

## “SAFE HARBOR” FOR THE INNOCENT INFRINGER IN THE DIGITAL AGE

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*Concerned with potential liability for any infringing uses by their users, the Online Service Provider (OSP) industry successfully lobbied Congress to exempt OSPs from copyright liability under certain conditions through the “safe harbor” provisions found in the Digital Millennium Copyright Act (DMCA). Qualified OSPs receive safe harbor from copyright infringement liability if they fulfill certain criteria. Absent safe harbor, OSPs could be held secondarily liable for infringing activities of their users even absent actual knowledge of any infringement. Accordingly, if (or more accurately when) those users copy, perform, display, republish, or adapt works in ways violative of copyright, OSPs are shielded from liability altogether.*

*This is in stark contrast to the strict liability nature of copyright infringement that applies generally in all cases. In fact, courts only consider mental state, if at all, when the court calculates damages. The ordinary range of statutory damages is \$750–\$30,000 per infringement. However, a court can increase the amount for willful infringement to \$150,000 or decrease it to \$200 in the case of innocent infringement; that is, in cases where the user neither knew nor had reason to know her use was infringing.*

*Due to the strict liability nature of copyright and importance of mental state in the court’s discretionary determination of the amount of damages due, it is critical for copyright users and OSPs alike to be*

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*able to reasonably anticipate the legal implications of their online activities. Unfortunately, it is not only more difficult than ever for copyright users in particular to determine beforehand what activities are potentially or actually infringing or fair, it is also easier for them to infringe unintentionally in the online environment. Congress included formalities of notice, registration, and publication in pre-1976 versions of the Act to give end-users advance warning that their use may be infringing. However, because those formalities are no longer required for rights to exist, it is especially difficult for users to determine whether their acts are infringing.*

*Therefore, the average user, who carries the greatest economic risk of running afoul of the law given the range of damages and trend of large damage awards, also has a duty to determine the ultimate legal question of liability with no real assurance that their legal determination is correct. In sum, today's unwitting direct infringer—also known as the innocent infringer—is not so fortunate.*

*Academic commentators and user-advocate groups have decried the varied and various shortcomings of copyright liability as applied to innocent infringers in the digital age. Even judges have implored Congress to clarify and reform the law, especially in the case of the excessive statutory damages dilemma. Judges, academics, and laypersons have all raised serious concerns about the constitutionality of the current range of statutory damages far exceeding the notice, deterrence, and punishment goals of copyright, especially in the case of civil remedies.*

*In adding my voice to this important reform debate, I assert a novel (even if aspirational) approach: Congress should amend the Act to afford safe harbor protections in the online context to certain classes of direct innocent infringers similar to those already afforded OSPs in the DMCA. To this end, I offer a proposed statutory amendment to § 512 of the Act so that certain direct, but innocent, infringers avoid liability altogether.*

*Accordingly, the primary goal of this Article is three-fold: (1) to explore the role of the innocent infringer archetype historically and in the digital age; (2) to highlight the tension between customary and generally accepted online uses and copyright law that compromise efficient use of technology and progress of the digital technologies, the Internet, and society at large; and (3) to offer a legislative fix in the form of safe harbor for direct innocent infringers. Such an exemption seems not only more efficient but also more just in the online environment where unwitting infringement for the average*

*copyright consumer is far easier than ever to commit, extremely difficult to police, and often causes little, if any, cognizable market harm.*

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## I. INTRODUCTION

Today’s consumers<sup>1</sup> use a wide range of digital copyrighted works: from online music, television streaming, and gaming to news, videos, and electronic books. They enjoy round-the-clock Internet connectivity and interactivity via multiple devices and in various mediums. Online service providers (OSPs) deliver and maintain that

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1. In this Article I use “consumer” and “user” interchangeably to describe a person who accesses, enjoys, and uses copyrighted works rather than a creator or rights holder who creates or exploits the bundle of rights granted in § 106 of the Copyright Act. In many cases, the intended user or consumer is the party who buys or otherwise acquires the material and the creator/owner is the party who sells the material. But as discussed hereinafter, users can also generate protectable content. The resulting content is often referred to as user-generated content (UGC). See *infra* Part II.C.

connectivity and interactivity. They also provide a range of services, including conduit services that allow users to connect with each other (e.g., Facebook or Pinterest) and remote storage services (e.g., Dropbox and Carbonite).<sup>2</sup>

Concerned with potential liability for any infringing uses by their users, the OSP industry successfully lobbied Congress to exempt OSPs from copyright liability under certain conditions through the “safe harbor” provisions found in the Digital Millennium Copyright Act (DMCA).<sup>3</sup> Qualified OSPs receive safe harbor from copyright infringement liability if they fulfill certain criteria before and after receiving notice of a user’s potentially infringing use.<sup>4</sup> The criteria include removing or otherwise disabling the relevant material and notifying the user of the infringement claim.<sup>5</sup> Absent safe harbor, courts could hold OSPs secondarily liable for infringing activities of their users even absent actual knowledge of any infringement.<sup>6</sup>

Accordingly, if (or more accurately when) those users copy, perform, display, republish, or adapt works in ways violative of copyright, the DMCA’s safe harbor provisions shield OSPs from liability altogether. This is in stark contrast to the strict liability nature of copyright infringement that applies generally in all cases. In fact, courts only consider mental state, if at all, when courts calculate monetary damages.<sup>7</sup> The ordinary range of statutory damages is \$750–\$30,000 per infringement. However, a court can increase the amount for willful infringement to \$150,000 or decrease it to \$200 in the case of innocent infringement;<sup>8</sup> that is, in cases where the user

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2. Conduits allow users to communicate with each other (i.e., social media networks) and storage providers allow users to upload, exchange, and disseminate materials (i.e., YouTube or Vimeo).

3. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). See *infra* Part III for a discussion of the Digital Millennium Copyright Act of 1998 and its safe harbors provisions.

4. *Id.*

5. *Id.*

6. See *infra* Part III for a discussion of the Digital Millennium Copyright Act of 1998 and its safe harbors provisions.

7. A court assesses mental state in its discretionary determination of the amount of damages to award. The general range of damages is \$750–30,000 per infringement. But a court may, in its discretion, reduce the amount to \$200 per infringement for innocent infringement or increase the amount to \$150,000 per infringement where a defendant is found to have infringed willfully. See 17 U.S.C. § 504(c).

8. 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.

neither knew nor had reason to know her use was infringing.<sup>9</sup>

It is critical for copyright users and OSPs alike to be able to reasonably anticipate the legal implications of their online activities for a number of reasons. One important reason is that due to the strict liability nature of copyright, users cannot avoid liability simply because they did not intend to infringe.<sup>10</sup> Another reason, as noted above, is the importance of mental state in the court's discretionary determination of the amount of damages due.<sup>11</sup> Unfortunately for users, it is not only more difficult than ever to determine beforehand what activities are potentially or actually infringing or fair, it is also easier to infringe unintentionally in the online environment, especially now that the formalities of notice, registration, and publication, which served as advance warning to end-users that their use may be infringing, are no longer required for rights to exist.<sup>12</sup> Therefore, the average user, who carries the greatest economic risk of running afoul of the law given the range of damages<sup>13</sup> and trend of large damage awards,<sup>14</sup> also has a duty to determine the ultimate legal question of liability with no real assurance their legal determination is correct. In sum, today's unwitting direct infringer—also known as the innocent infringer—is not so fortunate.

Academic commentators and user-advocate groups have decried the varied and various shortcomings of copyright liability as applied to innocent infringers in the digital age.<sup>15</sup> Even judges have implored Congress to clarify and reform the law, especially in the wake of the excessive statutory damages dilemma.<sup>16</sup> Judges, academics, and

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L. 767, 772–73 (2011).

9. See *infra* notes 40–44.

10. See Lipton, *supra* note 8, at 770–71 (noting that strict liability may be necessary in copyright “to circumvent the inherent difficulty of establishing a defendant’s culpable state of mind”).

11. See *infra* notes 40–44.

12. Copyright exists automatically when a literary or artistic work is fixed in some tangible medium of expression.

13. See *infra* notes 40–44.

14. See *infra* Part II.B.2.

15. See generally Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice about Their Use of Technical Protection Measures?* (UC Berkeley Pub. Law Research, Working Paper No. 1058561, 2007), available at <http://ssrn.com/abstract=1058561> (identifying six types of consumer harms that have occurred from inadequate notice, including lack of expected interoperability, privacy invasions, security vulnerabilities, anti-competitive lock-out as to compatible systems, risks of inadvertent anti-circumvention liability, and unanticipated changing terms and discontinued service).

16. See *Sony BMG Music v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010), *aff’d in*

laypersons have all raised serious concerns about the constitutionality of the current range of statutory damages far exceeding the notice, deterrence, and punishment goals of copyright, especially in the case of civil remedies. For example, Professors Pamela Samuelson and Tara Wheatland have described the trend of discretionary statutory damage awards as “frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”<sup>17</sup>

In adding my voice to this important reform debate, I assert a novel (even if aspirational) approach: Congress should amend the Act to afford safe harbor protections in the online context to certain classes of direct innocent infringers similar to those already afforded OSPs in the DMCA. To this end, I offer a proposed statutory amendment to § 512 of the Act so that certain direct, but innocent, infringers avoid liability altogether. This solution seems even more necessary now that a coalition of Internet Service Providers (ISPs)<sup>18</sup> have begun implementing the much anticipated industry response to

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*part, vacated in part, rev'd in part*, 660 F.3d 487 (1st Cir. 2011). In *Sony*, Judge Nancy Gertner implored Congress to take action to stop excessive damage awards in music file sharing cases. *Id.* at 95–96. See also *Capitol Records v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). In *Capitol Records*, Chief Judge Davis implored Congress to revisit statutory damages even in peer-to-peer cases when innocent infringement is not a viable defense:

The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court. . . . While the Court does not discount Plaintiffs’ claim that, cumulatively, illegal downloading has far-reaching effects on their businesses, the damages awarded in this case are wholly disproportionate to the damages suffered by Plaintiffs. Thomas allegedly infringed on the copyrights of 24 songs—the equivalent of approximately three CDs, costing less than \$54, and yet the total damages awarded is \$222,000—more than *five hundred* times the cost of buying 24 separate CDs and more than *four thousand* times the cost of three CDs. While the Copyright Act was intended to permit statutory damages that are larger than the simple cost of the infringed works in order to make infringing a far less attractive alternative than legitimately purchasing the songs, surely damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent.

*Id.* at 1227.

17. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009). In their comprehensive critique of statutory damages in copyright law, Professors Samuelson and Wheatland aptly note that “[i]n the modern world in which the average person in her day-to-day life interacts with many copyrighted works in a way that may implicate copyright law, the dangers posed by the lack of meaningful constraints on statutory damage awards are acute.” *Id.* at 443.

18. All ISPs are OSPs, but not all OSPs are ISPs. See *generally Online Service Provider*, COMPUTER BUS. RESEARCH, <http://www.computerbusinessresearch.com/Home/ebusiness/online-service-provider> (last visited Sept. 22, 2013).

