant to the next great copyright act.

Id. at 321.

infringement online in our “copy culture,”²²⁸ the following proposed statutory revision seeks to address those concerns and to offer a just, efficient, and equitable remedy for twenty-first century users and content owners alike.

I would leave intact subsection (2)²²⁹ but add an additional subsection to extend fair use protection beyond non-profits and public broadcasting entities.

- (2) *Except as provided in Section 512 (___),*²³⁰ in a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was:

- (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or
- (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118 (f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work; or
- (iii) *The court shall reduce statutory damages to not more than \$200 in any case where an infringer qualifies for the limited user exception under § 512 (___).*²³¹

VII. CONCLUSION

Despite the rapid technological and societal changes that have taken place since 1790, Congress has made only a few substantive overhauls to the Act. It amended the 1909 Act and created a flexible copyright regime dynamic enough to keep pace with technology. By the time Congress enacted the 1976 Act, however, the law already lagged behind. In fact, Pamela

228. KARAGANIS & RENKEMA, *supra* note 143, at 3 (noting that “copy culture” is “characterized by the copying, sharing, and downloading of music, movies, TV shows, and other digital media.”).

229. See WHITE PAPER, *supra* note 204.

230. See Evans, *supra* note 1, at 33.

231. See *id.* at 33–35.

Samuelson opined that perhaps the public may have been better served if the 1909 Act had remained in force.²³²

The 1976 Act was probably doomed from the start. The very technology the Act was intended to manage was not yet developed enough to give Congress an inkling of how substantially technology would challenge and outpace the law.²³³ Hindsight is 20/20. With forty years of reflection and dozens of incremental steps toward fixing the ill-fated 1976 Act, Congress has more than enough information about owner and intermediary concerns as well as commonplace user activities, especially of the user-as-creator variety, to engage in a substantive overhaul of copyright law.²³⁴ The next amendment should include greater protections of users. Congress should create safe, or at least *safer* harbors by adopting a more meaningful minimum statutory damage award under 504(c) for accidental and mea culpa infringers. It is reasonable, fair, just, and time.

232. See Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 555. Samuelson reasoned that perhaps users would have been better off under the 1909 Act because “so many more works would be in the public domain and available for free reuse and creative remixes.” *Id.* She went on to suggest “that U.S. copyright industries would have fared just fine had the legislative stasis over new technology issues continued for another few decades.” *Id.*

233. See *id.*

234. Pamela Samuelson asserted this point ten years ago when she wrote:

Thirty years after enactment of the 1976 Act, with the benefit of considerable experience with computer and other advanced technologies and the rise of amateur creators, it may finally be possible to formulate a more comprehensive approach to adapting copyright to digital networked environments and maintaining copyright’s integrity as to existing industry products and services that do not exist outside of the digital realm.

Id.; see also Elkin-Koren, *supra* note 72, at 1538 (noting that copyright was designed for an analog world and is, therefore, “making a slow and painful transition into the digital era”).