Internet piracy known as the “six strikes” rule and Copyright Alert System (CAS).<sup>19</sup> The goals of the CAS are to monitor the online activities of subscribers, to identify potentially infringing users, and to warn users. Warnings come with consequences that include slower bandwidth or even loss of service altogether.<sup>20</sup>

Accordingly, the primary goal of this Article is three-fold: (1) to explore the role of the innocent infringer archetype historically and in the digital age; (2) to highlight the tension between customary and generally accepted online uses and copyright law that compromise the efficient use of technology and progress of the digital technologies, the Internet, and society at large; and (3) to offer a legislative fix in the form of safe harbor for direct innocent infringers. Such an exemption seems not only more efficient but also more just in the online environment where unwitting infringement for the average copyright consumer is far easier than ever to commit, extremely difficult to police, and often causes little, if any, cognizable market harm.<sup>21</sup>

To be clear, I am not arguing that *all information wants to be free*.<sup>22</sup> I believe copyright liability has its place in both the brick and mortar and digital worlds. And as between an innocent copyright owner and an innocent infringer, in general the latter should bear the loss and harm the infringement causes. But I assert that without specific harm—or with resulting harm to the copyright owner that is arguably *de minimis*—little exists in the case of innocent infringement to compensate with monetary damages.

Additionally, by its very nature, a stiffer penalty could never

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19. See Chloe Albanesius, *ISPs Shed Light on Plans for ‘Six Strikes’ Copyright Alerts*, PCMAG.COM (Feb. 28, 2013), <http://www.pcmag.com/article2/0,2817,2416092,00.asp>; *Copyright Alert System*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system/> (last visited Sept. 22, 2013).

20. CTR. FOR COPYRIGHT INFO, *supra* note 19; see also Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373 (2010) (providing a comprehensive analysis of the graduated response, exploring the system’s effectiveness in addressing massive online copyright infringement, and highlighting the problems and unintended consequences brought about by the system).

21. See generally Ned Snow, *Copytraps*, 84 IND. L.J. 285 (2009) (explaining that “copytraps” result when websites invite innocent users to access copyrighted expression in ways that seem, to the good faith user, to be legal but are in fact actually infringing).

22. This phrase is attributed to Silicon Valley futurist Stewart Brand and is believed to have been uttered for the first time at the first Hacker’s Conference in 1984 (which he helped to organize). See Richard Siklos, *Information wants to be free . . . and expensive*, CNNMONEY.COM (July 20, 2009), <http://tech.fortune.cnn.com/2009/07/20/information-wants-to-be-free-and-expensive/>.

deter innocent infringement because innocents act without knowledge that their actions may be infringing. Therefore, safe harbor for certain uses of copyrighted works online seems not only desirable but necessary in order to reflect established informal behavioral patterns consistent with, and supportive of, a robust and dynamic Internet system. Such would go a long way in settling expectations of all parties and also reflect the type of progress contemplated in copyright's constitutional call.<sup>23</sup>

In Part II, I discuss the innocent infringer dilemma in greater detail. I highlight the policy considerations reflecting the importance of a viable innocent infringer defense as part of “just” statutory damage awards in infringement actions and compare the 21st century user of copyrighted material to the traditional user model, with a particular focus on the user expectations and online norms of the digital native.<sup>24</sup>

In Part III, I examine Title II of the DMCA, which created limitations on the liability of conduit and storage OSPs for copyright infringement if certain criteria are met. Ultimately, this Part serves to highlight the shared concerns between OSPs and good faith users of their services who, I argue, should be able to avail themselves of similar protections.

In Part IV, I propose an amendment to the DMCA to extend its safe harbor protections to users as well. In this way, users who might otherwise argue innocent infringement after liability is determined can instead avoid liability altogether in the same way OSPs do currently. The proposed amendment offers to Congress specific statutory language creating safe harbor protections to a certain class of good faith online users of digital goods similar to those currently enjoyed by OSPs.

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23. The purpose of the Intellectual Property Clause found in Article I, section 8, clause 8 of the United States Constitution is to promote progress of science (in the case of copyright) and useful arts (in the case of patents). U.S. CONST. art. I, § 8, cl. 8. The means of achieving the stated purpose is through the economic incentive of exclusive rights for “limited times[.]” *Id.*

24. Marc Prensky is credited with coining the term *digital native*. Marc Prensky, *Digital Natives, Digital Immigrant*, 9 ON THE HORIZON 1 (Oct. 2001), available at <http://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf>; see *Digital Natives*, YOUTH AND MEDIA, <http://youthandmedia.org/projects/digital-natives/> (last visited Sept. 27, 2013) (defining *digital natives* as “those who grow up immersed in digital technologies, for whom a life fully integrated with digital devices, is the norm”); see also JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 4–7 (2008).

Finally, in Part V, I offer concrete examples of how a court would apply the user safe harbor to certain activities that average accidental and good faith infringers engage in. User safe harbor seems optimal in the digital environment, especially when users access digital goods that neither bear visible copyright notice nor provide some other notice at the point of access. Such provisions are also optimal when copyright management information (CMI)<sup>25</sup> is encrypted and, therefore, inaccessible to users, and the user, upon receiving notice, takes immediate action to remedy the infringing activity.

## II. THE INNOCENT INFRINGER: THEN AND NOW

The Internet and digital technology have ushered in a brave new world of ways to create and to disseminate literary and artistic works that, when original and fixed in a tangible medium of expression, are protected by copyright. Many of these means of digital creation and dissemination employ collaborative and cumulative methods of transforming what already exists into something new. With little effort, anyone can transform from mere consumer, to republisher, to creator in her own right. Indeed, most websites invite their visitors to access and exploit works hosted on their sites with the all-too-familiar social plug-in invitation: “share.”<sup>26</sup>

The problem is that not all website owners control all of the copyrighted material accessible on their sites. For example, a site owner may have the legal right to make use of a copy but not to create additional copies (electronically or otherwise). Site owners also may not have the legal right 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

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25. Copyright management information (CMI) is defined as information relating to the title, author, owner (if different), dates of creation and publication, and conditions of use “conveyed in connection with copies or phonorecords of a work or performances or displays of a work.” 17 U.S.C. § 1202(c) (2013).

26. The share feature found on most websites is explained as follows:

Third-party websites and online publications help facilitate the publication and spread of user-generated content by including sidebar widgets on their web pages. These digital icons allow users to link directly to different social media accounts, where they can automatically post and share news stories, images, video and other content from the third-party website.

*Types of Consumer Generated Digital Content*, BOUNDLESS.COM, <https://www.boundless.com/marketing/social-media-marketing/introduction-to-social-media-digital-marketing/types-of-consumer-generated-digital-content/> (last visited Sept. 27, 2013).

via a website, or retweets a tweet via Twitter, the potential for copyright infringement exists.<sup>27</sup>

Copyright consumers can now effortlessly create perfect digital copies of protected works without permission and distribute them to one, dozens, hundreds, or thousands of others with only a few clicks of a mouse or taps on the touch screen of a handheld device. Some do so with actual knowledge that the works are protected by copyright and that their use is an infringement. Others do so without such knowledge (actual or otherwise) or with a good faith but mistaken belief that their use was fair. This is particularly true for the *digital native*, best understood as someone born after 1980 when social digital technologies emerged. Also sometimes referred to as Generations Z<sup>28</sup> and C,<sup>29</sup> digital natives have experienced and have come to expect round-the-clock access to networked digital technologies and have mastered the skills to exploit those technologies at an early age.<sup>30</sup> Digital immigrants too have come to expect and require 24/7 connectivity to work, play, and connect.

Access to, and exploitation of, copyrighted works for the average consumer today is far different than they were for their 19th and 20th century counterparts. For example, unlike their digital “immigrant” parents (including most judges and members of Congress) who separate virtual and real world identities, digital natives see themselves as having only one identity that they express via various modes and media.<sup>31</sup> In light of their digital immersion, digital natives relate to people (friends, family, and strangers alike), information,

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27. Participating in social networks requires adherence to the company’s terms of use. Opting into a social network, however, often means opting out of the full protections of copyright law. See generally Michael E. Kenneally, *Commandeering Copyright*, 87 NOTRE DAME L. REV. 1179, 1179 (2012) (examining “the increasingly common phenomenon of copyright commandeering, which is the use of standardized contracts and other legal devices to reassign, on a massive scale, the entitlements initially assigned by copyright law”).

28. See generally Grail Research, *Consumers of Tomorrow: Insights and Observations About Generation Z* (Nov. 2011), available at [http://www.grailresearch.com/pdf/ContentPodsPdf/Consumers\\_of\\_Tomorrow\\_Insights\\_and\\_Observations\\_About\\_Generation\\_Z.pdf](http://www.grailresearch.com/pdf/ContentPodsPdf/Consumers_of_Tomorrow_Insights_and_Observations_About_Generation_Z.pdf) (describing the Generation Z demographic as those born in the 1990s through 2010 who are constantly connected to, comfortable with, and dependent on technology).

29. Andrea M. Matwyszyn, *Generation C: Childhood, Code, and Creativity*, 87 NOTRE DAME L. REV. 1979, 1980 n.3 (2012) (describing the possible meanings of the C in Generation C).

30. See PALFREY & GASSER, *supra* note 24, at 1.

31. See *id.* at 4. Additionally, digital natives are “joined by a set of common practices, including the amount of time they spend using digital technologies, and their pattern of use of the technologies to access and use information and create new knowledge and art forms.” *Id.*

creativity, education, business, government, and themselves in vastly different ways than those charged with the task of enforcing laws that those interactions implicate.<sup>32</sup> However, those actions and interactions are often at odds with copyright law.

Understanding these fundamental differences provides great insight into today's accepted online behaviors. This understanding, in turn, can lead to ways of adapting copyright law to encourage beneficial uses (read: fair) and continue to deter harmful ones.<sup>33</sup> Professor Rebecca Tushnet expounds on this point in her article titled *User-Generated Discontent: Transformation in Practice*. Professor Tushnet explains that "user-generated fair use principles offer their own definition of transformation, both implicit and explicit, that draw not only on formal copyright law but also on the practices of specific creative communities."<sup>34</sup> Michael J. Madison's work in this area helps to illuminate the value of accepted online social and cultural patterns.<sup>35</sup> Specifically, Professor Madison argues that courts already informally and even formally give legal deference to certain accepted social and cultural patterns when courts weigh whether a use is fair.<sup>36</sup> It makes sense, therefore, that such accepted practices can serve as examples of the types of practices and behaviors ideally suited for user safe harbor consideration.

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32. *See generally id.* at 5–12.

33. Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 499 (2008).

34. *Id.* Professor Tushnet goes on to say:

Most people ripping, mixing[,] and burning have given little thought to the legitimate boundaries of creative appropriation. When they do, however, they can articulate good reason that not every possible use of a copyrighted work should require the consent of, or payment to, the copyright owner, even when a license might theoretically be available. These insights into transformativeness in practice should reciprocally influence formal copyright law.

*Id.*

35. *See* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623 (2004) (arguing that the affirmative defense of fair use should also consider whether a challenged use is part of a recognized and generally accepted social or cultural pattern). Professor Madison notes that courts often implicitly consider accepted patterns in fair use determinations. However, some courts cling to the four factors set forth in Section 107 of the Act. Accordingly, he argues that "[d]ecisions regarding whether any given unauthorized 'use' of a copyrighted work is 'fair' under § 107 should be judged by whether that 'use' is undertaken in the context of a recognized social or cultural pattern, and the four statutory fair use factors should be interpreted and applied as part of an overall pattern-oriented framework." *Id.*

36. *See id.*

### A. Copyright & Infringement

To better understand infringement and, ultimately, the corresponding problems the average digital content consumer and consumer-as-creator face, one must first understand the rights at issue. Copyright is a bundle of exclusive rights granted to a copyright owner that gives her the exclusive right to reproduce, distribute, adapt, and publicly display or perform the work, and to authorize others to do so (or not). Each right can be disaggregated from the rest and sold, licensed, or otherwise exploited as one, some, or all.<sup>37</sup> The subject matter of the copyright monopoly consists of a range of original literary and artistic works fixed in a tangible medium of expression.<sup>38</sup> Copyright infringement, a strict liability offense, occurs when someone exercises any of the exclusive rights without permission. Liability attaches when a copyright defendant fails to proffer a sufficient legal defense.<sup>39</sup>

A copyright owner can seek either actual damages and defendant's profits<sup>40</sup> or statutory damages<sup>41</sup> that range from a minimum of \$750 to a maximum of \$30,000 for each work infringed.<sup>42</sup> The court, in turn, has the discretion to decrease damages to a minimum of \$200 per infringement in the case of innocent infringement or to increase the award to a maximum of \$150,000 for willfully committed infringement.<sup>43</sup> In addition, courts remit damages altogether for innocent infringers who are affiliated with a nonprofit educational institution and for public broadcasting entities.<sup>44</sup>

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37. The Copyright Act of 1976, 17 U.S.C. § 106 (2013). Section 106 lists a copyright owner's exclusive rights and explains that "the owner of copyright . . . has the exclusive rights to do and to authorize any of the [106 rights]." Those rights include the right to reproduce, prepare derivative works, distribute copies and display or perform publicly. *Id.*

38. *Id.* § 102(a).

39. The most common defenses other than the innocent infringer defense includes: copyright invalidity that challenges whether a work is in fact original, whether it is the proper subject matter of copyright, or whether the plaintiff is in fact the owner; *de minimis* use; fair use; and independent creation.

40. *Id.* § 504(a)(1).

41. *Id.* § 504(a)(2). Statutory damages and attorney's fees are available only if the plaintiff timely registered the work with the Copyright Office prior to the infringement or within three months of publication.

42. *Id.* § 504(c)(1).

43. *Id.* § 504(c)(2). Unfortunately, the term "willful" is not defined in the Act and no examples are offered to provide additional guidance.

44. *Id.* § 504(c)(2)(i)-(ii). Although the law provides explicit discretionary limits on liability for certain good faith infringers, in practice "the lower level of statutory damages is

Both in concept and intent, the reduced damage awards for innocent infringement reflect the Act's requirement that damages be just. However, for a number of reasons unrelated to the defense itself, in the digital age innocent infringement seems a defense in name only. In isolation this reality may not be cause for alarm. But, in light of the parallel reality that statutory damage awards as a whole have become not only unjust but plainly penal, the existence of an anemic innocent infringer defense incapable of counterbalancing the excessive awards at the upper range of damages is particularly troublesome.<sup>45</sup>

### *B. The Innocent Infringer Archetype*

Historically, copyright law shielded a copyright user who infringed unintentionally from the more onerous damage awards that flowed from its strict liability scheme. This unintentionally infringing copyright consumer, referred to in the Act as an innocent infringer, is one who neither knew nor should have known that her use was infringing.<sup>46</sup> Professor Jacqueline D. Lipton offers three categories for the innocent infringer archetype:

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hardly ever used." See generally Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1221 (2010) [hereinafter *Directions for Reform*]. This article was a joint effort by the members of The Copyright Principles Project (CPP). Professor Samuelson goes on to say:

[T]he wide numerical range of permitted awards, coupled with the lack of standards or guidelines for awards, the ability of the plaintiff to unilaterally elect an award of statutory damages at any time in the litigation, and the willingness of courts and juries to decide that infringement was willful if the defendant should have realized his acts were infringing, has too often led to awards that seem arbitrary and capricious, inconsistent with awards in similar cases, and sometimes grossly excessive or disproportionate when compared with a realistic assessment of actual damages and profits.

*Id.*

45. Some of the most notorious statutory damages award include a \$1.92 million judgment against Jammie Thomas-Rasset, held liable for downloading and sharing twenty-four songs on KaZaA's file-sharing network, a \$675,000 award against college student Joel Tenenbaum for downloading and sharing thirty songs in the same manner, and sixteen-year old Whitney Harper, who—despite asserting an innocent infringer defense—was ordered to pay \$750 per song for downloading 27 songs. See Dave Itzkoff, *\$1.92 Million Fine for Music Piracy*, N.Y. TIMES (June 19, 2009), [http://www.nytimes.com/2009/06/20/arts/music/20arts-192MILLIONFI\\_BRF.html](http://www.nytimes.com/2009/06/20/arts/music/20arts-192MILLIONFI_BRF.html); Dave Itzkoff, *Student Fined \$670,000 in Downloading Case*, N.Y. TIMES (July 31, 2009), <http://artsbeat.blogs.nytimes.com/2009/07/31/judge-rules-student-is-liable-in-music-download-case/>; David Kravets, *Former Teen Cheerleader Dinged \$27,750 for File Sharing 37 Songs*, WIRED (Feb. 26, 2010), <http://www.wired.com/threatlevel/2010/02/for-mer-teen-cheerleader-dinged-27750-for-infringing-37-songs/>.

46. Lipton, *supra* note 8, at 772–73.

First, there are cases of “unconscious” or “subconscious” copying in which the defendant’s expression is copied from the plaintiff’s original work, but the defendant has, in good faith, forgotten the source of the work. Second, innocent infringement occurs when the defendant has, in good faith, copied material received from a third party, believing it to be original material or that the third party is otherwise authorized to give permission to copy. Finally, the third category includes deliberate copying by a defendant who mistakenly believes either that the copied material is in the public domain or that there is another legitimate reason why the copying is not an infringement.<sup>47</sup>

The court considers the innocent infringer “defense” in its discretion at the remedies phase of an infringement suit. It allows a judge to permit a defendant found liable to pay a reduced amount in statutory damages if that defendant proves she did not know her use was infringing or if she had a reasonable good faith belief that the use was a permissible or fair use.<sup>48</sup> The innocent infringer doctrine pre-dates statutory damages and has persisted through every major amendment of the Act to date.<sup>49</sup>

However, innocent infringement is far more difficult to establish in the digital context. As discussed earlier, the resulting damages in some cases bear no reasonable relationship to the harm and have a penal rather than compensatory effect.<sup>50</sup> The reasons lie in two areas. The first is the overly-broad interpretation of “notice” when digital works are involved. The second is judicial discretion that seems skewed toward the upper range of statutory damages permitted.<sup>51</sup> Instead of leaving the innocent infringement determination until the remedies phase, a more efficient and just approach would provide users safe harbor under certain circumstances *before* liability is actually assessed.

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47. *Id.* at 773.

48. Although innocent infringement does not immunize a defendant from liability for copyright infringement, “the innocence of the defendant may affect the remedies available to the plaintiff.” *See* Lipton, *supra* note 8, at 774.

49. *See generally* Brian Sheridan, *The Age of Forgotten Innocence: The Dangers of Applying Analog Restrictions to Innocent Infringement in the Digital Era*, 80 *FORDHAM L. REV.* 1453 (2011).

50. *See generally* Samuelson & Wheatland, *supra* note 17, at 441.

51. *See id.* at 483.

## 1. Notice

The Act bars defendants found to have notice of a copyright claim from asserting the innocent infringer defense to mitigate damages.<sup>52</sup> Notice in the digital and online contexts, however, is an elusive concept. This is especially true when the very nature of a copyrighted digital work precludes notice on the copy in the traditional sense or when CMI is embedded and encrypted and therefore inaccessible to the consumer. As a result, today's unwitting users of digital goods are neither as informed at the point-of-access of an owner's claim of copyright nor as protected by formalities as their 19th and 20th century counterparts.

For example, the average digital copyright consumer is often also a republisher when she utilizes the ubiquitous "share" features available on virtually every website and application (app),<sup>53</sup> especially those featuring "communicative" works.<sup>54</sup> A user can also become a second-generation creator if she, for example, adapts the original work to create a new musical work, video, or meme,<sup>55</sup> or she is an appropriation artist and uses existing materials (including some protected by copyright) to create new works.<sup>56</sup> However, both the "accidental infringers" and "*mea culpa* infringers" may not have sufficient notice when using protected works. Nonetheless, in both cases courts would otherwise hold these users strictly liable for infringement absent some safe harbor protection from liability. Therefore, my user safe harbor proposal treats notice as a factor in determining liability rather than its present function in the copyright framework as a factor in determining the amount of a damage award.

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52. 17 U.S.C. § 401(d) (2013).

53. The movie industry is scrutinizing closely the smart phone application market for a new frontier of copyright infringement worries. See Dara Kerr, *Movie studios target mobile apps for copyright infringement*, CNET.COM (Feb. 28, 2013), [http://news.cnet.com/8301-1023\\_3-57571976-93/movie-studios-target-mobile-apps-for-copyright-infringement/](http://news.cnet.com/8301-1023_3-57571976-93/movie-studios-target-mobile-apps-for-copyright-infringement/).

54. See *Dastar v. Twentieth Century Fox*, 539 U.S. 23, 33 (2003) (describing a communicative work as "one that is valued not primarily for its physical qualities, such as a hammer, but for the intellectual content that it conveys, such as a book or, as [in that case], a video.").

55. A meme is an image or video that Internet users pass electronically from one to another. It is often humorous or provocative, thus increasing its "viral" potential and appeal online. For additional information on memes, see Paul Gil, *What Is a 'Meme'? What Are Examples of Modern Internet Memes?*, ABOUT.COM, <http://netforbeginners.about.com/od/weirdwebculture/f/What-Is-an-Internet-Meme.htm> (last visited Sept. 27, 2013).

56. See generally Tonya M. Evans, *Reverse Engineering IP*, 17 MARQ. INTELL. PROP. L. REV. 61, 68–71 (2013) (discussing the tension between appropriation art and copyright).

## 2. Statutory Damages

A lack of clear legislative guidance to the courts in the discretionary judicial determination of a just remedy has led to a serious lack of continuity of court decisions and arbitrary and excessive awards.<sup>57</sup> This is especially troubling to the innocent infringer now that all of the mandatory formalities (as noted above) have been removed that historically gave users a reasonable opportunity to know or discover whether and under what circumstances a work is protected.<sup>58</sup> Therefore, safe harbor for the direct unwitting and, in some cases accidental, infringer seems both appropriate and necessary.

Congress created the first federal statutory damages framework in the 1909 Act.<sup>59</sup> Prior to 1909, copyright claimants successful in an infringement action could receive a “per sheet” (a.k.a. per copy) penalty of .50 cents (later increased to \$1) for infringing copies found in defendant’s possession.<sup>60</sup> The legislative history prior to the 1909 Act revision shows Congress was very dissatisfied with a per sheet penalty due in part to the decidedly “penal character” in an otherwise civil setting.<sup>61</sup> The penal effect often led judges to construe statutory damages narrowly in order to lessen the severity of the statutorily prescribed remedy. Accordingly, any part of the Act having a penal effect should be scrutinized closely.

The 1909 Act revision introduced three important reforms. First, it provided for actual damages and defendant’s profits, as well as forfeiture of infringing copies and a permanent injunction.<sup>62</sup> Second, it eliminated the per sheet penalty in favor of a “per infringement” rule.<sup>63</sup> Third, it created a new generalized regime of statutory damages available to plaintiffs “in lieu of” actual damages and profits for situations in which it was difficult to ascertain actual damages or

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57. Samuelson & Wheatland, *supra* note 17, at 443.

58. If Congress intends to maintain the statutory damage scheme, it must provide reasonable guidelines to courts on how to award damages in a consistent and just manner. See Samuelson et al., *supra* note 44, at 1220.

59. Samuelson & Wheatland, *supra* note 17, at 447 n.22 (noting that the 1909 Act was not the first United States copyright statute to provide for statutory damages, but was the first federal law to apply to all copyrighted works).

60. *Id.* at 447.

61. *Id.*

62. *Id.* at 448.

63. *Id.*

profits.<sup>64</sup> The statute also set a range of damage awards<sup>65</sup> and directed judges to make an actual statutory award determination in an amount deemed just.<sup>66</sup> Additionally, and importantly, Congress provided express guidance to the courts on the appropriate amount of compensation to award given the prescribed range. Section 101(b)<sup>67</sup> suggested specific amounts for certain common types of infringement.<sup>68</sup>

Courts charged with the task of applying that new statutory damages framework identified its purpose as granting fair compensation to copyright owners when it is difficult or impossible to determine the actual damages to the owner and the defendant's profits.<sup>69</sup> Some courts of that day even refused to grant statutory damages when actual damages and profits could be reasonably ascertained.<sup>70</sup> In fact, the Supreme Court ultimately held that the 1909 Act's statutory damage provision was unavailable in cases where actual damages and profits were established.<sup>71</sup> Currently, to the extent that infringement controversies even make it to and through the judicial process, a startling trend of high and excessive awards is afoot. Many commentators and even some judges have seriously questioned whether recent statutory damage awards even come close to reflecting fair and just compensation, even for the standard infringer, and challenge the statute's constitutionality.<sup>72</sup>

By creating a tripartite statutory damage framework within the same section of the Act, Congress intended to encourage modest awards against innocent infringers, moderate awards against most

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64. *Id.*

65. The range was between \$250 and \$5,000 per infringement; although, the court also had the discretion to go beyond the \$5,000 cap where the infringement was continuing and, presumably, particularly, willful and egregious. *See* Samuelson & Wheatland, *supra* note 17, at 448.

66. *Id.*

67. 17 U.S.C. § 101(b) (1976) (superseded).

68. Samuelson & Wheatland, *supra* note 17, at 449. The suggestions included: "\$10 for every infringing copy of a painting, statue, or sculpture; \$1 per infringing copy of other works; \$50 for every infringing performance of a lecture, sermon, or address; \$10 for every infringing performance of a musical composition. . . ." *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 450 (citing *Turner & Dahnken v. Crowley*, 252 F. 749, 754 (9th Cir. 1918)).

72. Samuelson & Wheatland, *supra* note 17, at 480–97 (arguing that some statutory damage awards are inconsistent with both congressional intent and Due Process principles of the Constitution).

ordinary infringers, and hefty awards against egregious infringers.<sup>73</sup> The primary goal of the former (modest and moderate awards) is to compensate the plaintiff, the latter (willful) to punish past acts and deter future acts.<sup>74</sup> However, the reality of damage awards in cases of even ordinary infringement neither reflects the intention nor the goal of compensation and deterrence. Congress may reach a better, more just result in cases of accidental or *mea culpa* infringement by channeling certain commonplace noncommercial online user behaviors away from strict liability and offering, instead, safe harbor from liability to those users; provided the users, once notified, work expeditiously and in good faith to minimize further harm. I explain this point further in Part V.

### *C. Potential Beneficiaries of a Safe Harbor Exemption*

The end-user is no longer a passive recipient of copyrighted works.<sup>75</sup> Today's user is often involved in making some cumulative contribution to an existing work or transforming it into new user generated content (UGC).<sup>76</sup> This is true for consumers who knew or should have known that their use was infringing, as well as those who either did not know their use was infringing or who reasonably (but

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73. *Id.* at 460–63 (noting rampant inconsistencies in the case law with some clearly willful infringers ordered to pay nominal damages and some innocent infringers with strong, or at least plausible, but unsuccessful fair use claims being ordered to pay a king's ransom).

74. *Id.* at 500.

75. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460 (2008).

76. UGC, which entered mainstream lexicon in 2005 via web publishing and new media content circles, "covers a range of media content available in a range of modern communications technologies . . . . It is used for a wide range of applications, including problem processing, news, gossip and research and reflects the expansion of media production through new technologies that are accessible and affordable to the general public." *User-Generated Content*, WIKIPEDIA, [http://en.wikipedia.org/wiki/User-generated\\_content](http://en.wikipedia.org/wiki/User-generated_content) (last modified Sept. 9, 2013). UGC has experienced tremendous growth in recent years and shows no signs of slowing despite often being at odds with traditional notions of copyright. Professor Edward Lee explains this phenomenon as follows:

The informal practices associated with user-generated content make manifest three significant features of our copyright system that have escaped the attention of legal scholars: (i) our copyright system could not function without informal copyright practices; (ii) collectively, users wield far more power in influencing the shape of copyright law than is commonly perceived; and (iii) uncertainty in formal copyright law can lead to the phenomenon of "warming," in which—unlike chilling—users are emboldened to make unauthorized uses of copyrighted works based on seeing what appears to be an increasingly accepted practice.

Lee, *supra* note 75, at 1459.

mistakenly) believed their use was lawful.<sup>77</sup> In fact, at least two generations of users are digital natives who may never have purchased physical copies of music like a compact disc or LP as did their digital immigrant parents.<sup>78</sup> However, in cases involving digital goods, judges deem users to have notice (constructive or at least inquiry) of copyright protection when a physical copy that bears proper notice is available in general circulation.<sup>79</sup>

Twenty-first century consumers use digital literary and artistic works like music, image, and video files, and electronic books (e-books) that they often acquire by download (legally or illegally) from third party websites or by direct transfer from other users. These end-users are often quite far removed downstream from copyright owners. This is especially true given the interactive nature of use in the digital environment that has forever changed user involvement and expectations. These uses include: Peer-to-Peer (P2P) file sharing and streaming, social networking (e.g., Facebook), microblogging (e.g., Twitter), interactive online gaming (e.g., Second Life), consumer-as-cumulative creator (e.g., Vimeo), and consumer-as-critic (e.g., TripAdvisor and OpenTable.com).

Digital natives are most comfortable utilizing some form of digital media in virtually every daily interaction, and they often seem at a loss without these supports.<sup>80</sup> In contrast to the habits of the digital native, digital immigrants, those born before the Internet and digital technology became pervasive and ubiquitous, distinguish the cyber world from the physical world both conceptually and actually;<sup>81</sup>

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77. See generally Brian Sheridan, Note, *The Age of Forgotten Innocence: The Dangers of Applying Analog Restrictions to Innocent Infringement in the Digital Era*, 80 *FORDHAM L. REV.* 1453, 1486 (2011) (examining the interplay between the innocent infringer defense and its interpretation by various circuits in the P2P digital file sharing context).

78. See PALFREY & GASSER, *supra* note 24, at 4 (comparing iPod-listening digital natives to LP-buying digital immigrants).

79. See *Maverick Recording v. Harper*, 598 F.3d 193, 199 (5th Cir. 2010) (holding that the Defendant's young age and naivety could not defeat a Section 402(d) limitation on her innocent infringer claim where the notice of copyright was properly displayed on the published phonorecord); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (holding that the defendant had notice because she had access to physical copies and, therefore, "could have learned, had she inquired, that the music was under copyright").

80. Shaheen Shariff, Alyssa Wiseman, & Laura Crestohl, *Defining the Lines between Children's Vulnerability to Cyberbullying and the Open Court Principle: Implications of A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 22 *EDUC. & L.J.* 1, 7 (2012) [hereinafter *Defining the Lines*].

81. *Defining the Lines*, *supra* note 80 (citing Colin Lankshear & Michele Knobel, *Digital Literacies: Policy, Pedagogy and Research Considerations for Education*, Opening

or at least they attempt to do so. It is the digital immigrant who struggles most to fit the proverbial round peg of a digital native's expectations and behavioral norms into a square legal framework.<sup>82</sup> Both natives and immigrants alike use technology in unintentionally infringing ways. Ideally, the user safe harbor provision would apply to accidental infringement and *mea culpa* infringement, as I explain further below.

Recall that courts do not factor a defendant's mental state—that is, whether she knew or should have known her acts were infringing or whether it was her intent to circumvent the law—into the determination of liability.<sup>83</sup> Courts only consider the innocent infringer argument, if at all, to mitigate damages during the remedies phase of an infringement suit.<sup>84</sup> Although the Act purports to shield innocent infringers from the more onerous remedies, today's innocent infringer is nonetheless exposed to considerable risk of liability and stiff economic penalties at a time when traditional safeguards to minimize the risk of committing infringement are diminished, fading, or have already disappeared. Part V of this Article highlights these risks in the summaries and examples of accidental and *mea culpa* infringement.

#### *D. The Digital User at Risk*

Copyrighted works have always reached and benefited the average citizen. Throughout the ages, creators of literary and artistic expression have provided its consumers with works that entertain, educate, and inform. Until recently in the Copyright Act's history, however, large-scale infringement was largely out of reach of the masses due the technological barriers to access, reproduction, and

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Plenary Address to ITU Conference (Oct. 20, 2005)).

82. The research and data presented in *Defining the Lines* is illuminating:

It is not surprising, then, that researchers report that 98% of Canadian youth access digital media daily and 93% of American teens use the Internet. Young adults aged 18 to 24 exchange an average of 3200 messages per month. Girls aged 14 to 17 send about 3000 messages per month, and boys between 12 and 14 send 600 texts per month. Social networking sites (SNS) have millions of active users and Facebook is recognized globally as an important communication tool for youth. While 47% of adults are SNS users, over 70% of teens use SNS and over 60% of 13- to 17-year-olds have personal SNS profiles. Lenhart reports that 75% of 12- to 17-year-olds own cell phones, and 88% like to text message.

*Defining the Lines*, *supra* note 80, at 7–8 (citations omitted).

83. See *infra* Part II.A.

84. See Sheridan, *supra* note 77, at 1460.

dissemination on such a scale. Such mass, intentional infringement was left to the wholesale copyright pirate. The World Wide Web and digital technologies, however, have forever changed the end-user's relationship to copyrighted works.<sup>85</sup>

In addition to the removal of many technological barriers to access and exploitation due to digital technology and the Internet, amendments to the Act have mostly dismantled the statutory and judicial safeguards originally built into copyright law to shield the innocent infringer.<sup>86</sup> The changes over time have been gradual, cumulative, and largely unrelated to, and without regard for, the fate of innocent infringement.<sup>87</sup> What remains of protection for the accidental and *mea culpa* infringers is now limited to remedial relief that is more theoretical than actual.

The relief is 'theoretical' for several reasons. First, the breadth of copyright subject matter and the scope of protection have expanded considerably. For example, early versions of the Copyright Act applied only to books, charts, and maps. Copyright now includes music, visual, and performing arts, and even architectural works. Congress also extended protection beyond literal copying, publication, and sale of infringing copies to include "substantially similar" imitative copying, as well as adaptation (a.k.a. preparing derivative works), public performance, and public display.<sup>88</sup> Additionally, the formalities of registration and notice are now permissive.<sup>89</sup> Although copyright formalities of notice, registration, and publication are encouraged to secure additional benefits under the 1976 version of the Act, they are no longer required.<sup>90</sup> Even more

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85. See Samuelson et al., *Directions for Reform*, *supra* note 44, at 1177.

86. See generally R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 135–45, 148–54 (2007) (explaining that historically it was more difficult to infringe because copyright protected far fewer works, the scope of protection was more limited and rights depended on, among other requirements, the formalities of notice and registration).

87. *Id.* at 175 (asserting that changes to copyright law by the end of the twentieth century "significantly increased the risk of infringing a copyrighted work . . . [and] simultaneously had the effect of eliminating many of the mechanisms that had protected innocent infringers from liability.").

88. 17 U.S.C. § 106 (2013); *Funky Films v. Time Warner*, 462 F.3d 1072, 1076 (9th Cir. 2006) (explaining substantial similarity and the infringement standard).

89. See 17 U.S.C. §§ 401–406 (2013). The formalities of notice, registration, and publication are no longer required to secure copyright; however, copyright owners enjoy certain privileges and benefits for timely registration. A deposit of the work is still required. 17 U.S.C. § 407 (2013).

90. See 17 U.S.C. §§ 401–407 (2013).

disconcerting, the duration of protection has been extended well beyond the original term of fourteen years.<sup>91</sup> The term of copyright protection currently runs for the life of the author plus seventy years after the author's death.<sup>92</sup>

As Congress continued to dismantle mechanisms that helped to reduce the likelihood of innocent infringement by making clearer what actions constituted infringement and which works were actually protected, technological advances were, in turn, making it far easier to infringe unknowingly.<sup>93</sup> Professor R. Anthony Reese explains that by abolishing the notice requirement, Congress “deprive[d] users of the simplest and least expensive means of determining that copyright protection is claimed for the work, by whom such protection is claimed, and when copyright protection began.”<sup>94</sup> The House Report on the 1976 Act identified these informational functions of notice as of such value and import that the notice requirement should be preserved.<sup>95</sup>

The result is that end-users in the digital age—who carry the greatest economic risk of running afoul of the law—now also have a duty to determine the ultimate legal question with no real assurance that their legal determination of liability is correct. The end-user bears the sole responsibility to assess whether a work is protected. This determination in and of itself is difficult because the version of the Copyright Act that existed at the time the rights came into existence determines the protection.<sup>96</sup> The end-user must then bear the attendant risks of strict liability to assess and determine correctly *ex ante* whether the intended use is permissible without authorization.<sup>97</sup> This assessment is complex and difficult even for

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91. The original term of copyright in the 1790 Act was 14 years with a renewable 14-year term if the owner survived the initial term. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act); *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

92. *See* 17 U.S.C. § 302 (2013).

93. *See* Reese, *supra* note 86, at 176.

94. *Id.* at 177.

95. *Id.* The corresponding Senate Report also noted the intrinsic value lost by eliminating the notice requirement.

96. By way of example, the Copyright Term and Public Domain in the United States chart maintained by Cornell University demonstrates how complex and nuanced a determination is in practice. *See* Copyright Term and the Public Domain in the United States, Cornell University, <http://copyright.cornell.edu/resources/publicdomain.cfm> (last updated Jan. 3, 2013).

97. *See* Lipton, *supra* note 8, at 774 (arguing that the difficulty with the fair use defense in practice has been that its boundaries are notoriously difficult to establish *ex ante*).

intellectual property attorneys and judges *ex post*. For the close cases in particular, such a sophisticated and nuanced determination involves a multi-factor analysis wholly dependent on context and the facts and circumstances of each situation.<sup>98</sup> In short, the layperson can rarely if ever resolve *ex ante* the ultimate legal question with any reasonable degree of certainty.

One can easily see that a bright-lined rule to determine liability is efficient from a judicial economy perspective and creates certainty for the plaintiff and defendant alike. And as between the innocent owner and user, the user traditionally was in the best position to avoid the harm. However, due to the ease with which innocent infringement can and does occur millions of times each day in the digital environment, it seems reasonable that a court should consider a defendant's mental state and intent under certain circumstances during the liability phase of an infringement action.<sup>99</sup>

#### *E. The Impact of Strict Liability on Innocent Infringers*

The 1909 Act revision abandoned knowledge as a pre-cursor to liability, thus making copyright infringement a strict liability offense. In 1931, the Supreme Court confirmed this interpretation in *Buck v. Jewell-Lasalle Realty Co.*<sup>100</sup> Accordingly, courts treated those who technically infringed without knowledge or intent like those who knowingly and recklessly infringed. Their fate as to damages rested within the discretion of the judge during the remedies phase and their only recourse was the statutory limitation on a copyright claimant's ability to recover against them.<sup>101</sup>

The strict liability nature of copyright infringement is

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98. See 17 U.S.C. § 107 (2013); see also Lipton, *supra* note 8, at 774–75.

99. Lipton, *supra* note 8, at 767 (exploring innocent infringement as an affirmative defense or, in the alternative, an element in establishing liability); Michael Traynor & Katy Hutchinson, *Some Open Questions About Intellectual Property Remedies*, 14 LEWIS & CLARK L. REV. 453, 466 (2010) (suggesting mental state should be considered in the initial liability determination because it might make a difference whether a defendant violated the law intentionally or not). If Congress does not reform the Act to consider mental state at the liability phase, it could also consider *ex post* to determine whether a minimum damage award is appropriate. Currently judges have discretion to find a defendant innocently infringed; however in a forthcoming article I argue the determination should, instead, be mandatory. See generally Tonya Evans, *Is There Any Safer Harbor from Statutory Damages in the Digital Age?* (on file with the author).

100. 283 U.S. 191, 198 (1931) (noting the “[i]ntention to infringe is not essential under the Act.”).

101. See Reese, *supra* note 86, at 179.

problematic to innocent infringers in the digital age. Today's user may not have notice of a copyright holder's rights (even or especially if such information is embedded or encrypted within digital goods). Additionally, consumers are no longer always in the best position to avoid the copyright infringement because technology has facilitated an exponential increase in opportunities to access copyrighted works at the same time that Congress dismantled legal safeguards of copyright formalities (namely, mandatory notice and registration) that provided actual or at least constructive notice to the end-user of rights. Further, strict liability is not necessarily the most efficient means of protecting a copyright owner's interests. With arguably hundreds of thousands of technical infringements occurring each day, strict liability seems imprudent as a matter of judicial economy. Strict liability also seems inappropriate given the reality that an optimally functioning Internet necessitates, and in fact depends on, certain technical infringements.<sup>102</sup>

Courts have typically imposed strict liability where: (1) a defendant has notice of a plaintiff's rights, particularly where those rights involve a property interest; (2) a mental state requirement on the part of the defendant would create an untenable burden on the plaintiff; (3) the defendant is in a better position to avoid the harm than the plaintiff; or, (4) it is deemed more efficient—either administratively or economically—for the defendant to bear the risk of the loss.<sup>103</sup>

One could reasonably argue that strict liability in copyright infringement cases made sense in the early years. At that time, infringement was hard to commit on a large scale and sufficient safeguards existed to give notice of copyright claims; therefore the defendant was in the best position to avoid liability. Accordingly, strict liability was the most efficient result. However, twenty-first century realities call into question whether the same conclusions can be made at this time in the history and evolution of copyright law. Unintentional infringement is far easier to commit and a lack of sufficient safeguards has further muddied the waters. Therefore, the defendant may no longer be in the best position to avoid the harm. Of

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102. 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) (discussing the discredited case *Playboy Enterprises, Inc. v. Frena*) (“All of this activity arguably infringes the copyright holder's exclusive rights of reproduction and distribution.”).

103. See generally Lipton, *supra* note 8, at 808.

course, the defendant *does* remain in the best position to mitigate the harm upon notice. Accordingly, a sufficient opportunity to cure upon notice of the copyright holder's rights seems a reasonable, fair, and efficient approach to innocent infringement.

### III. THE DMCA AND OSP SAFE HARBOR AS A MODEL FOR THE DIRECT INNOCENT INFRINGER

OSP safe harbor protection is an essential legal device that serves not only to limit liability but also to bring certainty to the industry, thereby encouraging OSPs to further invest and innovate in online services and digital communications technologies. Ultimately, this Article highlights the shared concerns about liability between the OSP industry and the good faith users of their services who should also benefit from similar safe harbor protections. After all, an OSP (and the Internet) is only as successful as its users. However, current domestic laws and international agreements seem structured to protect rights holders at all costs with little regard or explicit recognition of the value in also safeguarding the interests of those who use—intentionally and unintentionally—copyrighted works.<sup>104</sup>

In 1998, Congress enacted the DMCA in an effort to further extend the scope of copyright protection and proscribe access to copyrighted works. It created a safe harbor exemption from liability for qualifying OSPs that otherwise would be held secondarily liable for the direct infringement of their customers.<sup>105</sup> Because the DMCA

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104. See Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 21 (2004) (discussing the TRIPS Agreement, the means by which the General Agreement on Tariffs and Trade governs intellectual property at the international level). In her essay, Professor Dreyfuss presents a compelling case for the need for explicit user rights internationally.

105. 17 U.S.C. § 512 (2013). The DMCA was passed on October 12, 1998, by a unanimous vote in the United States Senate and shortly thereafter signed into law by President Bill Clinton on October 28, 1998. The DMCA both extended the breadth of copyright protection and simultaneously limited the secondary liability of the providers of online services for the direct copyright infringement by their users. Service provider is defined as:

(1) Service provider.—(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

*Id.* § 512(k).

extends protections to creative works beyond the exclusive § 106 rights to copy, distribute, prepare derivative works, and perform or display publicly, some commentators have referred to the DMCA rights as “paracopyright.”<sup>106</sup>

Copyright law actually recognizes at least five safe harbors for companies that “facilitate, even if not intentionally so, the infringing acts of others.”<sup>107</sup> In the *Sony Betamax* case, the Supreme Court articulated the first safe harbor, a creature of judicial construction that predates the DMCA.<sup>108</sup> In that case, the Court held that a manufacturer cannot be found liable for contributory infringement if the device in question is “capable of substantial noninfringing uses.”<sup>109</sup> *Sony* was the Court’s first attempt to reconcile an intermediary’s liability for the infringing acts of its users. The other recognized safe harbors appear in the DMCA after courts and Congress settled into a balance between supporting technological advances and protecting copyright. These provisions, scattered throughout the DMCA, relieve from liability OSPs that engage in: (1) transitory digital network communications (e.g., P2P file sharing);<sup>110</sup> (2) system caching (e.g., temporary file storage for quick access);<sup>111</sup> (3) remote information storage (e.g., file storage on OSP servers);<sup>112</sup> and (4) information location tools (e.g., search engines and indexes).<sup>113</sup>

By enacting the DMCA, Congress remained consistent with its historical approach to innocent infringers because it demonstrated a willingness to protect “innocents” in the digital and online

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106. For discussion of paracopyright and the DMC, see generally Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003). See also H.R. REP. NO. 105-551, pt. 2, at 24 (1998) (quoting a letter endorsed by sixty-two copyright professors characterizing the DMCA anti-circumvention provisions as “paracopyright”).

107. See *Directions for Reform*, *supra* note 44, at 1195.

108. See *id.* (citing *Sony v. Universal City Studios*, 464 U.S. 417 (1984)).

109. *Sony*, 464 U.S. at 442.

110. 17 U.S.C. § 512 (a) (2013).

111. *Id.* § 512 (b).

112. *Id.* § 512 (c).

113. *Id.* § 512 (d). Professors Samuelson describes the safe harbor provisions found in 17 U.S.C. § 512 (a)–(d) as follows:

These safe harbors allow ISPs (1) to transmit digital content from one user to another free from concern about whether the transmitted material is or is not infringing, (2) to store digital content on behalf of customers, (3) to cache digital content to make it more accessible to customers, and (4) to facilitate users’ queries to locate information of interest to them.

*Directions for Reform*, *supra* note 44, at 1195.

environments, under certain circumstances, or at least from secondary liability. A primary concern was that OSPs lacked: (1) sufficient control over the direct infringer and (2) sufficient knowledge of infringing activity to justify holding them strictly liable for the infringing acts of its users.<sup>114</sup> In other words, a primary justification for the DMCA's safe harbor provisions was one of fairness, provided the OSP follow certain guidelines to notify the infringer and takedown the allegedly infringing material.<sup>115</sup> Finally, a fundamental goal was to ensure robust and rapid development of the breadth and reach of the Internet platform and capabilities to support economic growth and worldwide connectivity across all socioeconomic and cultural lines.<sup>116</sup>

OSP's were concerned about the legal implications of their Internet and digital communications services, especially those regarding copyright. Early on, OSPs primarily played a passive and, therefore, innocent role when their customers committed infringing acts on their service platform.<sup>117</sup> But as the focus of the OSP industry switched from mere conduit—think “a series of tubes” thanks to Alaskan Senator Ted Stevens<sup>118</sup>—to provider of premium entertainment services, the industry sought to find common ground with the entertainment industry (as well as with law and policymakers) on an approach to infringement concerns.<sup>119</sup> For example, the move to deliver most content via the Internet that has traditionally been experienced on television and in movie theatres is no longer in its early phase of deployment. Examples include Google

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114. See Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 99, 99–100 (2005).

115. *Id.* at 115–18.

116. Stephanie Condon, *Stimulus Bill Includes \$7.2 Billion for Broadband*, CNET NEWS (Feb. 17, 2009), [http://news.cnet.com/8301-13578\\_3-10165726-38.html](http://news.cnet.com/8301-13578_3-10165726-38.html); see Yu, *supra* note 20, at 1375 nn.7–8 (citing American Recovery Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 128, 512 (2009)).

117. See Yu, *supra* note 20, at 1384 (citing COMMERCE, INDUS. & TECH., H.K. SPECIAL ADMIN. REGION, COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT, at iv (2007)). *CF* A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001); MGM Studios v. Grokster, 545 U.S. 913 (2005).

118. Bluefalcon 561, *Series of Tubes*, YOUTUBE (July 17, 2006), <http://www.youtube.com/watch?v=f99PcP0aFNE>. To hear Senator Stevens' painful 'digital immigrant' explanation of how the Internet works and the 'tubes' reference, visit YouTube. The tube reference is at 2:15.

119. Yu, *supra* note 20, at 1386 (discussing the deal struck between Comcast and General Electric to acquire a majority stake interest in NBC Universal followed by a long-term content licensing deal with CBS to deliver its content online).

TV, Hulu Plus, and Netflix original programming. The DMCA was the legislative culmination of this shared goal. It provided a way to mitigate potential liability for OSPs and thus supported the development and viability of the Internet and digital communications technologies.

The online environment requires greater flexibility in the application of copyright laws. By enacting the DMCA, Congress has already acknowledged that the Internet and digital technology require modifications to 20th century laws in the wake of the emergence of invaluable 21st century technologies and resulting accepted user practices.<sup>120</sup> It seems logical then that users of these essential technologies should be afforded some protection from strict copyright liability, at least under certain circumstances and provided users meet certain conditions.<sup>121</sup>

#### IV. PROPOSED STATUTORY FRAMEWORK FOR USER ‘SAFE HARBOR’

As Part II explains, the viability of the innocent infringer defense used to mitigate statutory damages has all but disappeared in the case of digital goods due to a number of factors unrelated to the propriety of the defense itself. The absence of a viable innocent infringer argument coupled with the strict liability nature of copyright infringement and discretionary range of statutory damage awards has led to little, if any, protection for the accidental and *mea culpa* infringers in the online context. This, in turn, has often led to grossly inequitable awards and unconscionable results even in cases where the plaintiff is far from sympathetic.<sup>122</sup>

A related and equally serious concern is that many infringement cases settle and thus do not reach trial. But the absence of a substantial body of case law does not mean the concerns raised in this Article are more theoretical than actual. Quite to the contrary, the

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120. Congress’ enactment of the Semiconductor Chip Protection Act is another example of its willingness to amend the Act to reflect nuanced technological challenges at odds with copyright law in need of industry-specific and technology-specific fixes. 17 U.S.C.A. §§ 901–914 (2013). For a general overview of the SCPA, see generally Steven P. Kasch, *The Semiconductor Chip Protection Act: Past, Present, and Future*, 7 HIGH TECH. L.J. 71 (1992).

121. The need for such flexibility in the digital age has also been recognized in other areas of intellectual property law. For example, the Ninth Circuit noted the need for flexibility in trademark law in its decision in *Playboy v. Netscape*. The court opined that “[i]n the Internet context, courts must be flexible in applying the [likelihood of confusion] factors, as some may not apply.” *See Playboy v. Netscape*, 354 F.3d 1020, 1026 (9th Cir. 2004).

122. *See* cases cited *supra* note 16.

propensity of users faced with a lawsuit to settle out of court makes users especially vulnerable to copyright misuse.<sup>123</sup> This result is problematic given current 21st century accepted practices, the prevalence of UGC, the extreme ease with which one may unknowingly infringe in the online context, and the confusing selective nonenforcement that is impossible to predict with any meaningful degree of certainty.<sup>124</sup> Professor Tim Wu describes such infringements as “tolerated uses.” He defines a tolerated use as “infringing usage of a copyrighted work of which the copyright owner may be aware yet does nothing about.”<sup>125</sup> The tolerated use concept fits a broader category of copyright owner selective nonenforcement, as Professor Lee noted, that also includes “acquiesced use, accepted use, publicly encouraged use, and uses that even might be supported by implied licenses.”<sup>126</sup> Selective nonenforcement illustrates the types of unauthorized uses with which even major content owners are willing to live. Tolerated uses on YouTube, for example, reflect established tolerated uses in the music and other entertainment industries due in large measure to the monetization of the YouTube pages of infringing material.<sup>127</sup> Accordingly, Congress could either elect to add such practices to the list of fair uses found in § 107 or to the types of unauthorized uses that trigger the possibility of user safe

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123. The misuse defense that originated in the patent law context was first extended to copyright in *Lasercomb America v. Reynolds*, 911 F.2d 970 (4th Cir. 1990). Other circuits have since followed suit. *See generally* *Alcatel USA v. DGI Technologies*, 166 F.3d 772 (5th Cir. 1999), *reh'g and reh'g en banc denied*, 180 F.3d 267 (5th Cir. 1999); *DSC Communications v. DGI Technologies*, 81 F.3d 597 (5th Cir. 1996); *Data General v. Grumman Systems Support*, 36 F.3d 1147 (1st Cir. 1994) (copyright misuse defense considered but not applied because defendant did not produce sufficient evidence to overcome plaintiff's motion for summary judgment on antitrust issue); *Atari Games v. Nintendo of America*, 975 F.2d 832 (Fed. Cir. 1992), *reh'g denied, en banc suggestion declined*, (Nov. 17, 1992) (recognizing copyright misuse defense but holding it barred by defendant's “unclean hands”). *Cf.* *United States v. Loews*, 371 U.S. 38 (1962) (tying arrangements in licensing of motion pictures for theatrical performances held to violate anti-trust laws). For a comprehensive overview of the history, relevant case law and equitable remedies associated with the defense, see Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2004).

124. *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008); *see also* Tim Wu, *American Lawbreaking: Tolerated Use and the Copyright Problem*, SLATE.COM (Oct. 16, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/features/2007/american\\_lawbreaking/tolerated\\_use\\_the\\_copyright\\_problem.html](http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/tolerated_use_the_copyright_problem.html).

125. *See* Wu, *supra* note 124, at 619.

126. *See* Yu, *supra* note 20, at 1412 (citing Lee, *supra* note 75, at 1486–88).

127. *See Copyright Overview*, YOUTUBE.COM, [http://www.youtube.com/t/content\\_management](http://www.youtube.com/t/content_management) (last visited October 7, 2013) (describing YouTube's Content ID System, which includes content verification and audio/video ID).

harbor protection. I suggest the latter more fully in my proposed user safe harbor discussion in Part V.

Understanding how today's user views transformative uses of creative works, especially those accessed via the Internet, can also provide valuable information about ways the law can transform to meet innocents where they are.<sup>128</sup> The average user's misunderstanding or general lack of understanding altogether of the complex and nuanced law of copyright necessitates a new approach to infringement liability. User safe harbor is such an approach. The proposed language identifies certain customary and accepted practices as both beneficial and innocent uses. As a result, innocent use contemplates both the unwitting user and the mistaken one. Finally, in addition to any reform to the statutory damages framework, Congress should provide safe harbor to certain classes of technical infringements that are noncommercial and, on balance, promote rather than thwart progress. Part V outlines specific examples of the types of ordinary online consumer activities labeled as accidental or *mea culpa* to which a user safe harbor provision would apply.

#### A. *Practical Considerations in User Safe Harbor*

Notice plays an important role in determining damages under the current statutory damages scheme after liability has been assessed. Most importantly for the accidental or *mea culpa* infringer today, properly affixed copyright notice on hard copies of a copyrighted work currently serves as a complete bar to a minimum damage award.<sup>129</sup> Therefore, accidental or *mea culpa* infringers rarely, if ever, qualify for the decreased statutory damage award and instead must submit to the range of damages for an ordinary infringer that extends from \$750 to \$30,000 per infringement.<sup>130</sup>

Courts have rejected the innocent infringer argument in digital goods cases even if the defendant did not have actual possession of a physical copy bearing proper notice of the digital good in question.<sup>131</sup>

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128. See Tushnet, *supra* note 33, at 497.

129. 17 U.S.C. § 504(c)(2) (2013); see also 17 U.S.C. § 402 (2013) (except as provided in section 504(c)(2), when a copy or phonorecord bears a properly affixed notice: "no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.").

130. See *supra* Part II.A.; see *supra* notes 40–44.

131. *Maverick Recording v. Harper*, 598 F.3d 193, 199 (5th Cir. 2010) (holding defendant's young age and naivety was irrelevant where the notice of copyright was properly displayed on the published phonorecord; ultimately barring Harper from using the "innocent

Those courts linked notice to access through general availability of a physical copy bearing notice in the marketplace and held defendants to have constructive notice of the rights at issue in the case.<sup>132</sup> The link between notice and access under these circumstances seems to result from a court's narrow interpretation of § 504.<sup>133</sup> I view with great skepticism the impact of such an interpretation on the availability of an innocent infringer defense in cases involving digital goods. In fact, a court's narrow interpretation of § 504 in digital content controversies runs the risk of being inequitable, unsound, and inconsistent with the historical purpose and goal of shielding the unknowing user from excessive awards. The danger of inequitable rulings, contrary to the copyright monopoly's constitutional call, seems especially troubling in civil actions where the main goals are compensation and deterrence (rather than penalty).<sup>134</sup> If Congress adopts my user safe harbor proposal, the type of constructive notice currently recognized in digital goods infringement cases will no longer have the same meaning or effect at the liability phase.

Notice would continue to play an important role in my proposed user safe harbor provision. However, notice would be considered in assessing whether liability will result at all, rather than during the remedies phase of an infringement case after liability has already been determined. Rather than serving as a complete bar to a minimum statutory damage award, notice would serve as a trigger requiring qualifying users to take immediate remedial steps to protect the copyright owner in order to receive safe harbor from liability.

In Part III, I highlighted a primary concern of OSPs, a primary justification for DMCA safe harbor in light of that concern, and a

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infringer" defense); *Electra Entm't Grp. Inc. v. McDowell*, No. 4:06-CV-115, 2007 WL 3286622, at \*5 (M.D. Ga. Nov. 6, 2007) (citing *BMG Music v. Gonzalez*, 430 F.3d 889, 892 (7th Cir. 2005)) (holding "[a] defendant who violated a copyright by downloading data to a computer would not be an innocent infringer if he or she had access to records and compact disks bearing the proper [copyright] notice[]"); *BMG Music v. Gonzalez*, No. 03C6276, 2005 U.S. Dist. LEXIS 910 (N.D. Ill. Jan. 7, 2005) (holding defendant was not entitled to claim innocent infringement because the thirty songs defendant downloaded had properly displayed copyright notification, to consumers, on the covers of the CDs).

132. See cases cited *supra* note 131.

133. See Samuelson & Wheatland, *supra* note 17, at 459. Patry on Copyright explains: "Section 504(c) creates four categories of infringers for statutory damage purposes: (1) certain individuals at nonprofit educational institutions or public broadcasting entities who had reasonable grounds for believing their conduct was fair use, (2) innocent infringers, (3) not innocent but not willful infringers, and (4) willful infringers." 6 Patry on Copyright § 22:175 (2012).

134. See Samuelson & Wheatland, *supra* note 17, at 500.

fundamental goal of the DMCA in its entirety.<sup>135</sup> I assert those observations apply equally to accidental and *mea culpa* users. Thus, such users should receive mandatory safe harbor from the standard and willful damage awards.

First, a primary concern was that OSPs lacked sufficient control over the direct infringer and sufficient knowledge of infringing activity to justify holding them strictly liable for the infringing acts of its users. Direct users who are not actively disregarding copyright law are similarly concerned with a lack of control over one who may share or transfer infringing material and who lack sufficient knowledge of the infringement.<sup>136</sup> It seems the law should be more focused on the one who knowingly or recklessly distributed infringing material than the unwitting recipients unless that recipient has some control over the third-party transferor or knowledge (or reasonable basis for knowing) of the infringement.

Second, a primary justification for the DMCA's safe harbor provisions was one of fairness as long as the OSP followed certain guidelines to notify the infringer and takedown the allegedly infringing material.<sup>137</sup> Similarly, it seems fair to afford an accidental or *mea culpa* infringer the opportunity to take reasonable and quick steps to cure the infringement. This might include a "take down [sic] and delete" requirement for infringing materials. Reasonable measures may also include requiring the user to post a notice of action taken if the infringement involved a static point of access or to disseminate such a notice to third party recipients.<sup>138</sup>

Finally, a fundamental goal of DMCA safe harbor was to ensure robust and rapid development of the Internet platform and capabilities to support economic growth and worldwide connectivity across all socioeconomic and cultural lines.<sup>139</sup> This applies equally to Internet users. Again, the success of the Internet depends not only on OSPs and technology but, ultimately, on the very users themselves. Threats of legal action and fear of onerous reprisals can clearly lead to a stifling effect on user behaviors even to the detriment of fair uses and

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135. See *supra* Part III.

136. See Scott, *supra* note 114, at 99–100.

137. *Id.*

138. One might wonder, however, whether these measures place an onerous burden on consumers. In this way, consumers might be transformed from copyright criminal to copyright cop. However, whatever burden may result pales in comparison to the burden of strict liability in all cases and the very real danger of excessive discretionary damage awards.

139. See Yu, *supra* note 20, at 1375–76; Condon, *supra* note 116.

permissive access. User safe harbor is the right solution at the right time.

*B. Proposed User Safe Harbor: Section 512 Re-Imagined*

Despite the general reluctance in the United States to embrace forced exchanges in a free-market system, some scholars suggest that enforcing copyright as a liability rule instead of a property rule best achieves these goals in the digital context.<sup>140</sup> Notable scholars have also proposed copyright reform in the following ways relevant to this Article: “reinvigorating copyright registration,”<sup>141</sup> “administrative reforms,”<sup>142</sup> refinement of the § 106 exclusive rights,<sup>143</sup> additional, broader safe harbor protections for OSPs who take reasonable measures to deter infringement,<sup>144</sup> modifications of the statutory damages scheme,<sup>145</sup> and more robust recognition of “copyright limitations and exceptions.”<sup>146</sup> A more earnest noncommercial personal use exemption could also be clarified and recognized.<sup>147</sup>

The idea of administrative reforms to increase the role of the Copyright Office to fill the types of gaps noted above seems plausible and desirable. The Copyright Office, for example, could be involved in issuing opinion letters, rulemaking, and regulations. In fact, at Congress’ request, the Copyright Office is considering the idea of a small claims court.<sup>148</sup> However, concerns over whether the Office

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140. See generally Traynor & Hutchinson, *supra* note 99, at 454–55 (exploring “whether infringement should be treated primarily as subject to a rule of liability rather than a rule of property, with significantly different consequences for remedial relief, not only in patent and copyright cases but also in trademark and trade secret cases.”).

141. See *Directions for Reform*, *supra* note 44, at 1198 (“Copyright law should encourage copyright owners to register their works so that better information will be available as to who claims copyright ownership in which works.”).

142. *Id.* at 1202 (offering several ideas for modernizing the role and functions of the Copyright Office).

143. *Id.* at 1208 (exploring, without consensus, whether copyright should be refined and limited as one “core” right).

144. *Id.* at 1216 (suggesting that DMCA safe harbor protection be extended to OSPs that, through technological safeguards, take reasonable, affirmative steps to illuminate or mitigate infringement committed by its users).

145. *Id.* at 1220 (recommending that Congress create guidelines to better enable courts to award statutory damages “in a consistent, reasonable, and just manner”).

146. *Id.* at 1228 (“More elements in copyrighted works than just ideas and information should be excluded from the scope of copyright’s protection for original works of authorship.”).

147. Jason Schultz, *Copyright Exhaustion and Personal Use Dilemma*, 96 MINN. L. REV. 2067, 2069 (2012).

148. See U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE

would actually be able to handle the overwhelming volume of claims resulting from the gaps and gray areas are noteworthy.<sup>149</sup> It seems more beneficial to address the root cause of concern—unclear laws—and to amend existing law by, among other things, limiting liability where appropriate rather than merely (and predictably) continue to treat the symptoms and tinkering at the edges of the law.

A user safe harbor amendment would directly impact § 512, which identifies who qualifies for safe harbor. OSPs and nonprofit educational institutions already receive safe harbor protection under the DMCA provisions.<sup>150</sup> Subsection (c) of § 512 provides a sound framework for the user safe harbor statutory language. On showing the user had no actual or constructive knowledge that her use was infringing and, upon receiving notice, the user acted “expeditiously” to cease the infringing activity, any potential damages are instead remitted. When the user has satisfied the requirements, she would qualify for safe harbor as a matter of right. Constructive notice, under this new approach, would not be satisfied by mere access to physical copies in general circulation bearing properly affixed notice.

By adopting and adapting the existing statute to apply also to users, the language could read as follows:

(L) Limited User Exception.—

(1) In general. — A User found liable for infringement of copyright by reason of the reproduction, adaptation, dissemination, transmission, or storage of copyrighted material or by reason of referring or linking to material accessed electronically on a system or network, shall not be liable for actual or statutory damages if the User—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

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REGISTER OF COPYRIGHTS (2013), available at <http://www.copyright.gov/docs/smallclaims/us-co-smallcopyrightclaims.pdf> (2013); see also *Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFFICE (Sept. 30, 2013), <http://www.copyright.gov/docs/smallclaims/> (describing the study of remedies for small copyright claims).

149. See Lee, *supra* note 75, at 1475.

150. 17 U.S.C. § 512(a)–(c) (2013).

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity; and

(C) upon notification of claimed infringement [as described in paragraph (3) (Contents of counter notification)], responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity and takes any reasonable and prudent measures to cease and desist the claimed infringement, including notice by transmission or disclaimer to any third party recipients of the subject work.

Of course, opponents of this approach may argue that no reasonable online user would believe the vast majority of digital works available online or via P2P networks are free for the taking. In that case, perhaps the suggested framework is a theoretical assertion without a practical application. But even if one argues, for example, that all users should know that music, image, video, and other digital works are likely protected by copyright or at least owned by someone other than the user, it is critical to make clear that the Act does not prohibit all uses, only those listed in § 106<sup>151</sup> and not excused by §§ 107–122.<sup>152</sup>

In sum, many commonplace noncommercial online user activities described in this Article currently constitute technical infringements. My user safe harbor alternative could safeguard innocent infringers engaging in these commonplace activities from liability. Such uses serve to support technological advancement and a fully realized Internet without unduly threatening copyright and “progress.” In fact, such practices promote the very progress that the constitutional drafters contemplated.

### *C. Other Alternatives*

Although my proffered user safe harbor amendment is a viable

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151. U.S.C. 17 § 106 (2013) (discussing unauthorized reproduction, publication, public display and performance, and adaptation).

152. U.S.C. 17 §§ 107–122 (2013). Sections 107–122 are limits on copyright protection. *Id.*

option to cure the innocent infringement remedy problem in some cases, this Part explores suggestions other commentators offer to reform copyright liability and remedies that could also lessen the negative impacts on copyright consumers in the digital age. The numerous and varied approaches, a few of which are discussed below, suggest a pressing need for reform in this area. The cacophony of calls for reform suggest it is not a matter of if but when the next major overhaul of copyright law will take place. In the midst of this sea of possibilities, I argue the user safe harbor is perhaps a lighthouse of opportunity.

Some scholars advocate for a complete overhaul of the existing legislative framework.<sup>153</sup> Others encourage at least a more uniform judicial approach and a narrow interpretation of statutory damages unless and until Congress acts.<sup>154</sup> In either case, the goal would be to revive more meaningful safeguards against liability or at least to eliminate excessive awards against innocent infringers and return to a just standard and result. Other fixes include: (1) legislative comments offering guidance on how to apply the tripartite system in addition to DMCA-like safe harbor for direct accidental infringers; (2) an express definition of willful infringement; and (3) clarity on what constitutes knowledge of copyright protection in the case of digital goods.

#### V. USER SAFE HARBOR IN ACTION

Millions of unauthorized uses of copyrighted works occur every day on the Internet. The current judicial and negotiated licensing system is ill-equipped to handle a case-by-case resolution, the issues of detection and enforcement notwithstanding. Detection and enforcement will play a much more prominent role in the months and years to follow as technology improves in this area. Case in point is the launch this year of the much-anticipated and criticized graduated response system.<sup>155</sup>

In an essay that explores the novel concept of a “warming” (as opposed to chilling) effect of user customs and norms on the contours of copyright law, Professor Edward Lee refers collectively to that

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153. See Samuelson & Wheatland, *supra* note 17, at 509–10.

154. *Id.* at 501–05.

155. See Dara Kerr, ‘Copyright Alert System’ rolls out to catch illegal downloaders, CNET.COM (Feb. 25, 2013), [http://news.cnet.com/8301-1009\\_3-57571237-83/copyright-alert-system-rolls-out-to-catch-illegal-downloaders/](http://news.cnet.com/8301-1009_3-57571237-83/copyright-alert-system-rolls-out-to-catch-illegal-downloaders/).

universe of uses as “practices.”<sup>156</sup> He suggests that the copyright world can be divided in two: (1) formal practices consisting of copyright law and licensing and (2) informal practices consisting of a range of unauthorized uses.<sup>157</sup> These unauthorized uses can be distinguished even further between those clearly violative of copyright and those that exist at the margins within the ever-growing gray areas of the formal law.<sup>158</sup> His approach injects realist theory into copyright law by acknowledging the role actual user behaviors and norms can and do play in shaping how copyright functions in practice.<sup>159</sup>

Professor Lee explains:

In some cases, the informal copyright practices could constitute infringement. In other cases, though, they could be fair use or fall within another exemption. In still other cases, the law might be unclear, or the copyright holders might tolerate or later condone the practice without ever granting a formal license. The precise status of the practice in question might, therefore, be unclear. These “gray areas” should be recognized as such.<sup>160</sup>

My proposed user safe harbor exemption focuses precisely and narrowly on uses that fall within this gray area, an area that emerges any time law is “vague on critical issues, leaving the public with no specific guidance” and to their own devices unless and until the law becomes more clear.<sup>161</sup> For example, substantial similarity and fair use (especially when transformative use is involved), are two fundamental copyright doctrines that define infringement in the former case and an affirmative defense to infringement liability in the

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156. *See Lee, supra* note 75, at 1470.

157. *See id.* Lee further explains: “Formal copyright practices take a formalistic view of copyright law . . . [where] rights are abstractly and neatly defined by the various provisions . . . of the Copyright Act.” *Id.* The formalistic approach, then, is a “permission first” practice where any unauthorized use that is not a fair use is actionable infringement. Informal uses, however, fall outside of formal law or permission and—particularly in the online environment—occur far more frequently by many more users than those making technically lawful uses of copyrighted works. *Id.* at 1472.

158. *See id.* at 1473 (arguing that informal copyright practices can serve as gap fillers in copyright law).

159. *Id.*

160. *Id.*

161. *Id.* at 1468.

latter case. Both are notoriously complex and difficult.<sup>162</sup>

A layperson's *ex ante* determination of the difference between fair transformative use and infringing adaptation is particularly daunting and vexing given the range of unauthorized uses online involving some form of cumulative effort and adaptation. User safe harbor would expressly identify and legitimize certain existing informal Internet practices that developed in response to "systemic uncertainties in formal copyright law" in a way that balances rights of the copyright owner *and* the user. This accounts for the reality that users who comprise the "public"—not copyright owners—are the ultimate beneficiary of the copyright monopoly.<sup>163</sup>

The foregoing, of course, begs the question of what user customs and practices I contemplate for user safe harbor protection. Not all unauthorized use is created equally. Nonetheless, in the absence of clearly articulated or discernible legal determinations of liability *ex ante*, the uses that might serve as gap fillers<sup>164</sup> under Lee's theory provide a welcome starting point.<sup>165</sup> First, it is helpful to identify a range of common unauthorized uses of digital creative goods. At a minimum, they involve copying, adaptation, and dissemination, usually the exclusive domain of copyright owners. File sharing and P2P streaming are probably the most noted and notable uses of digital creative goods. Second, and likely even more pervasive, is the Web 2.0 copy and paste, drag and drop, remix, and re-contextualize

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162. *Id.* at 1480 ("Courts and legal commentators alike have repeated acknowledged the complexity and indeterminacy of many key provisions of copyright law."). Both substantial similarity and fair use are subjective, fact-specific determinations. However, few cases reach the courts, let alone survive to an ultimate judgment. *See id.* at 1478.

163. *See id.* at 1468 (emphasis added). Emphasis was added to make the point that an optimal rights/access balance exists only when the rights of both the copyright owner and the user are protected by the copyright regime.

164. Lee uses the term gap "to indicate those areas in formal law where it is relatively unclear *ex ante* how the formal law would treat a particular set of facts." *Id.* at 1473. Such would be a gap in the law itself. He distinguishes his use of the word from a "divergence between formal law and law in action—i.e., circumstances in which people do not appear to be following the law at all [driving over the speed limit]." *Id.* I argue those uses that apply to the former case should receive safe harbor. The latter uses would seem to be pure, actionable infringement.

165. Lee explains how formal and informal practices co-exist in copyright law:

The expectation is that all answers to copyright issues will come from either the Copyright Act or courts applying it. This expectation does not square with reality, however. The 'formal' law of copyright can only go so far. It is filled with many gaps and gray areas. That is why informal practices are needed. They often serve as gap fillers in the copyright system.

*Id.*

culture.<sup>166</sup> It is omnipresent and firmly established in the online context.<sup>167</sup> A third category of use is UGC that involves user creation of video, music, images, and literature, and other creative productions.

Rights holders vary in their response to UGC and other unauthorized uses. As discussed above, some choose a selective nonenforcement approach sometimes referred to as tolerated use<sup>168</sup> or hedging.<sup>169</sup> In those instances, the owner may be aware of the infringing activity but choose not to enforce her rights.<sup>170</sup> The tolerated use concept fits a broader category of copyright owner selective nonenforcement that also includes “acquiesced use, accepted use, publicly encouraged use and uses that even might be supported by implied licenses.”<sup>171</sup> Other rights holders embark on a “shock and awe” hyper-aggressive enforcement approach, such as the recording industry’s litigation strategy in response to P2P file sharing that began in 2003. The strategy lasted through 2008, when the industry abandoned this approach in favor of more effective ways to combat piracy.<sup>172</sup> Based on this universe of possibilities, the hypothetical set forth below addresses how my user safe harbor might apply to the accidental and *mea culpa* infringer.

The accidental infringer is one who infringes unknowingly. Presumably the accidental infringer uses copyrighted materials in a way she would not have if she had known her use was infringing. In contrast to the accidental infringer, the *mea culpa* infringer is one who knowingly participates in an unauthorized use but has a colorable defense to infringement. Examples include someone who has a good faith but mistaken belief their use was fair, *de minimis*, or otherwise

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166. For a general overview of Web 2.0, see generally Tim O’Reilly, *What is Web 2.0?*, OREILLY (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>. Web 2.0 describes websites that use technology beyond the static pages of earlier websites. Darcy DiNucci coined the term in 1999 and Tim O’Reilly popularized it at the O’Reilly Media Web 2.0 conference in late 2004.

167. See Lee, *supra* note 75, at 1486.

168. See Wu, *supra* note 124, at 619; see also Madhavi Sunder & Anupam Chander, *Everyone’s a Superhero: A Cultural Theory of ‘Mary Sue’ Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597 (2007).

169. Lee, *supra* note 75, at 1461 (“On some occasions, copyright holders may, in fact, prefer to ‘hedge’ by allowing third-party uses of their works informally, instead of by formal license.”).

170. See Wu, *supra* note 124, at 619.

171. See Yu, *supra* note 20, at 1412.

172. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL STREET J. (Dec. 19, 2008), <http://online.wsj.com/article/SB122966038836021137.html>.

legally permissive or excused. Their mistaken belief could be based on accepted user expectations and informal practices developed due to the gaps and gray areas in online copyright law, as discussed more fully above.<sup>173</sup> To be sure, those uses easily and often lead to mistaken fair uses, especially given that the enumerated purposes for fair use may be underinclusive in light of current user practices.<sup>174</sup>

Even when the facts suggest objectively that an end-user had a plausible defense or legal excuse, if either argument fails at trial the defendant is often at the mercy of the same statutory damages range as those infringers who knew their use was infringing. Indeed, the trend in statutory damage awards is to award large discretionary civil awards that are both punitive in effect and intent.<sup>175</sup> This unfortunate trend serves to further erode the legal “space” necessary for second-generation creators to create something new from what already exists and meaningfully participate in commonplace Internet activities.<sup>176</sup> It also threatens the viability of a robust exchange on the Internet, which Congress already affirmed as an essential component and integral part of the American and global economies. Therefore, the *mea culpa* infringer is also an ideal candidate for the proposed user safe harbor provision.

Imagine a blogger, Beatrice, who shares political commentary via her free Wordpress website (which does not permit revenue-generating activities). Believing, in good faith, that sharing news reporting is a fair use of copyrighted material, she copies and pastes articles from similar political commentary sites into her own blog posts with a link to the copied site rather than writing independently created op-eds. Additionally, her free Wordpress blog is configured to share the post automatically with her blog followers via e-mail, as well as on Facebook and Twitter. Immediately on receiving the e-mail notification a recipient forwards the e-mail containing the full article to ten people, one of whom, Frederick, decides to copy and paste it into his Facebook status. Ten of Frederick’s Facebook friends love the article so much that they repost some or all of it on their own Facebook pages.

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173. *See supra* Part V.

174. *See supra* Part V (discussing gaps and gray areas in copyright, as articulated by Professor Edward Lee).

175. Samuelson & Wheatland, *supra* note 17, at 446.

176. Evans, *supra* note 56, at 100 (discussing the essential legal space second-generation creators in performing arts and appropriation art forms need to create new works from existing materials, some of which may be copyrighted).

The original news article author, Olivia, gets wind of the unauthorized reproduction and publication and submits a request for a takedown notice of the offending material from every Facebook user's page and to Wordpress to remove the material from the website. Both Facebook and Wordpress, as OSPs, act expeditiously to takedown the infringing material and notify the offending users. Olivia does not stop there. She decides to file suit against Beatrice and each person in the chain that copied and republished the news article without permission. Olivia's attorney opines that even if fair use included "news reporting" as one of the enumerated purposes, it would not excuse the republishing of the entire article under these circumstances. And for all others, notice on the hard copies of Beatrice's nationally distributed newsletters exhibits a copyright notice, which serves as a complete bar to an innocent infringement.

In this one example, dozens of accidental and *mea culpa* copyright infringements have occurred due to the direct unauthorized, copying (copy and paste) and random access memory, and read-only memory copying, as well as distribution of infringing copies. The DMCA will protect the OSPs involved in the equation. But, absent the user safe harbor I propose, what happens to those end-users who held a good faith but mistaken belief that they were actually or impliedly permitted to share the information in its entirety? Without safe harbor protection, and assuming the original copyright owner timely registered, each person in the chain is potentially liable for moderate damages of \$750–\$30,000 per infringement; a hefty price to pay for noncommercial good faith use. And yet this scenario plays out innumerable times each day. Indeed, the fact pattern is replete with customary and generally accepted practices integral to a robust Internet exchange that cause little harm, and yet carry a potential liability that might serve to chill rather than promote progress. Accordingly, my user safe harbor would balance the user's privilege with copyright owner's rights in a way that ultimately benefits society at large.

## VI. CONCLUSION

The ever-widening scope of copyright's subject matter, breadth, and duration of exclusive rights at a time when formalities of registration, notice, and publication became permissive instead of mandatory has left today's user extremely vulnerable to infringement liability in the online context. The difficulty for the average user in

assessing what uses are permitted, *de minimis*, or fair, especially in light of established online practices, presents a real and present concern to a just and rational approach to innocent infringement in the 21st century. The dawn, rise, and exponential growth of the Internet and digital communications technologies have posed unrivaled challenges to existing copyright law. They have also posed increasing threats to traditional notions of copyright at its incentive-based core.

But the digital age of worldwide connectivity has enormous benefit and value. It has also made good on the constitutional promise to spur innovation and creativity through, among other ways, user-generated creations and transformative uses. Even where such unauthorized uses infringe copyright, however, they still support the overall success of the Internet as the 21st century epicenter of innovation and exchange. Thus, law and policymakers, OSPs, and other stakeholders must recognize the value of established user-expectation and customary and accepted practices. They also must formalize those beneficial uses that currently exist in the gaps and gray areas of copyright law and that cause little, if any, market harm. Good faith users deserve safe harbor protection in the digital age. The proffered statutory amendment achieves protection of the innocent infringer to reflect today's reality. It does so in a way that contemplates all interest-holders—copyright owners, OSPs, *and* users.